

## FROM ST. IVES TO CYBERSPACE: THE MODERN DISTORTION OF THE MEDIÉVAL ‘LAW MERCHANT’

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*Modern advocates of corporate self-regulation have drawn unlikely inspiration from the Middle Ages. On the traditional view of history, medieval merchants who wandered from fair to fair were not governed by domestic laws, but by their own *lex mercatoria*, or “law merchant.” This law, which uniformly regulated commerce across Europe, was supposedly produced by an autonomous merchant class, interpreted in private courts, and enforced through private sanctions rather than state coercion. Contemporary writers have treated global corporations as descendants of these itinerant traders, urging them to replace conflicting national laws with a transnational law of their own creation. The standard history has been accepted by legal scholars across the ideological spectrum, by economists and political scientists, and by those drafting new regimes to govern Internet commerce.*

*This Article argues that the traditional view is deeply flawed. Returning to the original sources—especially the court rolls of the fair of St. Ives, the most extensive surviving records of the period—it demonstrates that merchants in medieval England were substantially*

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*subject to local control. Commercial customs and substantive laws varied significantly across towns and fairs, and did not constitute a coherent legal order. The traditional interpretation has been retained, not for its accuracy, but for ideological reasons and for its long and self-reinforcing pedigree. This Article takes no position on the merits of shielding multinational actors from domestic law; it merely denies that the Middle Ages provide a model for such policies.*

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## INTRODUCTION

On May 10, 1270, the wine merchant Gerard of Cologne appeared before the fair court of St. Ives to retrieve his property. A small vill in the county of Huntingdonshire, England, St. Ives was the site of an annual fair every Easter, and a special court had been established within the fair to hear disputes. Three containers of Gerard's Rhenish wine had allegedly been seized as collateral in another controversy, and he was ready to swear an oath to establish his ownership and get them back. Unfortunately, the records note, he did not come "sufficiently equipped"—and then a curious phrase—"according to law merchant."<sup>1</sup> Gerard was told to return with five oath-helpers, who would also swear oaths to guarantee the truth of his claim.<sup>2</sup>

No further proceedings in the case are recorded, and Gerard of Cologne—who probably never did retrieve his wine—might seem to have had little relevance for the future development of commercial law. Yet 730 years later, echoes of Gerard's failure were heard in the report of an American Bar Association panel on "Achieving Legal and Business Order in Cyberspace." In July 2000, the ABA panel suggested that courts should turn to "a 'law merchant' for the Internet" in enforcing mandatory, non-binding arbitration clauses, as well as in regulating the activities of automated software robots.<sup>3</sup>

One might well wonder how this unusual term, the "law merchant," could possibly have retained a consistent meaning across more than seven centuries. How could any institution that required oath-helpers of Gerard of Cologne also provide a model for the transnational regulation of Internet 'bots'?

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1. 1 SELECT CASES CONCERNING THE LAW MERCHANT 5 (Charles Gross ed. & trans., Selden Society 23, 1908) [hereinafter 1 SCLM]. The translation here offered by Gross is likely to be in error; the original text reads "*secundum legem mercatorum*," rather than the more common phrase "*secundum legem mercatoriam*," for which the translation may be more appropriate. See *infra* text accompanying note 258.

2. 1 SCLM, *supra* note 1, at 5; cf. *infra* text accompanying note 88 (describing compurgation).

3. American Bar Association Global Cyberspace Jurisdiction Project, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*, 55 BUS. LAW. 1801, 1822, 1933 (2000).

For hundreds of years, however, historians have sought from the Middle Ages evidence of an independent, exclusively mercantile legal system as a solution to contemporary problems of foreign trade. Since the early seventeenth century, the prevailing view has been that fair courts like that of St. Ives enforced a body of law known as “the law merchant.” This law differed from the municipal laws of existing jurisdictions in that it was created *autonomously* by merchants and expressed their customs, reflecting unwritten usages rather than the written command of a sovereign legislator. At the same time, the law merchant was not the product of a single merchant guild or even a single country, but was rather *universal*, the creature of the transnational merchant community, establishing substantive principles and convenient procedures to govern commerce across political borders. The law merchant thus represented a new legal order, free from the oppressive control of local laws and local lords. In the words of Levin Goldschmidt, a nineteenth-century German lawyer and historian, “‘out of his own needs and his own views’ the merchant of the Middle Ages created the Law Merchant.”<sup>4</sup>

This “Romantic” vision of a universal law merchant—produced, interpreted, and enforced by a legally autonomous merchant class—is still accepted in various forms by most studies of English commercial law.<sup>5</sup> It has been adopted by legal scholars across the

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4. WILLIAM MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT 161 (1904) (quoting Goldschmidt), *cited in* LEON E. TRAKMAN, THE LAW MERCHANT 9 (1983). The quotation from Goldschmidt is more fully given in MITCHELL, *supra*, at 10 (“The grandeur and significance of the medieval merchant . . . is that he creates his own laws out of his own needs and his own views.”).

5. *See, e.g.*, BRUCE L. BENSON, THE ENTERPRISE OF LAW (1990) [hereinafter BENSON, ENTERPRISE OF LAW]; HAROLD J. BERMAN, LAW AND REVOLUTION (1983); BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE 209 (2d ed. 2002); TRAKMAN, *supra* note 4; Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 YALE L. & POL’Y REV. 1, 4 n.3, 5 (2004); Bruce L. Benson, *Justice Without Government: The Merchant Courts of Medieval Europe and Their Modern Counterparts*, in THE VOLUNTARY CITY 127 (David T. Beito et al. eds., 2002) [hereinafter Benson, *Justice Without Government*]; Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT’L L.J. 317 (1984); William C. Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 U. CHI. L. REV. 445 (1958); Leonard P. Liggio, *The Medieval Law*

ideological spectrum, from Richard Posner to Roberto Unger;<sup>6</sup> it has made its way into standard first-year casebooks;<sup>7</sup> and it has profoundly influenced the development of commercial law in the modern era.<sup>8</sup> The rapid expansion of cross-border trade and the rise of electronic commerce—in which borders are all but invisible—suggest to some that a “new law merchant” is emerging, and that existing national legal systems would do well to strengthen its institutions and defer to its authority.<sup>9</sup>

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*Merchant: Economic Growth Challenged by the Public Choice State*, 9 J. DES ECONOMISTES ET DES ETUDES HUMAINES 63 (1999); Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1593-1601 (2003). (Trakman’s views have since moderated on certain points. See Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 U. TORONTO L.J. 265 (2003) [hereinafter Trakman, *E-Merchant Law*]; see also *infra* note 27.)

The term “Romantic” is not necessarily pejorative. See WYNDHAM ANSTIS BEWES, *THE ROMANCE OF THE LAW MERCHANT* (photo. reprint 1986) (1923).

6. ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY* 73-74 (1985) (claiming that merchants wished to avoid “government bureaucracies and government courts” and therefore “struggled to develop their own associations and their own law alongside the bureaucratic law of the state”); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 257 (1979) (“Throughout the Middle Ages European merchants had their own private courts and law for the adjudication of commercial disputes.”). Posner twice described the “medieval merchants’ courts” as “private courts” in *Discussion by Seminar Participants*, 8 J. LEGAL STUD. 323, 347 (1979). For references to medieval commerce in other studies of private legal systems, see ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 137 n.2 (1991); and Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1763 n.161 (2001).

7. See, e.g., RICHARD E. SPEIDEL & IAN AYRES, *STUDIES IN CONTRACT LAW* 2 (6th ed. 2003) (asserting that medieval merchants “administered a remarkably effective system which did not depend upon state enforcement mechanisms”); *id.* at 6.

8. For a discussion of the impact of Goldschmidt’s work on modern American law, especially with regard to Karl Llewellyn and the formation of the Uniform Commercial Code, see James Whitman, Note, *Commercial Law and the American Volk: A Note on Llewellyn’s German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987); and compare U.C.C. § 1-103(b), 1 U.L.A. 20 (1989) (“Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant . . . supplement its provisions.”).

9. For a (limited) sample of such works, see Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny*, in *LEX MERCATORIA AND ARBITRATION* 1 (Thomas E. Carbonneau ed., 1990); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to*

The appropriateness of a “new law merchant” to regulate cross-border commerce is far beyond the scope of this study. What this Article seeks to show, however, is that the historical experience of medieval mercantile law has been grossly misconceived. The Romantic interpretation is deeply inaccurate, at least as applied to the experience of medieval England, and provides a prime example of the misuse of historical evidence in support of political ends.

The origins of the “new law merchant” model, Filip De Ly once worried, “have been discussed by many authors, but have rarely been subject to thorough analysis.” As a result, “the subject has largely remained obscure,” and “there is hardly any evidence to determine whether the medieval law merchant had autonomous standing” apart from the local municipal law.<sup>10</sup>

Yet De Ly’s concerns seem overly pessimistic, especially in light of the evidence from the fair court of St. Ives. St. Ives is particularly well-suited for a focused study of the Romantic thesis. In the early thirteenth century, the rural village was the site of one of the largest

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*Adjudicating the New Law Merchant*, 144 U. PENN. L. REV. 1643 (1996); L. Yves Fortier, *The New, New Lex Mercatoria, or, Back to the Future*, 17 ARB. INT’L 121 (2001); Berthold Goldman, *Lex Mercatoria*, FORUM INTERNATIONALE, Nov. 1986, at 1; Louise Hertwig Hayes, Note, *A Modern Lex Mercatoria: Political Rhetoric or Substantive Progress?*, 3 BROOK. J. INT’L L. 210 (1977); Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 VAND. J. TRANSNAT’L L. 487 (1995); Andreas Lowenfeld, *Lex Mercatoria: An Arbitrator’s View*, in *LEX MERCATORIA AND ARBITRATION*, *supra*, at 37; Clive M. Schmitthoff, *International Business Law: A New Law Merchant*, in 2 CURRENT LAW AND SOCIAL PROBLEMS 129 (R. St. J. MacDonald ed., 1961).

On the application of the law merchant to cyberspace, see Matthew R. Burnstein, Note, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT’L L. 75 (1996); Noel Cox, *The Regulation of Cyberspace and the Loss of National Sovereignty*, 11 INFO. & COMM. TECH. L. 241 (2002); Gillian K. Hadfield, *Delivering Legality on the Internet: Developing Principles for the Private Provision of Commercial Law*, 6 AM. L. & ECON. REV. 154 (2004); I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. PITT. L. REV. 993 (1994); David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998).

10. FILIP DE LY, INTERNATIONAL BUSINESS LAW AND *LEX MERCATORIA* 8-9, 17-19 (1992).

fairs in England.<sup>11</sup> Though it reached its zenith under the reign of King John, the fair continued to be highly profitable throughout the 1200s as a significant center for the cloth trade, providing an opportunity for merchants from as far away as Italy to trade their wares along its central Bridge Street.<sup>12</sup> If the law merchant were indeed a universal means of regulating medieval commerce, one should expect it to be in force at St. Ives.<sup>13</sup>

More importantly, the activity of the St. Ives court is uniquely well documented. Far more information is available on the St. Ives court—both in published works and manuscripts—than on any other English fair of its day. Fourteen of the fair court's annual plea rolls, recording the administrative business of the court as well as the cases argued before it, are preserved in the Public Record Office. The surviving rolls are variously dated between 1270 and 1324 and provide the chronological focus for this study. Additionally, the

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11. ELLEN WEDEMEYER MOORE, *THE FAIRS OF MEDIEVAL ENGLAND* 1 (Pontifical Inst. of Mediaeval Studies, Studies and Texts 72, 1985); see also Avner Greif, *Institutions and Impersonal Exchange: From Communal to Individual Responsibility*, 158 *J. INSTITUTIONAL & THEORETICAL ECON.* 168, 189 (2002) (describing St. Ives as "one of England's most important fairs"). St. Ives was located on the River Ouse, and its importance as a center of trade was helped by the road to Ramsey that ran through it, as well as the well-traveled bridge across the Ouse that gave the name to "Bridge Street." Lillian J. Redstone, *St. Ives*, in 2 *THE VICTORIA HISTORY OF THE COUNTIES OF ENGLAND: HUNTINGDONSHIRE* 210, 211-13 (photo. reprint 1974) (William Page et al. eds., 1932). Henry III bought immense quantities of textiles there, but its revenues diminished during the reigns of Edward I and Edward II. *Id.* at 216.

12. DOROTHY USHER, *The Mediaeval Fair of St. Ives*, in *TWO STUDIES OF MEDIAEVAL LIFE* 1, 27 (1953).

13. St. Ives was a river town, and not a port; this study will therefore only be concerned with trade conducted on land, passing over related issues in the history of maritime law. Interpretations similar to Goldschmidt's have been proposed for admiralty law as well, inspired by such documents as the Rhodian Sea Laws, the Laws of Oleron and Wisby, and the *Consolato del Mar*. Cf. *THE RHODIAN SEA-LAW* (photo. reprint 1976) (Walter Ashburner ed. & trans., 1909); *MONUMENTA JURIDICA: THE BLACK BOOK OF THE ADMIRALTY* (Travers Twiss ed., Rolls Series 55, London, Longman & Co. 1871-1876); *CONSULATE OF THE SEA AND RELATED DOCUMENTS* (Stanley S. Jados trans., 1975). However, the sea laws pose substantially different problems to historians, and modern maritime and commercial law developed in large measure independently from one another. As a result, the two fields have often been considered separately, and it is the commercial history, with its purported rules of general application, rather than the specialized maritime experience, that has inspired recent suggestions for reform.

Selden Society has published a significant number of the records in two volumes of facing-page translation—one volume edited by the great legal historian F.W. Maitland, the other by Harvard history professor Charles Gross.<sup>14</sup> Though the Gross and Maitland editions are selective, the extracts were chosen with the design of presenting as much information as possible about the law as practiced at St. Ives.<sup>15</sup>

Gross had described the St. Ives series as “unrivalled,”<sup>16</sup> and his description has remained accurate to the present day. Ellen Wedemeyer Moore remarked that early documents from English fairs are “scattered” and present a coherent picture “only when taken as a whole.”<sup>17</sup> Although the heyday of English fairs was in the twelfth and early thirteenth centuries, most other records from local fairs are only available for the period after the Black Death.<sup>18</sup> The only series of documents that Moore regarded as at all comparable to the St. Ives rolls are the account rolls of the St. Giles fair at Winchester, which begin in 1287 and continue into the late

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14. See 1 SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS 130-60 (photo. reprint 1974) (Frederic William Maitland ed. & trans., Selden Society 2, London, B. Quaritch 1889) [hereinafter 1 SELECT PLEAS]; 1 SCLM, *supra* note 1, at xiii-107. Maitland was only aware of one roll, containing records from the years 1275 and 1291; in the introduction to his edited selection, he noted that “[i]t would be an eminently good deed to print the whole roll.” 1 SELECT PLEAS, *supra*, at 130.

15. Maitland was amazed by the rolls’ “detailed information about the commercial law and commercial morals of the thirteenth century,” and therefore emphasized the records of litigation over those describing the court’s administrative tasks. 1 SELECT PLEAS, *supra* note 14, at 130. Gross similarly sought to identify those records offering the most information “concerning the law merchant or the procedure of the fair courts.” Charles Gross, *Introduction* to 1 SCLM, *supra* note 1, at xv.

16. Charles Gross, *Introduction* to 1 SCLM, *supra* note 1, at xv.

17. MOORE, *supra* note 11, at 2-3.

18. For the period before the Black Death, Gross’s volume contains only a handful of cases from the fair and piepowder courts of Carnarvon, dated 1325-1326, as well as from the fair court of Wye, dated 1332. 1 SCLM, *supra* note 1, at 107-11. The records of eleven cases heard in the fair court of Leicester in 1347 have been preserved among other records of the city, but they are in poor condition, and the legible cases contain little information on the functioning of the court. See 2 RECORDS OF THE BOROUGH OF LEICESTER 72-74 (Mary Bateson ed., 1901); cf. Albert Thomas Carter, *The Early History of the Law Merchant in England*, 17 LAW Q. REV. 232, 232 (1901) (“[T]he local records . . . have most unfortunately been lost or destroyed.”).

fourteenth century. However, the latter are records of account and contain primarily fiscal information, which will not help us in examining the justice practiced in the fair courts.<sup>19</sup> The thesis of an autonomous, universal law merchant must be tested on the evidence available, and no source contains as complete a description of an English fair before the plague as the St. Ives rolls. The fair court records must therefore be trusted to depict accurately the experience of commercial law in English fairs of this period. Furthermore, although a great deal of original work has been done on English commercial law in the last twenty years, there has been no systematic examination of the St. Ives documents with an eye towards proving or disproving the Romantic thesis.<sup>20</sup>

What the fair court rolls reveal is that the merchants of St. Ives did not create their own legal order out of their own needs and views. Rather, the administration of the fair was in large part subject to the authority of the king of England and of the abbey of Ramsey, a powerful and wealthy monastic foundation that held both the St. Ives

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19. MOORE, *supra* note 11, at 3.

20. Significant works include JOHN HAMILTON BAKER, *The Law Merchant and the Common Law Before 1700*, in *THE LEGAL PROFESSION AND THE COMMON LAW* 341 (1986) (studying local customs and the common-law courts); JAMES STEVEN ROGERS, *THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES* (1995) (investigating bills of exchange); and *LEX MERCATORIA AND LEGAL PLURALISM* (Mary Elizabeth Basile et al. eds. & trans., 1998) (presenting a thirteenth-century commercial treatise). (Because *LEX MERCATORIA AND LEGAL PLURALISM* contains two separately paginated sections, references to the original text of the treatise will hereinafter be cited as *LEX MERCATORIA*, while references to the editors' commentary will be cited as LMLP.) Moore examined the St. Ives rolls extensively, but her discussion centered on the economic and social conditions of the fair rather than the nature of the law practiced in its court. *See generally* MOORE, *supra* note 11.

Some additional work has been done on Continental sources, including Oliver Volckart & Antje Mangels, *Are the Roots of the Modern Lex Mercatoria Really Medieval?*, 65 S. ECON. J. 427 (1999); Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 CHI. J. INT'L L. 39 (2004); and especially Charles Donahue, Jr., *Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica*, 5 CHI. J. INT'L L. 21 (2004). However, the traditional understanding of medieval mercantile law in the Anglo-American historiography has largely been derived from English sources, *see* Kadens, *supra*, at 40 n.6, and effective criticism of the traditional interpretation must cover the same ground.

fair and the manor of Slepe in which the vill was located.<sup>21</sup> The king and abbot had significant authority over the establishment of legal principles, the resolution of disputes, and the enforcement of the fair court's judgments. The merchants did participate in each of these areas of authority, especially in rendering judgments. However, the same could be said of the unfree suitors of a contemporary manorial court, and there is little evidence indicating that the merchants who traded at St. Ives possessed any unique rights to independence or autonomous self-government. In fact, the best way of understanding the fair court may not be as a special court for merchants, but rather as a seignorial court—a lord's court—the business of which was primarily commercial in nature.<sup>22</sup>

Moreover, the fair court rolls, in combination with evidence from the charters and custumals of English towns, indicate that the "*lex mercatoria*" occasionally cited at St. Ives could not have functioned as a universal law for the merchant class. Goldschmidt would have agreed (indeed, insisted) that the law merchant was a customary law; it derived its force from mercantile customs, and not from any official promulgation or enactment. Yet these customs were not necessarily constitutive of a coherent legal order, nor were they necessarily shared across any great distance. Within St. Ives, the use of the phrase "*secundum legem mercatoriam*" did not invoke a specific body of substantive principles ("according to *the* law merchant"), but rather referred indefinitely to whatever principles might be appropriate to the case, according to a mixture of local custom and contemporary notions of fair dealing (i.e., "according to mercantile law"). Claims that these principles were universal founder on the clear differences among the various customs of English fairs and towns. Indeed, the fair court rolls give no impression whatsoever

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21. St. Ives came into the possession of the abbey of Ramsey in Anglo-Saxon times, and it is estimated that in 1300, approximately 800 individuals lived in the vill as unfree tenants of the abbot. Redstone, *supra* note 11, at 216; MOORE, *supra* note 11, at 231. ("Vill" is the term used by Gross in his translation of the court rolls; Redstone occasionally described St. Ives as a "town," but it was certainly not a "town" or "city" in the sense of a legally independent corporation. Redstone, *supra* note 11, at 216.) The abbey of Ramsey has itself been the focus of a great deal of study, and there exists a large amount of excellent documentary evidence on its holdings. See, e.g., J. AMBROSE RAFTIS, *THE ESTATES OF RAMSEY ABBEY* (Pontifical Inst. of Mediaeval Studies, Studies and Texts 3, 1957).

22. Cf. ROGERS, *supra* note 20, at 25.

that the suitors considered themselves to participate in a tradition of commercial law extending beyond the borders of St. Ives. The point is not, as it has sometimes been put, that “the Law Merchant acquired a distinctly local flavour” as it was haltingly and imperfectly realized by various jurisdictions;<sup>23</sup> rather, there *only existed* a diversity of local practices, a diversity which has since been reified by scholars into a single—and fictional—“Law Merchant.”

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

Such models, however, are clearly divorced from historical reality. Broad principles of mercantile law may perhaps have been widely shared in medieval Europe; merchants would presumably have preferred justice that was swift and fair, that took notice of mercantile customs, and that did not place contradictory demands on those trading across jurisdictional lines. But there is no suggestion in the fair court rolls of an autonomous legal order that spanned the continent; there might have been mercantile laws and customs, but no Romantic law merchant. What similarities existed in the regulation of commerce may be better explained as the convergent evolution of local practices, rather than the conscious expansion across Europe of a distinct body of law. The memory of medieval commerce has been distorted considerably in the seven centuries since Gerard lost his wine; the evidence from St. Ives fails to support the view that the merchants of the Middle Ages “were subject to no legal order but their own.”<sup>24</sup>

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23. Trakman, *E-Merchant Law*, *supra* note 5, at 276.

24. LMLP, *supra* note 20, at 188 (describing a view contrary to that of the editors).

## I. MERCHANT AUTONOMY AND MERCANTILE COURTS

“If you read the law reports of the seventeenth century,” Thomas Scrutton wrote in 1909, “you will be struck with one very remarkable fact; either Englishmen of that day did not engage in commerce, or they appear not to have been litigious people in commercial matters, each of which alternatives appears improbable.”<sup>25</sup>

What Scrutton wrote of the seventeenth century might be said with more justice of earlier periods: that if you read the records of the English Crown, you might well assume that medieval merchants almost never appeared before the courts. Indeed, many modern writers have adopted this position, and claimed that medieval merchants turned to a private legal system instead. Bernardo Cremades and Steven Plehn described an idyllic past in which sovereigns “adopted a laissez-faire approach toward the merchant class,” granting merchants full autonomy “provided they did not infringe on local concerns.”<sup>26</sup> According to Leon Trakman, the courts recognized the capacity of merchants “to regulate their own affairs,”<sup>27</sup> and Harold Berman claimed that the merchant community “organized international fairs and markets” and “formed mercantile

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25. Thomas Edward Scrutton, *General Survey of the History of the Law Merchant*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 7, 7 (John H. Wigmore ed., 1909) [hereinafter 3 SELECT ESSAYS].

26. Cremades & Plehn, *supra* note 5, at 318.

27. TRAKMAN, *supra* note 4, at 9. In his recent work, he took a more nuanced view of the influence of existing local authorities over merchant courts: “[H]owever autonomous medieval merchants may have been depicted as being, they were clearly subject to the influence of local forces,” an influence “quite apparent . . . in the influence exerted by local rulers over courts of the fair generally and in local influence at the fair of St. Ives.” Trakman, *E-Merchant Law*, *supra* note 5, at 266 & n.3; *see also* Erratum, 54 U. TORONTO L.J. Table of Contents (Spring 2004) (citing Stephen Edward Sachs, *The ‘Law Merchant’ and the Fair Court of St. Ives, 1270-1324* (Mar. 21, 2002) (unpublished A.B. thesis, Harvard University) (on file with the Harvard University Library), *available at* <http://www.stevesachs.com/thesis.pdf>); Donahue, *supra* note 20, at 23 n.8. However, Trakman continued to maintain that “many local princes and rulers” adopted “[a] hands-off approach towards the Law Merchant,” which required “a sacrifice of physical control over merchant trade.” Trakman, *E-Merchant Law*, *supra* note 5, at 274. (He also noted that “[o]ver the decades [his] views . . . have changed” concerning the nature and extent of the “resurgence” of a “‘modern’ Law Merchant.” *Id.* at 278 n.66. *But see infra* text accompanying note 239.)

courts” to administer them.<sup>28</sup> Similarly, Bruce Benson presented a vision of merchants who “wanted to expand international trade” but found “highly localized legal systems [standing] in their way”; to avoid these legal systems, they created their own, building an autonomous law merchant that was “*voluntarily produced, voluntarily adjudicated, and voluntarily enforced.*”<sup>29</sup>

Yet to what extent was the fair court a court of the merchants, a court that belonged to the merchant community and that consistently enforced its will? The fair court of St. Ives—of the type widely referred to as “merchant courts,” or “courts of piepowder”—was established to hear cases arising out of the fair, many of which would naturally be commercial in nature. But the mercantile orientation of much of its business does not imply that the fair court was an institution under mercantile control. The vision of medieval mercantile law as an entirely private legal system—with legal principles developed, interpreted, and enforced by merchants—would be frustrated if external authorities were found to wield substantial influence over mercantile courts.

To answer this question, this section will consider the sources of authority in the fair court’s executive, judicial, and legislative functions.<sup>30</sup> Analyzing the evidence through these three categories shows that the merchants did not exercise anything approaching a monopoly of power over the fair court’s day-to-day operations. Both in theory and practice, the fair court of St. Ives was a creature of the king of England and of its lord, the abbot of Ramsey. While the merchants may have exercised some influence in the court’s decision-making, the evidence from St. Ives does not indicate the presence of a radically independent and self-governing merchant community. The power that the merchant community exercised

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28. BERMAN, *supra* note 5, at 340. Even Kadens, whose analysis differs radically from Berman’s (and who recognized that fair courts “were not . . . purely merchant institutions”), held that such courts should be categorized with “guild courts, specialized commercial courts, and commercial arbitration” as “private mercantile legal systems,” to be contrasted with the civil courts—“of the town, the prince, or the Church”—where the “governing local law” was the default source of legal principles. Kadens, *supra* note 20, at 53, 64.

29. Benson, *Justice Without Government*, *supra* note 5, at 128.

30. The division of authority along these lines is somewhat anachronistic, as the court itself did not acknowledge such divisions.

within the fair court was not unique to St. Ives or to merchant courts generally, but rather was common to local courts across England. The same could be said for many of the substantive legal rules applied at St. Ives, which were subject to the control of Crown and abbot and which strongly resembled those of other local courts. Most importantly, the very notion of a legal system reserved for merchants may well have been incoherent during this period, as merchants did not enjoy the status of a separate and distinct personal class.

Indeed, if you were to follow Scrutton's approach in reading the records of the central royal courts, you would be looking in the wrong place. A great deal of litigation in medieval England occurred in local and seignorial courts, which ought to be our natural basis for comparison. The misconception of the fair courts as "private" results from an anachronistic identification of the central royal courts with what would later be termed "the state." The court of St. Ives is most comprehensible in the terms of its contemporaries, as a seignorial court subject to the power of the abbot; the fair court was part of a pre-existing political framework rather than an autonomous merchant-led legal order.

#### A. "VOLUNTARILY ENFORCED"

##### *1. Enforcement by the Abbot*

Perhaps the most unusual aspect of Benson's formulation is its description of mercantile law as "voluntarily enforced." On this view, merchant courts were private courts with limited ability to enforce their judgments, lacking "the coercive authority of a state." Instead, these courts relied on voluntary private enforcement, such as the boycott of traders who refused to respect the court's decisions.<sup>31</sup> Cremades and Plehn described medieval mercantile law as "largely self-enforcing," as a trader "who refused to comply" with a decision "risked his reputation and could be excluded from trading at the all-important fairs . . . Parties to a dispute rarely needed the aid of the local sovereign to enforce a merchant court's decision."<sup>32</sup> Paul Milgrom, Douglass North, and Barry Weingast portrayed mercantile courts as operating "without the benefit of state enforcement of

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31. BENSON, ENTERPRISE OF LAW, *supra* note 5.

32. Cremades & Plehn, *supra* note 5, at 319.

contracts”; only in later ages could the state “seize the property of individuals who resisted paying judgments, or put them into jail.”<sup>33</sup> Their analysis was later seconded by Edward Schwartz, who suggested that “the law merchant has no power to coerce any party into paying a judgment.”<sup>34</sup>

In contrast, however, the St. Ives documents show that such coercive power—to enforce decisions, to collect damages, and to assess fines—was exercised routinely. Indeed, in the context of thirteenth-century legal theory, there could have been little dispute about such questions; these powers lay very clearly in the hand of the abbot of Ramsey. The court was part of the abbey’s patrimony, which included the manor of Slepe in which the village was located. The residents of St. Ives were largely of villein status and owed tenurial obligations to the abbey.<sup>35</sup> The abbot therefore had direct, personal jurisdiction over the many residents of St. Ives who appear in the court rolls, and who came before the fair court as before the court of their lord. Until St. Ives received a town charter in 1874, some six centuries after the court rolls were written, there was no officially recognized municipal jurisdiction within the town, and any

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33. Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade*, 2 *ECON. & POL.* 1, 2, 20-21 (1990); see also Douglass C. North, *Institutions, Transaction Costs, and the Rise of Merchant Empires*, in *THE POLITICAL ECONOMY OF MERCHANT EMPIRES* 22, 30 (James D. Tracy ed., Ctr. for Early Modern History, Studies in Comparative Early Modern History 2, 1991) (describing “the voluntaristic structure of enforcement of contracts via internal merchant organizations”).

34. EDWARD P. SCHWARTZ, *ESSAYS IN THE POSITIVE POLITICAL THEORY OF JUDICIAL INSTITUTIONS* 82 (1993). Unfortunately, Schwartz followed Milgrom, North, and Weingast in a particularly egregious error by treating the “law merchant” as a *person*, an individual merchant whose task it was to arbitrate disputes. See Milgrom et al., *supra* note 33, at 16 (initially treating the “Law Merchant” as an individual for the purposes of an economic model, but then stating that “[i]t might be that the Law Merchant is a more sedentary merchant than the long-distance traders whom he serves”); see also SCHWARTZ, *supra*, at 103 (the goal of finding knowledgeable judges “was achieved by choosing law merchants from among the population of traders at a fair”).

35. MOORE, *supra* note 11, at 231; see also Redstone, *supra* note 11, at 216 (“The tenure of the houses within the immediate region of the fair was almost entirely copyhold . . . . [Tenants] paid a yearly rent, and did customary works, being particularly bound to mow the abbot’s Great Holme or meadow, and to be obedient to his bailiff.”).

mercantile courts held there operated solely under the authority of its feudal lord.<sup>36</sup>

Moreover, the abbot's rights in the fair had been confirmed by royal grant. When the abbey received a charter from Henry I granting the right to hold an annual fair at St. Ives in 1110, the terms of the charter included the customary rights to take tolls in the fair and to hold a court to govern it.<sup>37</sup> A dispute over the extent of this grant in the mid-thirteenth century illustrates well the official view of the St. Ives fair and its court. In 1252, the abbot of Ramsey sued several royal bailiffs for extending the term of the royal peace for three weeks after the end of the fair—in other words, adding a three-week-long royal fair at St. Ives, leading many merchants to delay their arrival until after the abbot's fair had ended. The abbot and monks claimed that these actions were “contrary to their charter and contrary to the will of the king who had that charter made for their benefit”; the fair had been given “as an appurtenance to Ramsey abbey in free and perpetual alms,” so that the abbots had possession of it “*as of their own soil, with which they could do as they pleased.*”<sup>38</sup> The plaintiffs repeatedly invoked the argument that the

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36. Redstone, *supra* note 11, at 216 (“[P]iepowder courts [in St. Ives], as well as courts baron for the manors of Slepe and the priory, retained a purely seigniorial character.”).

37. The charter of Henry I granted the abbot a fair

to be held from Tuesday in Easter week until the octave, well and truly, with *sac* and *soc*, *toll* and *theam*, and *infangentheof*, and with all customs such as any fair in all England has. And I wish and command that all coming there, staying there, or going away from there, may enjoy my firm peace.

Charter to the Abbot of Ramsey (1110), in A SOURCE BOOK FOR MEDIEVAL ECONOMIC HISTORY 119, 119-20 (Roy C. Cave & Herbert H. Coulson eds., 1936) (quoting 2 CARTULARIUM MONASTERII DE RAMESEIA 101 (W. H. Hart & P. A. Lyons eds., Rolls Series 79, London, Longman 1886) [hereinafter 2 CARTUL. MONAST. DE RAMES.]). The phrase “*sac* and *soc*” represented the grant of jurisdiction along with the profits of justice, and the power to compel attendance at the court. JOHN HUDSON, THE FORMATION OF THE ENGLISH COMMON LAW 44 (1996); *see also* 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 578-80 (photo. reprint 1952) (Cambridge, Cambridge Univ. Press 2d ed. 1898).

38. Ramsey v. Taylor, Curia Regis Roll 146, 36 Hen. 3, m. 10, 10d (K.B. 1252), in SELECT CASES IN PROCEDURE WITHOUT WRIT UNDER HENRY III, at 25, 26 (H.G. Richardson & G.O. Sayles eds. & trans., Selden Society 60, 1941) [hereinafter PROCEDURE WITHOUT WRIT] (emphasis added); *see also* 2 SELECT

St. Ives fair was held on “their own soil,” and they protested that the king’s bailiffs had collected tolls and rent even from “the abbot’s houses, stalls, and booths and from the boats and ships which were moored to the abbot’s own soil.” The plaintiffs also represented St. Ives as a private hundred,<sup>39</sup> saying that “Hurstingstone hundred belongs to the abbot, and he has and always ought to have the attachments which arise from plaints within the fair and outside it, and [the right] to hear those plaints at his pleasure where he may wish.”<sup>40</sup> The resolution of the case is not preserved, but three years later, Henry III sold to the abbot all the revenues and jurisdiction of the fair however long it might last—establishing abbatial control over the fair for the entire period of the extant court rolls.<sup>41</sup>

The executive authority of the abbot over the fair, so well established in theory, was also confirmed in practice. The officers of the fair court—the steward, the bailiffs, and the clerks—were appointed by the abbot or by his representatives. The court was held

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CASES CONCERNING THE LAW MERCHANT lxxxvii-lxxxix (Hubert Hall ed., Selden Society 46, 1930) [hereinafter 2 SCLM].

39. A royally established subdivision under the sole control of a lord. Cf. James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 165 (1983) (“The term ‘hundred’ escapes uniform definition, but historically it refers to a subdivision of a county, measured either by a number of villages or by population.”).

40. *Ramsey*, in PROCEDURE WITHOUT WRIT, *supra* note 38, at 27-29. The royal bailiffs replied by asserting the king’s power over the fair: once the term of the abbot’s fair ended, the fair “came into the king’s hand,” and “the abbot can in fact claim no rights in either fair or market after the time of this fair is past.” However, the bailiffs did not contest the abbot’s lordship over the fair during the period of the king’s one-week grant. *Id.* at 28-29.

41. Charter to the Abbot and Convent of Ramsey, 42 Hen. 3, m. 2 (May 7, 1258), in 2 CALENDAR OF THE CHARTER ROLLS PRESERVED IN THE PUBLIC RECORD OFFICE 10 (1906) [hereinafter 2 CHARTER ROLLS]. The record of the case ends with the commissioning of a jury, consisting of twelve knights and twelve merchants, to investigate the customary rights of the abbot over the St. Ives fair. *Ramsey*, in PROCEDURE WITHOUT WRIT, *supra* note 38, at 30. Gross gleaned from “vague statements of Matthew Paris” that “judgment was pronounced against the abbot.” Gross, *supra* note 15, at xxviii. Many years later, Edward I transferred the annual rent the abbot paid for the fair to his Queen Eleanor by charter, and in 1293, Edward granted the abbot a weekly market on Mondays in addition to the fair. Charter to Queen Eleanor, 3 Edw., m. 3 (Oct. 22, 1275), in 2 CHARTER ROLLS, *supra*, at 192, 193; Charter to the Abbot and Convent of Ramsey, 21 Edw., m. 4 (May 14, 1293), in 2 CHARTER ROLLS, *supra*, at 427.

in the abbot's own administrative buildings,<sup>42</sup> and the fines and amercements paid in the fair court went to the abbot's treasury.<sup>43</sup> The

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42. An entry from 1295 describes an oath sworn "at St. Ives, in the hall of the abbot of Ramsey where pleas are held during the fair." 1 SCLM, *supra* note 1, at 67. Additionally, the bailiffs of the town of Huntingdon, which held the rights to certain taxes in the fair, swore their oaths on May 7, 1300, "at St. Ives, in the hall of the lord abbot where the pleas of the fair are held." 1 *id.* at 73; *see also* Redstone, *supra* note 11, at 216. The building housed other courts of the abbot as well, implying that the fair court was hardly a private institution of the merchants. *Id.* at 219.

43. *See* MOORE, *supra* note 11, at 200-01 (observing that though the revenues from the fair court were relatively small—only £8 9s. in 1287, compared to £126 from stall and shop rentals the year before—the fines and amercements still represented a valuable source of income).

The manner in which these payments were recorded provides additional evidence of the abbot's financial interest. The notes in the margins of the St. Ives court rolls contain information that the scribe or a later reader found significant and chose to emphasize; as a result, the contents of the marginalia should give us some insight into the court's purpose in maintaining records. Of the first year of records that Gross translated, for example, two-thirds of all marginalia record the amount of money paid in fines or otherwise rendered to the abbot. *See* 1 SCLM, *supra* note 1, at 1-10. (Other notes include such information as "*Prec' est* [it is ordered]," generally to mark a distraint, or "*Memorandum*," simply to draw attention to a proceeding.)

The fact that so many of the marginalia record payments—and that almost all payments to the court are recorded in the margins—indicates that the court rolls were used not only by the court to keep track of its proceedings, but also by the abbot's officials to calculate how much their lord was owed. This may have been viewed as a more central purpose of the rolls than their use as authorities in future cases, which seems from the records to have been rather infrequent: out of the hundreds of proceedings recorded in the Gross and Maitland collections, only five refer to the record of a previous case on the rolls. *See* *Glemsford v. Longmark* (St. Ives Fair Ct. 1295), *in* 1 SCLM, *supra* note 1, at 72; *Titchwell v. Burdon* (St. Ives Fair Ct. 1300), *in* 1 SCLM, *supra* note 1, at 81; *Lolworth v. Soaper* (St. Ives Fair Ct. 1300), *in* 1 SCLM, *supra* note 1, at 82; *Gavelock v. Trot* (St. Ives Fair Ct. 1300), *in* 1 SCLM, *supra* note 1, at 82; *Cause v. Ward* (St. Ives Fair Ct. 1302), *in* 1 SCLM, *supra* note 1, at 88.

If the records were indeed primarily fiscal in nature, the St. Ives fair would have been in keeping with the best administrative practices of its day. An anonymous treatise on husbandry, written *circa* 1300 and believed to reflect the procedures on the Ramsey abbey estates, mentions court rolls only in the context of assessing the profits of justice: "The steward ought to hand in his court rolls soon after Michaelmas so that one can charge with these rolls reeves and bailiffs who ought to render account for the perquisites of courts for the whole year." *Husbandry*, *in* WALTER OF HENLEY AND OTHER TREATISES ON ESTATE MANAGEMENT AND ACCOUNTING 437 (Dorothea Oschinsky ed. & trans., 1971)

watchmen and constables as well as the jurors of presentment were unfree men who owed services to the abbot as their lord.<sup>44</sup> The abbot's men were responsible for collecting payments to the court,<sup>45</sup> requiring the parties' appearance,<sup>46</sup> continuing private prosecutions on their own authority,<sup>47</sup> distraining absent defendants by seizing their goods,<sup>48</sup> and conducting lawbreakers to jail.<sup>49</sup>

These practices, most notably the authority to imprison defendants, are difficult to reconcile with the interpretation that merchant courts lacked coercive power. Avner Greif, for example, wrote that "during this period English law precluded . . . punishing a borrower who defaulted with imprisonment."<sup>50</sup> This statement may

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(ca. 1300) [hereinafter WALTER OF HENLEY]. Oschinsky argued that the original version of this treatise was included in the remembrance produced for John of Sawtrey, who was abbot of Ramsey from 1286 to 1316. Dorothea Oschinsky, *Introduction to Husbandry*, in WALTER OF HENLEY, *supra*, at 200-01.

44. See generally MOORE, *supra* note 11, at 160-73.

45. See *Knaresborough v. Leyland* (St. Ives Fair Ct. 1270), in 1 SCLM, *supra* note 1, at 1 (charging the bailiff William of Graveley with collecting the amercement).

46. See *Bolton v. Goldsmith* (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 158 ("[The defendant] withdrew from the court in contempt of the Abbot and his bailiffs.").

47. See *Tanner v. Francis* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 48 (in which the steward ordered an inquest "'*ex officio*,' as if at the suit of the lord king"); *Benefield v. Fittleton* (St. Ives Fair Ct. 1300), in 1 SCLM, *supra* note 1, at 74. In most cases, however, the proceedings were ended if the plaintiff failed to appear. See, e.g., *Howell v. Mules* (St. Ives Fair Ct. 1287), in 1 SCLM, *supra* note 1, at 28; *Broughton v. Canwick* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 46; *Glemsford v. Longmark* (St. Ives Fair Ct. 1295), in 1 SCLM, *supra* note 1, at 72.

48. See, e.g., *Waite v. Curtrey* (St. Ives Fair Ct. 1287), in 1 SCLM, *supra* note 1, at 30 ("[The defendant] broke the seal of William Unwin of Sawtry, a bailiff of the fair, which had been placed on his booth because he would not be justiced to answer Adam Waite plaintiff.").

49. See, e.g., 1 SCLM, *supra* note 1, at 16 (ordering Ralph of Armston and his fellow bailiffs to "cause the bodies of all the said harlots and the bodies of all other harlots, wherever they may be found within the bounds and lists of the fair, to be arrested and brought to the court and held in safe custody until etc.").

50. Greif, *supra* note 11, at 195; see also Avner Greif, *Impersonal Exchange Without Impartial Law: The Community Responsibility System*, 5 CHI. J. INT'L L. 109, 134 n.69 (2004) [hereinafter Greif, *Impersonal Exchange*]. For a wider discussion of medieval punishments for debt, see W.J. Jones, *The Foundations of*

have been true of the law enforced in central royal courts, but not necessarily in local courts, and certainly not in St. Ives.<sup>51</sup> In *Ribaud v. Russell*, a pair of feather-merchants were accused of failing to pay their agent his commissions; they were unable to prove their case or pay the damages, and therefore pledged “their bodies”—in Gross’s explanation, a euphemism for imprisonment.<sup>52</sup> A number of other cases involved imprisonment for debt,<sup>53</sup> including minor debts,<sup>54</sup> and defendants who “refused to be justiced . . . and to stand trial” could be forced to pledge their bodies as well.<sup>55</sup> Even when the court did not resort to extreme measures such as imprisonment (or exile),<sup>56</sup> the

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*English Bankruptcy: Statutes and Commissions in the Early Modern Period*, TRANSACTIONS OF AM. PHIL. SOC’Y, July 1979, at 5, 11-14.

51. Indeed, Greif’s statement would not even be true of royal courts during this period if the debt had been secured by a bond under the 1285 Statute of Merchants. Statute of Merchants, 1285, 13 Edw. (Eng.), reprinted in 1 STATUTES OF THE REALM 98-100 (photo. reprint 1993) (London, George Eyre & Andrew Strahan 1810).

52. *Ribaud v. Russell* (St. Ives Fair Ct. 1287), in 1 SCLM, *supra* note 1, at 15-16, 16 n.1. They were later released on their own recognizance. *Id.* at 16.

53. In 1291, Robert Almain defaulted on a debt that William of Sheepshed had guaranteed; he was later ordered to pay Sheepshed 12d. as well as 2s. damages, and pledged his body as a guarantee of payment. *Sheepshed v. Almain* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 48. Another such case is *Hereford v. Lyons* (St. Ives Fair Ct. 1293), in 1 SCLM, *supra* note 1, at 62-63, in which the defendant “in the presence of the lord’s steward . . . binds himself so that if he does not so pay, his body together with all his chattels may be detained until satisfaction shall have been made.” This latter case may have attempted to rely on a royal statute justifying the detention, but there is good reason to characterize the invocation of the statute as mere pretext. See *infra* text accompanying notes 169-173.

54. In 1275, Alice Crese claimed that she had been given a respite from payment for 2s. worth of bread purchased from Richard of Ely two weeks earlier. When she was unable to prove her case or pay for the bread, she was forced to pledge her body. *Ely v. Crese* (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 158-59.

55. *Benefield v. Fittleton* (St. Ives Fair Ct. 1300), in 1 SCLM, *supra* note 1, at 74.

56. When Roger of Pontefract and his wife Beatrice were convicted of stealing shoes worth 2.5d. in 1291, it was judged that “because the said shoes are of little value, wherefore no one may lose life or limb,” they should instead “leave the vill of St. Ives and never more hereafter return thereto.” *Shepherd v. Pontefract* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 38. A similar penalty was prescribed that same year for the ten-year-old John, son of William, son of Agnes of Lynn, who was found stealing a purse near the bridge in St. Ives, “because he is

far more common practice of seizing and withholding goods still required a coercive power far beyond an organized boycott.

Moreover, the abbot claimed—and the fair court enforced—a monopoly on the use of such physical coercion within the fair. A plaintiff in 1293 sued a servant of Amice Hendeman who had attempted to seize his goods, arguing that “the said Amice has no authority to arrest the goods of [the plaintiff] or of any other merchant which are hosted in the frontages during the fair, [nor has anyone] save only the lord abbot and his bailiffs.”<sup>57</sup> In 1287, a man named Totte Simon attempted to collect a tax on wool; because he “executed this office without warrant and without the leave of the bailiffs of the fair,” he was summoned to the fair court and his goods were distrained.<sup>58</sup> Similarly, in 1291, Hamon of Bury St. Edmunds claimed the right to exercise the office of alnager (measurer of cloth) without appointment from the abbot. He based his claim on a letter patent from Sir Roger de Lisle, clerk of the Great Wardrobe—a powerful royal official—ordering that he be admitted to measure wool, linen, and canvas. Hamon was arrested on a Saturday for measuring canvas without appointment to the office. On Monday, the court cited the “charter of the lord king touching the fair” and declared that “no bailiff or officer of the lord king should in any way interfere with the said fair or its appurtenances,” since that might prevent the abbot and convent of Ramsey from “having for ever the administration of all things pertaining to that fair both inside and outside the vill”: an unabashed statement of abbatial power. Hamon was finally admitted to his office—after all, he had served as the abbot’s alnager several times in the past—but he was forced to give up the letter and renounce his claim to office.<sup>59</sup> The fair court was thus both willing and able to assert the abbot’s power when challenged, even against higher authorities.

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not old enough to sustain the judgment which is ordained and provided for such evil-doers.” *In re Lynn* (St. Ives Fair Ct. 1291), *in* 1 SCLM, *supra* note 1, at 42.

57. *Bury v. Quy* (St. Ives Fair Ct. 1293), *in* 1 SCLM, *supra* note 1, at 66. The plaintiff eventually lost the case, but on different grounds. *Id.*

58. *In re Simon* (St. Ives Fair Ct. 1287), *in* 1 SCLM, *supra* note 1, at 16.

59. *In re Hamon of Bury St. Edmunds* (St. Ives Fair Ct. 1291), *in* 1 SCLM, *supra* note 1, at 42.

## 2. Enforcement by the Merchants

As the holder of a royal grant and as the lord of St. Ives, the abbot of Ramsey enjoyed an immense amount of control over the conduct of the fair.<sup>60</sup> No similar claim to executive authority could plausibly be made on behalf of the merchant community.<sup>61</sup> Benson wrote of “the threat of ostracism by the merchant community at large” as a means of enforcing the decisions of a merchant court, and certainly traders would have thought twice before extending credit to a man who had just been convicted of theft.<sup>62</sup> But the fair court rolls contain no evidence that such ostracism was ever institutionalized; indeed, given that some defendants appear repeatedly in the rolls, one infers that they lived to trade again.

Some authors, however, have sought to locate such private enforcement power in the collective actions of mercantile

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60. A lord who held a royal charter could exercise significant authority over a fair even if it were not held on his “own soil.” Often the king would grant a fair to an outside lord to be held in an independent town; in such cases, the lord’s authority would supersede that of the town burgesses. The bishop of Winchester, for example, held “little jurisdiction” over the town itself, which was a royal borough, “or over the port of Southampton, the crucial link between St. Giles fair and its international merchants.” MOORE, *supra* note 11, at 18. However, during the term of the fair, the power of the civic authorities in Winchester was entirely transferred to the officers of the bishop, who held the keys of the city gates so long as the fair lasted. Similar powers were claimed by the lords of fairs in Hereford, York, Westminster, and many other towns. 1 SCLM, *supra* note 1, at xxi-xxii; see also K.L. MCCUTCHEON, YORKSHIRE FAIRS AND MARKETS TO THE END OF THE EIGHTEENTH CENTURY 124-25 (Publications of the Thoresby Society 39, 1940); Charles Gross, *The Court of Piepowder*, 20 Q. J. ECON. 231, 238 (1906); Sachs, *supra* note 27, at 16 n.21.

61. The sole exception to this rule seems to be the practice of individuals “raising the hue” following an assault, which alerted the fairgoers to the danger. See, e.g., *Hautaine v. Burdon* (St. Ives Fair Ct. 1295), in 1 SCLM, *supra* note 1, at 72. However, “raising the hue” appears to have been a common practice in English villages and was not in any way unique to merchants or fairs. Moreover, as Maitland notes, although “[e]very good and lawful man is bound to follow the hue and cry when it is raised,” this “improvised and unprofessional police force” was “utterly inefficient” in locating the culprit. Frederic William Maitland, *Outlines of English Legal History, 560-1600* [hereinafter Maitland, *Outlines*], in 2 COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 417, 460 (H. A. L. Fisher ed., 1911) [hereinafter MAITLAND PAPERS].

62. Benson, *Justice Without Government*, *supra* note 5, at 129.

organizations.<sup>63</sup> A merchant guild, for example, could use boycotts both to influence the decisions of external actors and to coerce its own members to abide by guild policy. Greif, Milgrom, and Weingast found numerous records of guilds taking reprisals against foreign merchants and “conditioning future trade on adequate past protection,” citing boycott threats in medieval Flanders, Genoa, and Germany.<sup>64</sup> Moreover, boycotts could be maintained by punishing guild members who violated the rules of the cartel. In 1281, Jakemin of Liège was ostracized from the guild of Leicester because he “went through the country in the county of Leicester and took with him strange merchants and bought wool with the money of those merchants,” thereby threatening the guild’s wool monopoly.<sup>65</sup>

Merchant guilds are, however, only rarely mentioned in the St. Ives rolls, which provide no evidence of organized boycotts at St. Ives.<sup>66</sup> Two additional factors would caution against viewing boycotts as a significant mechanism of private enforcement. First, it is not clear how effective or credible such threats were. For example, in a purported exchange of letters in 1299-1300, the fair court of Champagne (engaged in a dispute with a merchant court in London) threatened “*to inhibit the land and fairs of Champagne and Brie to all your subjects and their goods.*”<sup>67</sup> Yet the threat does not appear to

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63. See, e.g., Milgrom et al., *supra* note 33, at 19 (describing mercantile courts as part of “a system that relies on boycotts as sanctions”).

64. Avner Greif et al., *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745, 755-58 (1994). In 1261, a group of guilds in five Flemish towns agreed “[f]or the good of the trade” that “if it should happen that any cleric or any other merchant anywhere in England . . . deals falsely with any merchant in this alliance . . . no present or future member of this alliance will be so bold as to trade with them.” MOORE, *supra* note 11, at 301, *cited in* Greif et al., *supra*, at 756; *see also* Greif et al., *supra*, at 755-56 (discussing the Genoese boycott of Tabriz in the 1340s); *id.* at 757 (discussing embargoes by German merchants of Norway in 1284 and Bruges in 1358).

65. 2 RECORDS OF THE BOROUGH OF LEICESTER, *supra* note 18, at 205.

66. In fact, there may be no mention of guilds at all; the only possible reference of which I am aware is found in *Almaine v. Flanders* (St. Ives Fair Ct. 1270), in 1 SCLM, *supra* note 1, at 8 (describing the presumably German plaintiff as a “burgher of Lynn”).

67. CORNELIUS WALFORD, FAIRS, PAST AND PRESENT 257 (London, Elliot Stock 1883). These should be compared to the more certainly apocryphal letters included as a formulary in the treatise *Lex Mercatoria*. See *LEX MERCATORIA*, *supra* note 20, at 38-40; *see also* LMLP, *supra* note 20, at 103-06 (analyzing factual

have been carried out, even after the Champagne court's judgment was disregarded. Large-scale boycotts were a blunt instrument—they could be far more costly to their organizers than to those whom they targeted—and should not be viewed as a dominant method of enforcement for individual cases. (Nor were they always evidence of mercantile self-enforcement; the keepers of the fairs of Champagne were knights or royal officials, and represented the interests of the French Crown.)

Second, and more importantly, the guilds that might organize such boycotts were not fully private organizations, but were often coextensive with local municipal jurisdictions. The sentence against Jakemin of Liège, for example, was pronounced by the mayor of Leicester.<sup>68</sup> This practice was far from unusual, as town governments were often created out of merchant guilds. As Greif noted elsewhere, “in many towns the mercantile and municipal organizations were identical, since the merchant guild was the governing body of the borough.”<sup>69</sup> To the extent that the merchant guild had been officially endowed with municipal jurisdiction, its enforcement actions cannot be considered “private” or “voluntary” in the modern sense.

A more sophisticated means of collective self-regulation would be the “community responsibility system” (CRS) proposed by Greif.<sup>70</sup> Under Greif's model, every member of a community could be held liable for any other member's unpaid debts or breaches of contract.<sup>71</sup> In a world of many local jurisdictions with geographically limited enforcement power, foreign traders could easily escape liability by fleeing to another town; by holding the defendant's “peers [and] parceners” equally liable, the CRS could satisfy the plaintiff's claims, while ensuring that the defendant's irate countrymen would

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deficiencies of letters contained in *Lex Mercatoria*). It is entirely possible that Walford's letters are apocryphal as well; those from London are attributed to the Mayor “and the Citizens of London,” while Basile et al. noted that “[n]o London court of which we are aware . . . had ‘citizens of London’ in its title.” LMLP, *supra* note 20, at 104 n.87; *see also infra* text accompanying note 314.

68. 2 RECORDS OF THE BOROUGH OF LEICESTER, *supra* note 18, at 205.

69. Greif, *supra* note 11, at 183 n.20.

70. *See generally* Greif, *supra* note 11; Greif, *Impersonal Exchange*, *supra* note 50.

71. Greif, *supra* note 11, at 169.

seek compensation at home.<sup>72</sup> The CRS would therefore give the community a strong interest in the honorable conduct of each of its members, and could make use of strong intra-community ties to encourage honest dealing abroad. It could allow for “impersonal exchange despite the lack of impartial legal enforcement provided by a third party,” and would be “self-enforcing” in the sense that “all relevant incentives—to individual traders and their communities—were provided endogenously.”<sup>73</sup>

Yet to the extent that the CRS model applies to St. Ives, it can hardly be described as a successful example of “voluntary enforce[ment]” of mercantile law, since it was neither voluntary nor well-enforced.<sup>74</sup> The applications of collective responsibility at St. Ives were accompanied by a torrent of litigation, with repeated disagreements as to which merchants were members of which communities, as well as hasty (and potentially arbitrary) seizures of goods.<sup>75</sup> Even when the system worked as designed, law-abiding merchants could find their goods confiscated without regard to their own actions; as Lars Boerner and Albert Ritschl noted, collective liability had been described from the earliest sources onward as “a nuisance, an obstacle to merchant activity, and a bad practice that

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72. The phrase can be found in *S. Michel v. Troner* (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 152.

73. Greif, *supra* note 11, at 168, 200. For more on the medieval use of coalitions and collective business entities to prevent cheating, see Greif, *Impersonal Exchange*, *supra* note 50; Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989); Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525 (1993); and Avner Greif, *Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies*, 102 J. POL. ECON. 912 (1994).

74. Nor was it specific to issues of mercantile law; in one case cited by Greif, the plaintiff complains of the forcible seizure of his property, rather than of an unpaid debt or breach of contract. *Almaine v. Flanders* (St. Ives Fair Ct. 1270), in 1 SCLM, *supra* note 1, at 9; Greif, *supra* note 11, at 188.

75. See, e.g., *Blacythemout v. Hamerton* (St. Ives Fair Ct. 1270), in 1 SCLM, *supra* note 1, at 3; *Currier v. Holdcorn* (St. Ives Fair Ct. 1270), in 1 SCLM, *supra* note 1, at 2, 4; *Fleetbridge v. Coventry* (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 145-47.

had to be abolished or at least regulated.”<sup>76</sup> Indeed, the practice was prohibited in England by the first Statute of Westminster in 1275, which forbade the application of collective liability to residents of England.<sup>77</sup>

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76. Lars Boerner & Albert Ritschl, Comment, *Individual Enforcement of Collective Liability in Premodern Europe*, 158 J. INSTITUTIONAL & THEORETICAL ECON. 205, 206 (2002) (citations omitted); cf. 2 FLETA ch. 63 (H.G. Richardson & G.O. Sayles eds., Selden Society 72, 1955) (ca. 1290) (complaining of the practice “in fairs, markets, [and] cities” of “obstructing, distraining and harassing anyone who passes through . . . for a debt due from another . . . alleging against him that he was an associate of the debtor in question,” and noting that “this is done with impunity”); Volckart & Mangels, *supra* note 20, at 445.

Boerner and Ritschl further argued that the practice was rarely conceived as a means of individualized contract enforcement. Rather, the creditor was required first to pursue the debtor in the courts of the latter’s own community, and collective liability would be imposed only as a punishment on communities that had failed in doing justice. Boerner & Ritschl, *supra*, at 208. This seems to have often been the practice at St. Ives; William and Amice of Fleetbridge sued the entire community of Leicester only after they had “sued for the payment of the said money in the court of Leicester . . . [and] the commonalty of Leicester made default of justice . . . wherefore [the plaintiffs] style them and the others of the said commonalty detainers, deforceors and principal debtors of the said debt.” *Fleetbridge v. Coventry* (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 145-46; see also 1 SCLM, *supra* note 1, at 94-95 (concerning a theft of jewels by Flemish pirates, which the count of Flanders did not correct); *Almaine v. Flanders* (St. Ives Fair Ct. 1270), in 1 SCLM, *supra* note 1, at 9-10; *S. Michel v. Troner* (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 152 (“[T]o obtain which money the said Brun and his representatives have often laboured at Boston and at Norwich and as yet have not been able to get any part thereof . . .”).

Similar requirements can be found in royal charters to Leicester, Cambridge, and Lubeck. Third Charter of Henry III to the Burgesses of Leicester, 53 Hen. 3, m. 18 (Apr. 20, 1269), in 2 RECORDS OF THE BOROUGH OF LEICESTER, *supra* note 18, at 56; Greif, *supra* note 11, at 194 (quoting THE CHARTERS OF THE BOROUGH OF CAMBRIDGE 14 (Frederic William Maitland & Mary Bateson eds., 1901)); *id.* at 183-84 (quoting Charter to the Merchants of Lubeck, 51 Hen. 3, m. 31 (Dec. 23, 1266), in 6 CALENDAR OF THE PATENT ROLLS PRESERVED IN THE PUBLIC RECORD OFFICE: HENRY III, at 20 (1913)).

77. Statute of Westminster I, 1275, 3 Edw., cl. 23 (Eng.), reprinted in 1 STATUTES OF THE REALM, *supra* note 51, at 33. Greif described the new remedies provided in the Statutes of Acton Burnell and of Merchants as a response to this loss of collective responsibility: “Edward seems to have abolished the system, recognizing its cost, only to later realize its benefits and gradually introduce an alternative based on individual legal liability.” Greif, *Impersonal Exchange*, *supra* note 50, at 136; see also *id.* at 135 n.74, 136 n.76; Statute of Acton Burnell, 1283, 11 Edw. (Eng.), reprinted in 1 STATUTES OF THE REALM, *supra* note 51, at 53; Statute of Merchants, 1285, 13 Edw. (Eng.), reprinted in 1 STATUTES OF THE

More fundamentally, in order to be effective, the CRS required the forcible seizure of goods from the defendant's community, thus relying on the coercive power of local courts—or, in Greif's terms, "intra-community contract enforcement institutions."<sup>78</sup> Although these institutions functioned in the "absence of centralized legal contract enforcement provided by a state," a comparison to state enforcement is somewhat anachronistic; at most, the CRS served to assist local authorities in projecting power beyond their own boundaries, shifting the cost of enforcement to innocent members of the defendant's community. When no one of that community could be found in their limited local domain, these authorities were helpless.<sup>79</sup> Collective liability provided only a means for the magnification and projection of local power, rather than a new merchant-led mechanism of enforcement.<sup>80</sup> Even if the merchants

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REALM, *supra* note 51, at 98. The evidence of Edward's regret is uncertain, however, because the option of individual suit had always existed. The innovation of the statutes was the creation of a sealed bond that provided for immediate execution without litigation, and avoidance of litigation had been no virtue of the CRS. See *supra* text accompanying note 75. Moreover, the process of Acton Burnell was one of extreme formality, requiring an appearance by both creditor and debtor before the mayor of one of three specified cities, and could not have been envisioned as a replacement for a widely available process of recovery.

78. Greif, *supra* note 11, at 200-01.

79. See Grief, *Impersonal Exchange*, *supra* note 50, at 132. In 1315, when Edward II sought to seize the goods of Flemish merchants to compensate for injuries done by Flemish pirates, the bailiffs of St. Ives responded that no merchants from Flanders could be found within the fair, and "[t]herefore up to the present time nothing has been done therein etc." 1 SCLM, *supra* note 1, at 94.

80. Another case of mercantile self-regulation being ultimately dependent on coercive authority can be found in Grele v. Lucas (Ch. 1292), PRO C258/1 no. 5 (Paul Brand trans., 2003) (on file with author). In 1291, Thomas Lucas bought £31 worth of fish from the German merchant Arnald de Grele at the fair of Lynn, and was later accused of having left town at night without having paid. According to the accusation, Lucas then fled "to Boston, from Boston to Lincoln, from Lincoln to Hull, from Hull to London, always promising [to pay Grele], who followed him from town to town." *Id.* m. 3. The "men of his trade" complained to the London officials that "they had received great harm in the fair at Lynn," because

no foreign merchant would make any sale before full payment was made in their ships and houses, calling them false debtors and maliciously carrying off their goods, where previously they could buy £500 or £400 of goods by God's penny [a nominal down payment used to confirm a sale] without any further payment.

had regulated their own affairs, they still depended on the existing local authorities to make those regulations enforceable.

#### B. "VOLUNTARILY ADJUDICATED"

Merchant courts have traditionally been conceived as highly informal affairs. Perhaps the most extreme example was offered by Bernard Brodhurst, who claimed that "[w]herever a market or fair was held," disputes would be resolved "by four or five of the merchants present on the spot," applying "the principles and customs recognized as obtaining generally among the trading classes."<sup>81</sup> The

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*Id.* m. 2. The Londoners also worried that "unless a speedy remedy was provided on this matter their goods in overseas parts could be arrested until full satisfaction was given to the said merchant on the said debt." *Id.*

Although the case does suggest a form of collective action by the foreign merchants, it does not seem to fit Benson's description of "voluntary enforcement." Although they had lost their good credit, the Londoners were still *able* to trade with others—this was no punitive boycott, but rather a sensible insistence that those who associate with thieves should pay in advance. Moreover, although the London traders collectively sought assistance outside of existing legal structures—they wanted Lucas arrested and held in jail before his trial—they did so by seeking the intervention of royal officials, complaining that "the good name of the merchants of London attending fairs . . . has been much damaged by his actions and can be damaged still more unless he can be brought to justice by his body (since he has nothing) as a warning to others." *Id.* In January 1292, Lucas was brought before the royal warden of London (the city was under the king's direct control at the time), tried, and consigned to the Tower. It was therefore still necessary to apprehend Lucas as a "warning to others"—the threatened sanction of loss of credit was insufficient to prevent violations of the rules.

This case therefore casts any theory of independent merchant justice in a rather poor light; Lucas fled from town to town without the universal law merchant ever catching up with him. The situation required the intervention of the Crown, because Lucas "had nothing by which he could be attached [i.e., he was judgment-proof], nor could he find sureties for a quarter of a year and more"—the medieval equivalent of posting bail. *Id.* The possibility of flight was not something that the transnational community of merchants (or even tighter communities such as the "men of his trade" or the merchants of London) could address on their own, and the use of physical force by local authorities, rather than merely boycotts by aggrieved merchants, was at some basic level necessary to make the system work. (I am indebted to Paul Brand for bringing this case to my attention.)

81. Bernard Edward Spencer Brodhurst, *The Merchants of the Staple*, in 3 SELECT ESSAYS, *supra* note 25, at 16, 25 (citing GEORGE NORTON, COMMENTARIES ON THE HISTORY, CONSTITUTION & CHARTERED FRANCHISES OF THE CITY OF LONDON 324 (E. Tyrrell ed., London, Longman 3d ed. 1869)). Little good evidence exists to support Brodhurst's position; the charter of Henry III cited

process of the St. Ives court was certainly more formal than that, but a number of authors have attributed independent judicial authority to the merchant community. On this interpretation, the decisions in mercantile matters were rendered by merchants themselves, either as a collective body or in individual proceedings resembling modern arbitration.<sup>82</sup>

The evidence from St. Ives, however, fails to show that the merchant community exercised a unique degree of influence in the adjudication of mercantile cases. Although the merchants did participate in rendering decisions, this “participatory” structure was common to local courts throughout England. Furthermore, the merchants were hardly an autonomous legal class; mercantile cases and appeals could be heard in the royal courts, and the abbot of Ramsey had significant power to alter the course of litigation in St. Ives. Rather than modern tribunals for arbitration, England’s mercantile courts far more closely resembled the local and seignorial courts that were their contemporaries.

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by Norton says nothing at all about “four or five” citizens. Charter of 52 Hen. 3, ¶ 98 (Mar. 26, 1268), in 1 LIBER ALBUS, LIBER CUSTUMARUM, ET LIBER HORN 137 (Henry Thomas Riley ed., Rolls Series 12, London, Longman 1859) (1419), cited in Norton, *supra*, at 324 (“*exceptis placitis de mercandis quae secundum legem mercatoriam terminari solent in burgis et feriis*”). (I am grateful to Rhett P. Martin for assistance with the Latin text.) One mention of “four or five” merchants can be found in the Charter to the Burgesses of Melecumbe, 8 Edw., m. 9 (May 27, 1280), in 2 CHARTER ROLLS, *supra* note 41, at 223, 223 (“Grant to the burgesses of Melecumbe all of the liberties granted to the citizens of London, that is that none of them shall be compelled to plead without the bounds of the said borough . . . excepting [among others] pleas of merchandise which by the law merchant are determined in boroughs and fairs, so that such plaints (*querelle*) shall be determined by four or five of *the said burgesses* [i.e., the burgesses of Melecumbe] present in the said boroughs or fairs; saving always to the king the amercements thence arising.”) (emphasis added). Yet this provision seems to grant the community of Melecumbe that four or five of its members are to be included among the suitors hearing cases in *other* towns in which they trade, rather than indicating a general tradition of relying on four or five randomly assembled traders on the spot. (The insistence that fines be paid to the king also diminishes any impression of private ‘frontier justice.’)

82. See, e.g., A. Claire Cutler, *Globalization, the Rule of Law, and the Modern Law Merchant: Medieval or Late Capitalist Associations?*, 8 CONSTELLATIONS 480, 485 (2001) (“These courts operated privately, more like contemporary arbitration tribunals than like courts of law.”).

### 1. *The Influence of the Merchants*

According to the thirteenth-century treatise *Lex Mercatoria*, written during the period of the extant St. Ives rolls, the merchant community did exercise some independent judicial authority in mercantile courts. In market courts, the treatise states, “every judgment ought to be rendered by merchants of the same court and not by the mayor or by the seneschal of the market.”<sup>83</sup> There is a good deal of evidence that this practice was followed in St. Ives. In the case of *Fulham v. Francis*, upon encountering a particularly knotty legal problem (namely, whether servants may swear an oath to establish ownership of goods by their master), the court called upon the merchants to render the decision. The court rolls record that “thereupon all the merchants of the said fair, both natives and foreigners, to whom judgments belong according to the law merchant [*secundum legem mercatoriam*], having been called for this purpose and consulted, say that [the servants] may properly be admitted in this and similar cases according to the law merchant.”<sup>84</sup>

Merchants were relied upon to render the decisions of the fair court quite frequently, not only in cases of exceptional difficulty. We know that there were merchants present at the court on a regular basis. In *Hereford v. Lyons*, the defendant swore “in the presence of the lord’s steward, James Pilat, Bernard Pilat, and many other citizens, burghers, and merchants” to abide by a settlement.<sup>85</sup> The merchants had a significant role even in cases concerning royal law: when Simon Blake of Bury was arrested for violating the royal assize

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83. *LEX MERCATORIA*, *supra* note 20, at 20; *see also* Gross, *supra* note 60, at 242 (“In the Middle Ages the merchants were the suitors or doomsmen; they found the judgment or declared the law.”).

84. *Fulham v. Francis* (St. Ives Fair Ct. 1311), *in* 1 SCLM, *supra* note 1, at 90.

85. *Hereford v. Lyons* (St. Ives Fair Ct. 1293), *in* 1 SCLM, *supra* note 1, at 62, 63. Similarly, in *Swavesey v. Pope*, the question arose whether Hugh Pope, the defendant, had received a new trial date before his essoiner (a representative sent to excuse his absence) left a previous court hearing. According to the rolls, Pope

craves that the record of the merchants and of the whole court be allowed him. The merchants and all others of the court testify and say that [Hugh’s essoiner] withdrew from the court before a day was given to him; wherefore they say that Hugh made default at that court.

*Swavesey v. Pope* (St. Ives Fair Ct. 1288), *in* 1 SCLM, *supra* note 1, at 35.

in selling canvas, the court assembled all the merchants of the fair to try his case.<sup>86</sup>

The merchants' decision-making role is emphasized by the parties themselves in *Graffham v. Pope*, in which Alan of Berkhamstead intervened to claim as his own a horse that had been attached for a debt. He said that he had bought the horse from Thomas of Ramsden, "[a]nd that this is so he craves may be inquired [by an inquest], unless he may be admitted to [make] his law [i.e., prove his case by oath] by the award of the merchants." The inquest later revealed that Alan had bought the horse through collusion with the defendant, but the fact that Alan had sought relief "by the award of the merchants" indicates that the merchants attendant at court were seen as among the decision-makers.<sup>87</sup> Later in the same session, a dispute arose in *Fleming v. Tanner* over whether the appropriate means to prove a breach of contract were an inquest or a wager of law, a formal oath of innocence sworn by the defendant and a specified number of compurgators (oath-helpers). On this question "the parties put themselves on the judgment of the merchants, and it is awarded by the merchants that the truth of the matter be inquired [by an inquest]."<sup>88</sup> These are only a few of the many cases at St. Ives in which a party appealed to "the merchants" for a favorable decision.

These cases would seem to establish that the St. Ives court did give decision-making power to the merchant community. The ability of the merchants to render decisions in this way would certainly have been unusual in the courts of King's Bench or Common Pleas, and some historians have emphasized this fact in describing the mercantile community's judicial independence.<sup>89</sup>

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86. 1 SELECT PLEAS, *supra* note 14, at 154-55.

87. *Graffham v. Pope* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 50-51. They were not the only decision-makers, however. See *Fleetbridge v. Coventry* (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 147 (referring to a judgment "of the court and of the merchants," thus implying that the two were not coextensive).

88. *Fleming v. Tanner* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 52.

89. See, e.g., Benson, *Justice Without Government*, *supra* note 5, at 130 ("[Given that royal judges] often adjudicated disputes about which they knew nothing . . . [p]articipatory or communal adjudication was, therefore, a necessary characteristic of the law merchant."); see also 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 539 (7th ed. rev. 1956) (remarking that the practice

Where these interpretations err, however, is in choosing the central royal courts as an appropriate basis for comparison. In local courts, it had long been customary for the population judged by the court to provide suitors who would attend the court and participate in rendering its decisions. In fact, the permanent residents of St. Ives joined the merchants in rendering decisions—these were the “others of the court” mentioned in *Swavesey v. Pope*.<sup>90</sup> If the process followed in fair courts were compared to that of manorial and other seignorial courts, one would find that it was actually quite standard—and that “participatory” procedure was not in any way an innovation of the merchants.

An examination of the records of nearby manorial courts shows a structure very similar to that of St. Ives. In 1295, in the court of the manor of King’s Ripton (which, like St. Ives, was part of the patrimony of the abbot of Ramsey), a legal question was “inquired by the township,” which says that the plaintiff “has produced sufficient suit.”<sup>91</sup> Clearly, this procedure appears to involve the same population that is judged by the court in the process of making judgments. In 1249, in the court of the manors of the abbey of Bec, Richard Blund asked for a jury “of the whole court” to determine whether he has the greater right in a certain piece of land; after investigation, “the whole court say upon their oath that the said Richard has greater right in the said land than anyone else.”<sup>92</sup> The “whole court” seems very clearly to have been an assembly of suitors rather than a single judge, especially given that they pronounce their judgments by oath. Cases were delayed in the abbot’s honour of Broughton in 1294 because “the present court is thinly attended by suitors,” and in King’s Ripton in 1288, “the whole court” requested a delay in giving judgment until the next court session—an event that

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of merchant judges gave “the merchants who attended . . . power to shape directly the law there administered”).

90. *Swavesey v. Pope* (St. Ives Fair Ct. 1288), in 1 SCLM, *supra* note 1, at 35.

91. *Sweyn v. Nicholas* (King’s Ripton Manor Ct. 1295), in 1 SELECT PLEAS, *supra* note 14, at 118. “Suit” here refers to the *secta*, the witnesses and others who accompanied the plaintiff and would swear to the truth of his accusations. *Cf.* 2 FLETA, *supra* note 76, ch. 63 (defining “suit” in a contract case as “the witness of law-abiding men who were present at the contract made between them”).

92. *Blund v. Frith* (Abbey of Bec Manor Ct. 1249), in 1 SELECT PLEAS, *supra* note 14, at 20-21.

is only comprehensible if the “whole court” includes the suitors and not the steward alone.<sup>93</sup>

Additional examples can be found in the scant records of other fair courts. In 1347, when John of Knaptoft sued William Parchment-Maker for debt in the fair court of Leicester, the defendant “[came] and by leave of the community [put] himself in mercy.”<sup>94</sup> The “community” was no mere abstraction. In a later case, it performed the function of a special jury; the defendant David Blanket-Maker protested his innocence, “wherefore the bailiff was ordered to summon the community also etc. which says that he is guilty.”<sup>95</sup>

These examples support the assessment of F.W. Maitland that although the steward may have presided over a court, often he “was not the judge; the suitors were the judges.”<sup>96</sup> Maitland cited a case of 1226 from Bracton’s Note Book in which the sheriff of Lincolnshire was forced to adjourn the court “because he had quarreled with the freeholders whose business it was *‘facere judicia.’*”<sup>97</sup> To make judgments—even in a royal county court—was the responsibility of the suitors, although the steward or sheriff was “the presiding magistrate, . . . control[led] the whole procedure, issue[d] all the mandates, [and] pronounce[d] the sentence.”<sup>98</sup> In fact, Maitland argued, the separation between the presiding officer and the suitors

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93. 1 SELECT PLEAS, *supra* note 14, at 83; *Alconbury v. Stalker* (King’s Ripton Manor Ct. 1288), *in id.* at 111. One can also find examples further afield. In 1326 in Hatfield Chase, Yorkshire, it was “attested by the community of the court” that deathbed transfers of land were not accepted, and in 1344 an inquest in Great Waltham, Essex, was “taken by the entire vill” to determine a point of law. SELECT CASES IN MANORIAL COURTS, 1250-1550, at 14, 102 (L.R. Poos & Lloyd Bonfield eds., Selden Society 114, 1997).

94. *Knaptoft v. Parchment-Maker* (Leicester Fair Ct. 1347), *in* 2 RECORDS OF THE BOROUGH OF LEICESTER, *supra* note 18, at 72.

95. *Cochet v. Blanket-Maker* (Leicester Fair Ct. 1347), *in* 2 RECORDS OF THE BOROUGH OF LEICESTER, *supra* note 18, at 72-73.

96. Frederic William Maitland, *Introduction* to 1 SELECT PLEAS, *supra* note 14, at xi, lxxv.

97. *Id.*; *see also* *Lincoln v. Auteyn*, Hilary, pl. 1730 (K.B. 1226), *in* 3 BRACTON’S NOTE BOOK 565 (photo. reprint 1999) (Frederic William Maitland ed., London, C. J. Clay & Sons 1887).

98. Maitland, *supra* note 96, at lxxv.

or 'doomsmen' was even in the thirteenth century "very ancient, and look where we will in Western Europe we may find it."<sup>99</sup>

As in the fair of St. Ives, moreover, most local courts in England displayed no fine distinctions in personal jurisdiction, "no distinctions of procedure between cases which concern freeholders and cases which concern customary tenants." Villeins could even be suitors and "do justice upon their lord," even as they owed him services "of a very 'villanous' kind."<sup>100</sup> In the end, the injunction of *Lex Mercatoria* that judgments are to be rendered by the suitors of the court and not the seneschal does not seem very far removed from the principle cited by Maitland that "*Curia domini debet facere iudicium et non dominus*."<sup>101</sup>

Such a system of justice may seem quite alien to those familiar with modern courts, where an appointed judge decides questions of law and a jury tries questions of fact. But at the time, the actual work of the court was strictly limited. In most cases the suitors of local courts only decided *how* the proof was to be rendered, such as by compurgation or by a jury inquest, and not whether the evidence offered was in fact sufficient. In determining who had the greater right to the piece of land, the jury of Bec was making judgments of both fact and law, determining the proper custom to apply as well as how the parties stood with regard to that custom. The fact that juries in commercial cases in St. Ives might be composed of "merchants

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99. Maitland, *Outlines*, *supra* note 61, at 446; *see also* Carter, *supra* note 18, at 236 ("'Popularity' is however not peculiar to mercantile Courts, but was common to all early local Courts, as in this country, to the Manorial Court and the Sheriff's Court.").

100. Maitland, *supra* note 96, at lxix-lxxi. Maitland added that in the thirteenth and fourteenth centuries, "it is common enough to find a demandant claiming a villein tenement by inheritance 'according to the custom of the manor,' . . . with all the same strict accuracy that would have been required of him had he been a freeholder pleading before the Common Bench." Frederic William Maitland, *A New Point on Villein Tenure* (1891), in 2 MAITLAND PAPERS, *supra* note 61, at 202, 204. One distinction, however, between cases concerning freeholders and customary tenants was that the former might insist on having freemen among the court's suitors. One free plaintiff made this claim in 1284, arguing that Magna Carta had guaranteed a right to judgment by his peers. *Simon Subburg' of Burnham v. Prior of Walsingham*, CP 40/55, m. 97d (C.P. 1284), *cited in* PAUL BRAND, *THE MAKING OF THE COMMON LAW* 296 (1992). However, this distinction does not seem to have arisen at St. Ives.

101. Maitland, *supra* note 96, at lxviii-lxix.

and neighbors” therefore did not mean that merchants represented an autonomous legal class.<sup>102</sup> Unlike today’s juries, medieval juries were expected to include those most knowledgeable about the case and its participants, and courts often impaneled juries of experts on specific questions. The dispute between King Henry III and the abbot over the extension of the St. Ives fair was referred to a jury of twelve knights and twelve merchants; this was certainly *not* done because the merchants had any legal right to be consulted in a dispute over revenues, but rather because the merchants would have been likely to remember past practice.<sup>103</sup> James Oldham has even presented examples of juries of matrons (to determine if a woman were pregnant) and of fishmongers (to assess food quality), and no one has suggested that matrons or fishmongers were legally autonomous in medieval England.<sup>104</sup>

In relying on specialist juries for specialist questions, therefore, or in including members of the community as suitors, the fair court was entirely unexceptional. Indeed, Maitland noted that for much of the

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102. See, e.g., *Lawford v. Northampton (St. Ives Fair Ct. 1287)*, in 1 SCLM, *supra* note 1, at 25. Participation in the judicial process may have been viewed more as a burden than a privilege. Maitland described a number of examples in which tenants sought to avoid serving as a suitor for their lord’s court, and noted that “[i]t would have been very dangerous for any one to attend the county court unless he was bound to go there, for he would have been creating evidence of a duty to attend.” Frederic William Maitland, *The Suitors of the County Court* (1888), in 1 MAITLAND PAPERS, *supra* note 61, at 458, 465. In *St. Ives*, litigation occasionally had to be delayed “owing to the small attendance at the court.” *Papworth v. Kent (St. Ives Fair Ct. 1291)*, in 1 SCLM, *supra* note 1, at 39; see also *Cause v. Ward (St. Ives Fair Ct. 1302)*, in 1 SCLM, *supra* note 1, at 88. Individuals would also willingly pay fines in order to avoid jury service. William of Hamerton paid 6d. to avoid serving on a jury in 1302; Robert Bank of the Green was fined 6d. the same day for refusing to serve, and Ralph Clerk was fined 12d. because, “having been elected by the jurors to be one of them, [he] would not make oath but withdrew from the court in contempt of the lord and his bailiffs.” 1 SCLM, *supra* note 1, at 83.

103. *Ramsey v. Taylor*, Curia Regis Roll 146, 36 Hen. 3, m. 10, 10d (K.B. 1252), in *PROCEDURE WITHOUT WRIT*, *supra* note 38, at 30; see also *supra* text accompanying notes 38-41.

104. See James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 139 (1983) (reporting the early existence of juries composed of “experts” in a particular field). Where a foreigner was a party, there was established a tradition of juries “of the half tongue,” with half of their members of the foreigner’s own country; the same could hold for Welshmen, Jews, and university students. *Id.* at 168-69.

history of St. Ives, “the great bulk of all the justice that was done” in England was done by local and seignorial courts.<sup>105</sup> The true innovation of the period may well have been the more formal procedure of central courts, and not the conventional local approach adopted by the fairs.<sup>106</sup>

## 2. *The Influence of the Abbot*

The evidence presented thus far has shown that the merchants possessed no unique claim on the judicial power of the fair court, no authority that would not also have been extended to the populations judged by other local, seignorial, and manorial courts. However, the merchants’ claim was also far from exclusive: the power to hear mercantile cases was not limited to merchants alone. The proceedings of the St. Ives court did not in the least resemble private arbitration hearings. The abbot’s steward presided over them,<sup>107</sup> and the abbot and his officers could and did intervene in the court’s deliberations—even to the point of moving litigation from one court controlled by the abbot to another. The abbot’s authority was recognized not only by the royal courts in hearing cases from St. Ives, but also by the fairgoers themselves. There is therefore little reason to conclude that the merchants of St. Ives were the masters of their own affairs, or that the disputes arising from the fair were “voluntarily adjudicated.”

To begin with, the merchants had little opportunity to escape the fair court’s jurisdiction. Although medieval mercantile courts have

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105. Maitland, *Outlines*, *supra* note 61, at 433. The king’s own courts, on the other hand, had begun as courts for the “protection of royal rights,” the “causes of the king’s barons,” and the appeals of “persistent litigant[s]” whom “justice had failed . . . everywhere else.” It was only over time that the royal courts “flung open [their] doors to all manner of people” and made their custom “the common law of England.” *Id.* at 433-34.

106. “Elsewhere the position of the ‘*curia*’ is less clear because it seems to discharge many functions: now it judges, now it presents, now it serves as a jury of trial. Imitation of the royal courts seems to be transfiguring it . . . .” Maitland, *supra* note 96, at lxviii.

107. The steward’s role was typical for such courts. *See* Gross, *supra* note 60, at 238 (“The court of piepowder was held . . . before the steward if the market or fair belonged to a lord.”).

often been analogized to modern arbitration tribunals,<sup>108</sup> the fair court was a particularly inhospitable environment for private arbitration. In 1287, Robert of St. Leonards and Ralph Pole sued Richard Elsdon; instead of litigating, they asked for a day in which to negotiate a settlement, and would “submit themselves in all things to the arbitrament of Bartholomew of Acre.”<sup>109</sup> Yet this settlement was accepted only after the defendant paid 12d. for the amercements of both parties.<sup>110</sup> There are many other cases where parties sought to settle their cases out of court, but there is no indication in any of them that the parties ever submitted themselves to the decision of an arbitrator, nor was the fair court ever called upon to enforce an arbitral award. In each case where the parties sought leave to make concord on their own, they had to do so “saving what should be saved”—with the leave of the steward, and protecting the lord’s rights, “especially his right to demand a fine.”<sup>111</sup> In other words, this tribunal was not merely a voluntary mechanism for resolving private

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108. See, e.g., Schmitthoff, *supra* note 9, at 134 (“[T]hese commercial courts . . . were in the nature of modern conciliation and arbitration tribunals rather than courts in the strict sense of the word.”); Trakman, *E-Merchant Law*, *supra* note 5, at 282 (“As in medieval times, commercial arbitration centres have developed at merchant centres, not unlike courts of the fair, and have applied arbitration laws and procedures to suit merchant clientele, not unlike the actions of medieval courts of the fair.”); Cutler, *supra* note 82, at 485 (“These courts operated privately, more like contemporary arbitration tribunals than like courts of law.”).

109. St. Leonards v. Elsdon (St. Ives Fair Ct. 1287), *in* 1 SCLM, *supra* note 1, at 18.

110. *Id.* at 21. The arbitrator’s decision was that the *plaintiffs* should give the *defendants* 4s. No reason is given for the reversal, although it is possible that there were counterclaims that do not appear in the record. For comparison, the average wage for a building craftsman during this period is estimated at between 3-4d. per day (1s. = 12d.; £1 = 20s. = 240d.), while that of an unskilled laborer was 1½-2d. per day. Henry Phelps Brown & Sheila V. Hopkins, *Seven Centuries of Building Wages*, 22 *ECONOMICA* 195 (1955), *reprinted in* A PERSPECTIVE OF WAGES AND PRICES 1, 11 (Henry Phelps Brown & Sheila V. Hopkins eds., 1981).

111. See, e.g., Serjeant v. Foville (St. Ives Fair Ct. 1270), *in* 1 SCLM, *supra* note 1, at 2. A manual for holding seignorial courts written *circa* 1307 offers a similar message, saying that “none can make compromise without the leave of the lord or his steward when a plaint has been made and gage and pledge given, except with a saving for all the lord’s rights.” *The Manner of Holding Courts—John de Longueville*, *in* THE COURT BARON: BEING PRECEDENTS FOR USE IN SEIGNORIAL AND OTHER LOCAL COURTS 79, 79 (Frederic William Maitland & William Paley Baildon eds. & trans., Selden Society 4, London, B. Quaritch 1891) [hereinafter COURT BARON].

disputes among individuals, but a coercive public forum that could and did demand payment even from parties who decided not to litigate.<sup>112</sup>

Once a dispute had come before the fair court, its resolution could be affected by the intervention of the abbot of Ramsey or his officials. In *Coventry v. Fleetbridge*, two plaintiffs who had sued the community of Leicester were countersued, and claimed to be outside the fair court's jurisdiction as London citizens.<sup>113</sup> This case was "[r]eserved for the abbot's hearing," perhaps because it posed diplomatic issues among the various communities involved. Yet there is no evidence that the abbot's intervention occurred with the consent of the parties, or with that of the merchants and residents who served as suitors. Diplomatic concerns could also affect the successful execution of a judgment; the judgment against the defendant in *Lolworth v. Soaper*, who was "of the homage of the bishop of Ely," was suspended "owing to a love-day [i.e., a time to make concord] between the bishop and the abbot, which has been granted and at which they are to treat concerning the various matters in dispute between them."<sup>114</sup>

The abbot's officers also exercised significant discretionary powers in the fair court, similar to those they might have possessed in manor courts. For instance, through the office of the steward, the abbot had the authority to pardon offenses and remit fines. Pardons appear twenty-five times in the cases described by Gross and Maitland, and some of these pardons may indeed have been intended

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112. Douglas Yarn provided additional examples of medieval arbitration, and argued that arbitration "was not unknown to the merchant courts and those who used them." Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN. ST. L. REV. 929, 975 (2004). However, the practice hardly seems common, and those arbitrations that did occur seem to have been conceived as mediated settlements rather than independent tribunals.

113. *Coventry v. Fleetbridge* (St. Ives Fair Ct. 1275), 1 SELECT PLEAS, *supra* note 14, at 155; *see also supra* note 76 (reviewing *Fleetbridge's* suit).

114. *Lolworth v. Soaper* (St. Ives Fair Ct. 1300), in 1 SCLM, *supra* note 1, at 82. Although the court had awarded the plaintiff "his debt together with his damages," there is no mention in the extant rolls whether either were ever recovered. However, at the end of the record, the plaintiff "puts Richard of Peche in his place," meaning that further proceedings in the case were envisioned.

to correct a miscarriage of justice.<sup>115</sup> Unsuccessful plaintiffs were normally fined for their “false claim,” and eight pardons were used to excuse plaintiffs in such cases—perhaps because the steward chose not to add a fine on top of the suffering alleged in their plea. In the case of *Tempsford v. Chaplain*, the plaintiff’s allegations against an intervening party had been supported by the results of an inquest, which was later thrown out because it had been undertaken by the steward *ex officio*; although the intervening party successfully waged his law, the steward chose to pardon the plaintiff for his false claim.<sup>116</sup> Four more cases involved procedural errors; Colletta Donel lost her case against Robert Woodfool when it was revealed that her real name was Hawise, but the warden of the fair—an official of the abbot who had no prescribed role in the fair court—chose to remit her fine.<sup>117</sup>

Pardons could be granted for less noble purposes as well. Although poverty was a common ground for pardons, accounting for another eight of the twenty-five cases, these were hardly instances of absolute privation. In 1293, a merchant selling dishware ‘at the backs’ (i.e., away from the main street of the fair) was pardoned for his poverty and immediately thereafter paid 12d. to the lord abbot to sell there lawfully. The payment shows that he was hardly impoverished, and the prosecution and later pardon may just have been a means of compelling him to pay for his new privilege.<sup>118</sup> Those involved with the abbot’s administration frequently received pardons: the court pardoned the bailiffs of the fair in a case involving improper distraints, and when the abbot was found to have lent houses to prostitutes through an attorney, the attorney’s fine was

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115. This number does not include several cases where a party had his fine pardoned on account of poverty and then pledged his body—a euphemism for being sent to prison for inability to pay. *See supra* text accompanying notes 52-54 (citing four cases where debtors pledged their bodies for unsatisfied debt). It does, however, include one case where the defendants had pledged their bodies and then were liberated on their faith. *Ribaud v. Russell* (St. Ives Fair Ct. 1287), *in* 1 SCLM, *supra* note 1, at 15-16.

116. *Tempsford v. Chaplain* (St. Ives Fair Ct. 1291), *in* 1 SCLM, *supra* note 1, at 44-45.

117. *Donel v. Woodfool* (St. Ives Fair Ct. 1293) *in* 1 SCLM, *supra* note 1, at 57.

118. 1 SCLM, *supra* note 1, at 56.

quickly forgiven.<sup>119</sup> The court also pardoned defendants “at the instance of” various intervenors “and other friends,” whose intervention was no doubt influential.<sup>120</sup> The ability to grant pardons at the steward’s discretion made the favor of the abbot a valuable commodity, and it reinforces the vision that the fair court was not fundamentally different from its sister court of the manor.<sup>121</sup>

Indeed, there is a striking absence of any clear line between the business of the fair court and the business of other courts belonging to the abbot of Ramsey. When “a certain carter” in 1287 accidentally knocked three tiles off a house belonging to the abbot, he was fined 3d. in the fair court. Yet there is no explanation of why the case is heard in the fair court rather than in that of the manor, which presumably would have been more appropriate.<sup>122</sup> Additionally, at least one record survives in which a case is removed from the fair court to that of the weekly market in St. Ives, which was granted to the abbot in 1293.<sup>123</sup> In 1316, Ralph of Houghton sued John Christian in a plea of debt, and after the defendant was distrained by “a tapet, a barrel, two hogsheads, and a tankard” and still failed to appear, the plaintiff requested that the case be transferred “to the court of the market together with the said distresses.”<sup>124</sup> No explanation is given for the transfer, but as the case was heard on May 29, very close to the end of the fair court’s session, the plaintiff may have chosen to

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119. *Boys v. West* (St. Ives Fair Ct. 1293), in 1 SCLM, *supra* note 1, at 60; 1 SCLM, *supra* note 1, at 74.

120. 1 SCLM, *supra* note 1, at 41 (describing one such pardon).

121. This is not to say that all pardons, or even most, were examples of favoritism. Based on a survey of the pardons granted by the fair court of St. Ives in the year 1287, Moore concluded that the abbots and his officials were “relatively equitable and impartial” in granting pardons, with “at least as much concern for the humble and impecunious as for the wealthy fairgoers.” MOORE, *supra* note 11, at 201-02. However, even if pardons were, on the whole, granted fairly, the fact remains that officers of the abbot held the arbitrary and unchecked power to grant them—and that pardons granted in the fair court to further the abbot’s interests or “at the instance of . . . other friends” were never contested by the merchants. 1 SCLM, *supra* note 1, at 41.

122. 1 SCLM, *supra* note 1, at 31.

123. *Id.* at 121 n.1 (quoting 2 CARTUL. MONAST. DE RAMES., *supra* note 37, at 298).

124. *Houghton v. Christian* (St. Ives Fair Ct. 1316), in 1 SCLM, *supra* note 1, at 101.

keep his case alive in a weekly court instead of waiting until the next fair. The same phenomenon can be found in other manorial courts held by the abbot.<sup>125</sup> The ability to move from one court to another implies that the abbot's justice was to a certain extent fungible; regardless of the tribunal's name or function, it was ultimately the court, not of the merchants, but of the abbot of Ramsey.

The authority of the abbot was well understood by his contemporaries, as the records of the central royal courts make clear. In 1315, Simon Dederic of Guisnes brought suit in the court of King's Bench against the abbot of Ramsey and one of the abbot's bailiffs for executing what Guisnes considered an improper judgment—the abbot, as the lord who held the fair, was being held personally responsible for the actions of the St. Ives court, even when a decision had been reached *secundum legem mercatoriam*.<sup>126</sup>

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125. The abbot held his honor court, where his free tenants would be justiced, in the manor of Broughton. This manor lay within Hurstingstone hundred, a private hundred which the abbot held of the king. *See supra* text accompanying note 38. In 1256, Richard King sued one of the abbot's bailiffs for trespass in the honor court; “[t]he parties were given a day ‘at the hundred’” instead. On August 31, 1235, a servant named Laurence accused John le Megre in St. Ives of stealing a sheep. Laurence offered to prove that the sheep was his master's at the honor court the next day. There was no need for the case to be heard there, rather than the manor court—Warren Ault, in recounting the dispute, noted that “[t]he matter is scarcely in its field”—but the manor court was then no longer in session, and Laurence might have had to wait for justice until the following spring. The case was eventually disposed by assigning it to yet a third forum, the hundred court, where it was heard the next Monday. Warren Ortman Ault, *Introduction to COURT ROLLS OF THE ABBEY OF RAMSEY AND OF THE HONOR OF CLARE xvii-xviii* (Warren Ortman Ault ed., Yale Historical Publications, Manuscripts & Edited Texts 9, 1928).

126. *Dederic v. Ramsey*, Coram Rege Roll 221, 8 Edw. 2, m. 93d (K.B. 1315), in 2 SCLM, *supra* note 38, at 86-88; *see also* Clive M. Schmitthoff, *International Trade Law and Private International Law*, in 2 VOM DEUTSCHEN ZUM EUROPÄISCHEN RECHT 257, 262 (Ernst von Caemmerer et al. eds., 1963) (noting that a court had strong incentive to recognize a foreign court's ruling). *See generally infra* text accompanying note 287.

An additional case from St. Ives is found in *Saxby v. Bedford*, PRO Curia Regis Roll 155, Michaelmas, m. 1d (K.B. 1255), in 2 SCLM, *supra* note 38, at 5. This case arose during the period when the fair was in the king's hands, so perhaps it is not surprising that it would be heard in the court of King's Bench. However, we should note the respondent's claim that he need not “answer for this,” because he had recovered his money “in the aforesaid fair [of St. Ives] . . . . And inasmuch as he recovered there as a merchant and according to the method of merchants [*per*

A similar practice can be found in the court of the Exchequer in 1321, where the abbot of Westminster was sued for the actions of his bailiff pursuant to an order given by the fair court of Westminster. The merchant plaintiffs argued that in arresting their goods, the bailiff acted as “minister of him, the abbot, of the . . . fair aforesaid to do those things that concerned that liberty and the jurisdiction thereof in the place and name of [the abbot], which things the abbot ought to have done if personally, etc.” On that basis, the act of the bailiff “ought to be regarded as the act of the abbot himself, when as bailiff . . . exercising the jurisdiction of the abbot[,] he arrested the said goods.”<sup>127</sup> The royal courts did not shrink from reviewing the actions of such courts, and moreover considered the authority of the fair courts’ decisions as proceeding from the lords who held them.

These cases have not been accounted for under the traditional interpretation, which understands the decisions of merchant courts to be unreviewable by existing authorities.<sup>128</sup> Yet cases could even be brought to the royal courts directly. In 1276, Richard Lombe brought suit in the court of King’s Bench for an assault that had taken place in the fair of St. Ives, when five men “beat and wounded him and cut off his left ear and so ill-treated him that his life was despaired of.”<sup>129</sup>

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*modum mercatorum*], he seeks judgment.” *Id.* This claim was ignored by the royal court, which clearly did not regard the decision of a mercantile court as binding.

127. Mays v. Seman, PRO Exchequer Plea Roll 43 (Ex. 1321), in 2 SCLM, *supra* note 38, at 93. Judgment was initially given in the abbot’s favor, as the defendant was no longer in his service, and because the abbot had received a favorable royal writ. 2 SCLM, *supra* note 38, at 93, 151-54.

128. See, e.g., TRAKMAN, *supra* note 4, at 16 (“Appeals were forbidden where the tribunal wished to avoid frivolous disputes.”); Benson, *Justice Without Government*, *supra* note 5, at 130 (“To steer clear of unnecessary litigation, delays, and other disruptions of commerce, appeals were forbidden.”); see also *id.* at 131 (erroneously arguing that royal courts gained appellate jurisdiction only after the 1353 Statute of the Staple, which “served to weaken the authority of the merchant courts and the law merchant itself” by “ma[king] the law merchant appear to be less decisive law”). The royal courts may not have been analogous to modern appellate tribunals, but they clearly could review the judgments of the fair court.

129. Lombe v. Clopton, Coram Rege Roll No. 26, Michaelmas, m. 40 (K.B. 1276), in 1 SELECT CASES IN THE COURT OF KING’S BENCH UNDER EDWARD I, at 30 (G. O. Sayles ed. & trans., Selden Society 55, 1936) [hereinafter KING’S BENCH].

Similar cases can easily be found in the fair court rolls,<sup>130</sup> but Lombe chose to sue in the royal courts instead; the St. Ives court did not exercise a monopoly over pleas arising out of the fair.<sup>131</sup>

The strong impression left by these records is that the St. Ives court was well integrated into the contemporary legal framework, and that it did not possess any source of judicial authority apart from existing patterns of lordship. In rendering its decisions, the fair court operated exactly as a seigneurial court would have, with its suitors drawn from the population to be judged. Furthermore, despite the existence of local courts to hear mercantile pleas, the king retained some jurisdiction over fairs and markets. The abbot held his fair court by royal grant, and when its decisions were in error, the royal courts were competent to hear the appeal and to apply the proper remedy. Indeed, according to contemporary manuals and formularies, seigneurial courts heard mercantile cases as a matter of course.<sup>132</sup> Perhaps nothing else should be expected from the records of royal or feudal courts; yet the evidence does not betray even a trace of the idea that mercantile cases are properly resolved only through a decision of the merchant community.

As a final note, one can examine what any good merchant would consider an incontestable source: the fairgoers' pocketbooks. When John Beeston of Nottingham sued Gilbert Chesterton of Stamford in 1275 for the lordly sum of £10 principal and £10 in damages, he promised one-third of any money he would receive to the lord abbot

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130. See, e.g., *Shearman v. Longville* (St. Ives Fair Ct. 1287), in 1 SCLM, *supra* note 1, at 29.

131. No reason is provided as to why Lombe entered the royal courts; it is possible that the defendants left the fair shortly after the assault, or that Lombe expected better results from the more powerful tribunal. Also, his suit was heard in the Michaelmas term, when the St. Ives court had been out of session for several months and would not convene again until Easter.

132. "The Court Baron," an instruction manual for stewards of seignorial courts at the time of the St. Ives rolls, provides a sample case in which a merchant sues for defamation and subsequent loss of credit. This manual was designed for seignorial courts generally, and demonstrates that such courts were accustomed to hearing mercantile disputes. It was also popular, as at least seven copies of the manuscript survive. *The Court Baron*, in COURT BARON, *supra* note 111, at 20, 40-41; see also Frederick William Maitland & William Paley Baildon, *Precedents in Court Keeping*, in COURT BARON, *supra* note 111, at 3, 6-7.

“that he may have aid.”<sup>133</sup> A significant number of litigants repeated this gesture; four merchants accused of selling cloth with a false measure gave the abbot 40s. “for his grace and favour.”<sup>134</sup> The merchants who traded at St. Ives made their living from trade; they would not have been so willing to make payments if they did not believe that the abbot could give them something in return. There would be no reason for the parties to pay such substantial sums to the abbot in a court organized and operated by merchants alone. Even in cases that did not concern the abbot directly, the parties at the fair court knew where their justice was coming from.

### C. “VOLUNTARILY PRODUCED”

On what principles of law did the St. Ives court rely? Unfortunately for our inquiry, the fair court was a forum of expedience, not one preoccupied with the labored examination of statute and precedent. When a certain Luke sued Gilbert Tarter for failure to pay 7s. rent, the fair court concerned itself only with determining the facts, and would likely have thought it absurd to ask which specific principle the alleged actions had violated.<sup>135</sup>

Even if such principles were debated, the debates would rarely be preserved in the rolls. A contemporary treatise describes the dilemma of a debtor in a court like St. Ives who acknowledged a debt but wished to show his innocence under the law—for instance, because the debt had been paid. In such a case, the defendant should make a general statement of his defense and then make his proof “by his law” (an oath) or “by the country” (a jury inquest).<sup>136</sup> In either case, the specific arguments would not be introduced into the record, which would reveal only successful or unsuccessful oaths and

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133. *Beeston v. Chesterton* (St. Ives Fair Ct. 1275), in 1 *SELECT PLEAS*, *supra* note 14, at 144. Despite his generous offer, Beeston later lost his case. *Id.* at 155.

134. 1 *SELECT PLEAS*, *supra* note 14, at 155; *see also* *Almaine v. Flanders* (St. Ives Fair Ct. 1270), in 1 *SCLM*, *supra* note 1, at 9 (pledging one seventh of damages); *S. Michel v. Dunwich* (St. Ives Fair Ct. 1275), in 1 *SELECT PLEAS*, *supra* note 14, at 149 (pledging 13s. 4d. to the abbot if the plaintiff collected, and 4s. if he did not); *Thirning v. Wiggshall* (St. Ives Fair Ct. 1275), in 1 *SELECT PLEAS*, *supra* note 14, at 157 (pledging 4s. to the abbot).

135. *Luke v. Tarter* (St. Ives Fair Ct. 1300), in 1 *SCLM*, *supra* note 1, at 75.

136. *The Manner of Holding Courts—John de Longueville*, *supra* note 111, at 91-92.

verdicts of “guilty” or “not guilty”—making it impossible for later readers to determine the facts of the case or the substantive law applied to them. As in the contemporary common-law courts, the inscrutable methods of proof obscured the distinction between law and fact.<sup>137</sup> The proceedings of the St. Ives court are even more difficult to decipher, as the rolls habitually confuse actions of detinue, debt, and trespass with a freedom that would be shocking to the doctrinaire common lawyers of a later era.<sup>138</sup>

Yet the fair court had established rules of substance and of procedure, even if it rarely presented them in an explicit manner. To understand them, we must leave behind the modern assumption that courts decide cases only on the basis of positive, written, enacted law; as Fritz Kern has noted, the fair court’s contemporaries would have likely considered true law to be “unenacted and unwritten.”<sup>139</sup> The substantive principles on which the court operated seem in large measure to have been general principles of fair play. Promises ought to be kept; debts ought to be paid; trespasses ought to be punished. These may be addressed by custom, but they are also matters of simple justice, which it was the duty of the court to provide.

For some scholars, these principles constituted an alternative legal system, a “voluntarily produced” law merchant.<sup>140</sup> Indeed, there are cases in the St. Ives records in which decisions are reached “*secundum legem mercatoriam*.” Although a full examination of the meaning of this phrase must be postponed until Part II, for the

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137. Cf. J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 95-96 (3d ed. 1990).

138. The fair court was anything but rigorous in its classification of cases; Maitland cited an example in which an action for money due on contract “is conceived as an action to obtain money ‘detained and deforced by violence against the lord’s peace.’ It looks like an action of tort; it also looks like an action to obtain coins which already are the plaintiff’s.” 1 SELECT PLEAS, *supra* note 14, at 134.

139. FRITZ KERN, KINGSHIP AND LAW IN THE MIDDLE AGES 156 (photo. reprint 1985) (S. B. Chrimes ed. & trans., Studies in Mediaeval History 4, 1939) (1914).

140. Benson, *Justice Without Government*, *supra* note 5, at 128. This view was also endorsed by the sociologist Max Weber, who wrote his doctoral dissertation on medieval partnership law under the guidance of Levin Goldschmidt. MAX WEBER, THE HISTORY OF COMMERCIAL PARTNERSHIPS IN THE MIDDLE AGES 51 (Lutz Kaelber trans., Rowman & Littlefield 2003) (1889) (arguing that the “formation of commercial law” took place as “entirely new legal constructions . . . emerged from the rapidly multiplying demands of the historical times”).

moment it is enough to make three observations. First, the merchants at St. Ives were subject to many legal regimes *other* than *lex mercatoria*, including the ordinances of the abbot, the statutes of the king, and the customs and principles of equity which constrained and modified these two authorities. Second, certain fundamental principles applied by the St. Ives court strongly resembled those of other, decidedly non-mercantile local and seignorial courts, rather than any merchant-created legal order. Third and finally, the laws applied at St. Ives governed all parties before the court, and were not reserved for the private use of a merchant class. Taken together, these observations gravely weaken the argument that the merchant community exercised the primary legislative authority within the fair—that the merchants were sole authors of the laws by which they were privileged to be governed.

### *1. Alternative Sources of Legal Principles*

To return to Scrutton's remark with which we began, a reader of the St. Ives rolls, well versed in the Romantic interpretation, would be struck with the "very remarkable fact" of how rarely "*lex mercatoria*" is mentioned. Only eleven records of the entire set of court rolls contain the phrase "*secundum legem mercatoriam*" or its variants, and these references establish principles concerning the following seven subjects: the attachment of goods (including the number of oath-helpers required to claim them,<sup>141</sup> whether servants may do so in their master's place,<sup>142</sup> and the time period after which they may be sold to satisfy a debt);<sup>143</sup> the conclusion of a sale through the payment of earnest money;<sup>144</sup> the need for pledges in a wager of law;<sup>145</sup> the need to specify the regnal year in which an

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141. 1 SCLM, *supra* note 1, at 5.

142. Fulham v. Francis (St. Ives Fair Ct. 1311), *in* 1 SCLM, *supra* note 1, at 90.

143. Fairhead v. Tankus (St. Ives Fair Ct. 1295), *in* 1 SCLM, *supra* note 1, at 71; Yarmouth v. Fick (St. Ives Fair Ct. 1300), *in* 1 SCLM, *supra* note 1, at 81.

144. Tempsford v. Chaplain (St. Ives Fair Ct. 1291), *in* 1 SCLM, *supra* note 1, at 45.

145. Saddington v. Laungbaugh (St. Ives Fair Ct. 1287), *in* 1 SCLM, *supra* note 1, at 22.

offense occurred,<sup>146</sup> the admissibility of a sealed writing of debt;<sup>147</sup> the king's claim to fraudulently marketed licorice;<sup>148</sup> and the right of a third-party butcher to intervene in sales of meat and fish.<sup>149</sup>

No matter how unsophisticated the medieval economy, these principles would hardly constitute a sufficient body of law to regulate European commerce. As a result, we cannot read "according to the law merchant" into the court's deliberations in cases where it does not appear. Rather, we should take the documents as they are, and consider whether the merchants who traded at St. Ives were subject to many alternative sources of legal principles. *Lex mercatoria* is far from the only authority cited in the rolls—the regulations of the abbot, the statutes of the king, and the dictates of custom and fairness are all used at various times to justify decisions of the court. Indeed, the records of the fair court give very little indication of where one type of authority ended and another began. To adopt T.F.T. Plucknett's phrase, the fair court was wound within an "elastic web" of legal authority, in which the will of king and abbot had significant influence, although not necessarily complete adherence.<sup>150</sup>

To investigate the substantive legal principles that the fair court applied, we must look first to the manorial institutions that the court most closely resembled. As was argued in Part I, the fair court can in many ways be understood as a manor court of the abbot of Ramsey; in Lloyd Bonfield's formulation, it "established and enforced village by-laws, elected local officials, enquired into disturbances of public order, . . . and [monitored] payment of fines and the performance [of] services owed to the lord," all in addition to resolving disputes

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146. *Darlington v. Burser* (St. Ives Fair Ct. 1302), in 1 SCLM, *supra* note 1, at 85-86.

147. *Hoppman v. Welborne* (St. Ives Fair Ct. 1302), in 1 SCLM, *supra* note 1, at 86-87.

148. *Bedford v. Reading* (St. Ives Fair Ct. 1312), in 1 SCLM, *supra* note 1, at 91.

149. *Legge v. Mildenhall* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 46-47; *Bishop v. Godsbirth* (St. Ives Fair Ct. 1315), in 1 SCLM, *supra* note 1, at 97.

150. T.F.T. PLUCKNETT, *LEGISLATION OF EDWARD I*, at 13 (Ford Lectures 1947, 1949).

among parties subject to its jurisdiction.<sup>151</sup> Tenurial obligations related to the fair, such as the requirement that the vill of Houghton supply watchmen, were addressed in the fair court along with unrelated issues such as fire safety regulations and complaints about a neighbor's garbage piles.<sup>152</sup>

In its capacity as an administrative institution of the abbot, it was only natural that the fair court would make decisions based upon the authority of the abbot's will. An entry from 1315 fines a clerk six times for successively failing to "present the articles of the fair, as is the custom [*prout moris est*]." <sup>153</sup> Exactly what these articles contained, we do not know; however, we can assume that they served to regulate conduct within the fair. In 1287, Richard of Banbury was accused of selling russet cloth "at the backs," meaning away from the main street of the fair—an act that was considered "contrary to the ordinances [of the fair]." <sup>154</sup> Similarly, letting houses to prostitutes was described in 1300 as "contrary to the ordinance of the fair [*contra statutum ferie*]." <sup>155</sup>

The abbot's "peace," a lord's guarantee of freedom from violence, was also frequently cited as an authority by the fair court. Most of the cases of assault are said to occur "*contra pacem domini Abbatis*

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151. Lloyd Bonfield, *The Nature of Customary Law in the Manor Courts of Medieval England*, 31 COMP. STUD. IN SOC'Y & HIST. 514, 517-18 (1989).

152. See 1 SCLM, *supra* note 1, at 73, 75, 84.

153. *Id.* at 98.

154. *Id.* at 21. The phrase "contrary to an ordinance of the fair" is used in two other cases of selling at the backs, those of Reginald of Wetwang in 1293 and of William of Gidding in 1300. *Id.* at 58, 78.

155. *Id.* at 74. In a conversation with the author, Paul Brand noted that it is not certain whether these ordinances were promulgated by the abbot, as opposed to being formed in community with others. However, the rolls do make it clear that the abbot was licensed to grant exceptions. See, e.g., *id.* at 24 (granting an exception to merchants who unlawfully sold merchandise during the time of the fair). One possible interpretation is to identify the ordinances with the charter of 42 Hen. III, which Gross read as granting that "during the fair no one is to carry on trade whereby the profits of the abbot and convent may be diminished." *Id.* at 36 n.1; see Charter to the Abbot and Convent of Ramsey, 42 Hen. 3 (May 7, 1258), in 2 CARTUL. MONAST. DE RAMES, *supra* note 37, at 67, 68; see also Charter to the Abbot and Convent of Ramsey, 42 Hen. 3, *supra* note 41. But at least one entry of 1288 describes such sales as contrary to both "the charter of the lord king" and "the ordinances of the fair," indicating that they were considered as distinct. Pollard v. Nicholas (St. Ives Fair Ct. 1288), in 1 SCLM, *supra* note 1, at 36.

[against the peace of the lord abbot],” and the phrase appears repeatedly in cases of trespass, slander, and breaking and entering.<sup>156</sup> The formula even makes its appearance in a case of debt and contract, where the defendant is accused of having violated the peace by taking possession of a horse before he had sufficiently paid for it.<sup>157</sup>

This position of authority was not unique to the abbot; the king’s will found its expression in St. Ives in a similar way. When faced with a direct royal command, such as the 1315 order to seize the goods of all Flemish merchants present at the fair, the St. Ives court immediately sought to comply.<sup>158</sup> It also obeyed the terms of the king’s charters—of course giving pride of place to those describing the privileges of the abbot,<sup>159</sup> but also accepting as valid royal grants that exempted individuals from the fair court’s jurisdiction. For instance, in *Almaine v. Flanders*, the fair court exempted foreign communities from judgment if they could present royal charters granting them immunity.<sup>160</sup> Those of the city of London had the right to be tried in their own courts, and the fair court respected this right

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156. *Ledman v. Barber* (St. Ives Fair Ct. 1288), in 1 SCLM, *supra* note 1, at 33; *Wells v. Horningsea* (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 138; *London v. Woodfool* (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 143; *Raven v. Cobbler* (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 145.

157. *Lawford v. Northampton* (St. Ives Fair Ct. 1287), in 1 SCLM, *supra* note 1, at 25; *cf.* *Chapman v. Boston* (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 141 (accusing the defendant of assault and robbery on the king’s highway “against the peace of the lord abbot and his bailiffs”).

158. 1 SCLM, *supra* note 1, at 94. The goods were to be seized to help repay a countess for her robbery at the hands of Flemish pirates; the bailiffs answered that no goods or chattels of Flemish merchants had been found in the fair since the writ was delivered, and “therefore up to the present time nothing has been done therein etc.” *Id.* at 94-95.

159. In 1288, John Poke was convicted of leasing two houses when not all of the houses of the abbot had yet been leased. This was described as “contrary to the charter of the lord king.” 1 SCLM, *supra* note 1, at 34. Gross noted that Henry III had granted a charter ensuring that the abbot’s houses would be the first to be leased. *Id.* (quoting 2 CARTUL. MONAST. DE RAMES., *supra* note 37, at 68).

160. *Almaine v. Flanders* (St. Ives Fair Ct. 1270), in 1 SCLM, *supra* note 1, at 9-10.

when it was invoked.<sup>161</sup> The king reserved the rights to establish standards of weights and measures, to take prises of goods for the royal wardrobe, and to regulate the currency, and the court rolls contain records of these procedures.<sup>162</sup> Furthermore, the king could still exercise some direct legislative control over the fairs of his realm, as when he granted privileges in St. Ives to the bishop of Ely, or exempted foreign merchants from many taxes and tolls in the *Carta Mercatoria* of 1303.<sup>163</sup>

The court of St. Ives was even called upon to enforce royal grants that had nothing to do with its own jurisdiction. In 1293, Thomas of Grantham sued the abbot of Thorney for taking a 6d. toll from him in the abbot's market of Yaxley, even though "he and all citizens of London are free and quit of such demands in all cities and boroughs throughout the realm of England."<sup>164</sup> The record leaves no indication of why the abbot of Thorney was subject in this case to the abbot of

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161. See *Coventry v. Fleetbridge* (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 155.

162. See 1 SCLM, *supra* note 1, at 40-41 (litigation concerning a false measure); *id.* at 76 (concerning prises); *May v. Stanground* (St. Ives Fair Ct. 1300), in 1 SCLM, *supra* note 1, at 80 (noting that the debased "crookards and pollards" had been "prohibited by the lord king throughout all England," and enforcing payment at the prescribed 2:1 rate). Damages were partially paid in "cokedones" in *Yarmouth v. Fick* (St. Ives Fair Ct. 1300), in 1 SCLM, *supra* note 1, at 81, but in that case the debased coins had already been attached before the currency regulations took effect. See generally Statute Concerning False Money, 1299, 27 Edw. (Eng.), in 1 STATUTES OF THE REALM, *supra* note 51, at 131; C.G. Crump & A. Hughes, *The English Currency Under Edward I*, 5 ECON. J. 50, 63 (1895); N.J. Mayhew & D.R. Walker, *Crookards and Pollards: Imitation and the Problem of Fineness in a Silver Coinage*, in EDWARDIAN MONETARY AFFAIRS 125, 137 (N.J. Mayhew ed., British Archaeological Reports 36, 1977).

163. 1 SCLM, *supra* note 1, at 32; *Carta Mercatoria*, 31 Edw. 3, m. 11 (Feb. 1, 1303), in ENGLISH ECONOMIC HISTORY: SELECT DOCUMENTS 211 (A.E. Bland et al. eds., 1914). In 1287, the prior of Ely appeared in St. Ives to request the privileges he had been guaranteed in prior royal charters; these included the rights to receive the amercements of his own men in pleas against others, and to have his officers carry a rod in the fair as a symbol of their power. No answer to the request is recorded. 1 SCLM, *supra* note 1, at 32. (These royal privileges had earlier been the subject of litigation before the Common Bench. See *Ely v. Ramsey* (C.P. 1283), in 1 EARLIEST ENGLISH LAW REPORTS 138 (Paul A. Brand ed., Selden Society 111, 1996).)

164. *Grantham v. Thorney* (St. Ives Fair Ct. 1293), in 1 SCLM, *supra* note 1, at 63-64.

Ramsey's jurisdiction; however, it does show that the fair court could and did entertain litigation based on a royal grant.<sup>165</sup>

The extant records from St. Ives coincided with the explosion of legislation under Edward I, and occasionally a royal statute did effectively change the practice of justice at the fair court. Before 1275, for instance, an entire community could be held collectively liable for the debt of a single member (as mentioned earlier concerning the CRS).<sup>166</sup> Indeed, much of the litigation examined by Gross in the fair court rolls of 1270 and by Maitland in the rolls of 1275 arose out of such disputes.<sup>167</sup> Once the Statute of Westminster I exempted English communities from this practice, a change is clearly reflected in the records—at no point after 1275 were the goods of an English community seized in an individual dispute.<sup>168</sup>

At other times, however, royal statutes would be more honored in the breach than in the observance. In 1287, the fair rolls record that the communities of merchants at the fair of St. Ives “were assembled to hear the command of the lord king in accordance with the new form of his statute touching merchants frequenting English fairs.” The “new form of his statute” is believed to be the Statute of Merchants, issued at Westminster in 1285, which amended the 1283 Statute of Acton Burnell.<sup>169</sup> As a result of this assembly, the merchants would have presumably been familiar with the procedure for debt collection that the statute established. However, after the

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165. This case cannot be explained—as one might explain a number of others arising from conduct that did not take place in St. Ives—by assuming that the plaintiff found the defendant in the fair and turned to the nearest court at hand. The abbot of Thorney and his co-defendant, his bailiff William Curteis, were both represented by attorneys, giving the impression that they had expected the litigation and had sent representatives to take their places. The case is made still more mysterious by the fact that the defendants chose to settle for the sum of a full mark, many times the 6d. claimed as damages. *Id.*

166. See *supra* text accompanying note 70.

167. Cf. 1 SCLM, *supra* note 1, at 1-10; 1 SELECT PLEAS, *supra* note 14, at 145, 149.

168. Statute of Westminster I, 1275, 3 Edw., cl. 23 (Eng.), reprinted in 1 STATUTES OF THE REALM, *supra* note 51, at 33.

169. 1 SCLM, *supra* note 1, at 19; cf. Statute of Acton Burnell, 1283, 11 Edw. (Eng.), reprinted in 1 STATUTES OF THE REALM, *supra* note 51, at 53; Statute of Merchants, 1285, 13 Edw. (Eng.), reprinted in 1 STATUTES OF THE REALM, *supra* note 51, at 98.

statute is mentioned in this record, it virtually disappears from the rolls. In fact, the St. Ives records appear to contain only one case where the Statute of Merchants was invoked, namely *Hereford v. Lyons*, where a debtor was imprisoned “in accordance with the statute of the lord king [*secundum statutum domini regis*]” until he could find security for the payment of his debts.<sup>170</sup> Even in this sole example, the fair court was playing fast and loose with the terms of the statute, which provided for the recovery of certain *registered* debts, not any debt whatsoever. Moreover, the debtor in this case was given an opportunity to sell his goods and to repay the debt before he was arrested—a practice allowed by Acton Burnell but prohibited by the Statute of Merchants, which required that the debtor be imprisoned immediately and that he remain in prison until the debt were paid in full.<sup>171</sup>

Even as the court misapplied the statute, however, it still relied on the statute’s authority for justification—its actions were undertaken *secundum statutum domini regis*.<sup>172</sup> To be treated so unevenly, these statutes cannot have been understood as strict, positive law; instead, the fair court seemed to follow more closely the interpretation of Plucknett described earlier, that statutes “in essence were merely

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170. *Hereford v. Lyons* (St. Ives Fair Ct. 1293), in 1 SCLM, *supra* note 1, at 62-63.

171. *Id.*; PLUCKNETT, *supra* note 150, at 140; *see also* Statute of Acton Burnell, 1283, 11 Edw. (Eng.), *reprinted in* 1 STATUTES OF THE REALM, *supra* note 51, at 53; Statute of Merchants, 1285, 13 Edw. (Eng.), *reprinted in* 1 STATUTES OF THE REALM, *supra* note 51, at 98. In a conversation with the author, Paul Brand suggested that the record may reflect a deliberate misreading of the statute. The parties in this case eventually settled, after the defendant promised to pay his debts by the end of the coming June.

172. Not all royal statutes were so lucky; clause 35 of the Statute of Westminster I forbade the officials of non-royal courts to seize goods in cases involving “contracts, covenants, and trespasses done out of their power and their jurisdiction . . . nor within their franchise where their power is.” Statute of Westminster I, 1275, 3 Edw., cl. 35 (Eng.), *reprinted in* 1 STATUTES OF THE REALM, *supra* note 51, at 33, 35; *see also* LMLP, *supra* note 20, at 107 n.3. This statute seems to have been entirely ignored at St. Ives, even by those who would have an interest in citing it so as to avoid punishment. *See, e.g.*, *Saddington v. Langbaugh* (St. Ives Fair Ct. 1287), in 1 SCLM, *supra* note 1, at 22 (arising entirely out of a dispute that took place in the town of Bedford); *Titchwell v. Burdon* (St. Ives Fair Ct. 1293), in 1 SCLM, *supra* note 1, at 59 (concerning a debt incurred in Boston, for which the plaintiff had pursued the defendant for almost a year before finding him in the St. Ives fair).

modifications of the elastic web of the customary common law.”<sup>173</sup> The authority of the statutes was not set aside in conflict with a superior law merchant; rather, the statutes were never so hard and fast to begin with.

A similar story can be told of the customary constraints on the abbot’s power. Some evidence of the power of custom is provided by the fact that the fair court appealed to custom, not to the abbot’s command, in fining the clerk who had failed to present the articles of the fair.<sup>174</sup> In 1287, Robert Pole and six others sought permission to sell woolen cloths and canvas in the same stalls, a practice prohibited by the abbot’s regulations; for the significant sum of 20s., their request was granted for one year only, and they were required to take an oath that “never in the future will they make such a sale there, or demand this as a custom, save by leave of the warden and the steward of the fair.”<sup>175</sup> The fact that the abbot’s officials would require a solemn oath to prevent a claim of custom shows the influence that such a custom might have wielded had it been allowed to form, as well as the power of custom to restrict the abbot’s freedom of action.<sup>176</sup> Yet it must be noted that there is nothing uniquely mercantile in such customs, which could emerge between lords and their tenants concerning any kind of privilege.<sup>177</sup> Even were the one-time grant to harden into a custom, it would have been owed

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173. PLUCKNETT, *supra* note 150, at 13.

174. 1 SCLM, *supra* note 1, at 98.

175. *Id.* at 24.

176. As Bonfield argued, however, to understand this notion of custom, we must separate it from the modern concept of “precedent,” which contains not only the principle that similar reasoning must be applied to similar cases, but the requirement that rules be held either to be unchangeable or to be changed only in a certain legally recognized manner. Such a description would be entirely inappropriate for the customary law of the St. Ives court, in which the abbot’s representatives feared a new claim of custom might eventually arise from a single one-year exemption. Confusing custom with precedent might also “startle historians of common law, because it would mean that manor courts had adopted the concept of precedent centuries before . . . that of the royal courts.” Bonfield, *supra* note 151, at 522.

177. The bishop of Chichester, for example, in 1408 granted his tenants an exemption from building a new hay loft “on condition that it shall not serve as a precedent in time to come.” *Id.* at 520.

only to Robert Poole and his fellows, and not to all merchants generally.

That the fair court might have relied on custom in this way should not be surprising, given Plucknett's description of the "elastic web" of "customary common law." The king and abbot exercised significant influence over the principles applied there, and customary principles were often combined with these authorities—as in one case concerning the manipulation of wool prices, described as both "contrary to the custom of the fair" and "to the great damage and prejudice of the lord king."<sup>178</sup>

As is clear from the above discussion, the authority of the king and that of the abbot were not entirely distinct in the fair court's records, and may not have been distinct in the minds of the fair court's suitors either. Several cases in the court rolls cite royal and abbatial authority almost interchangeably, and occasionally combine it with customary provisions. For instance, selling "at the backs" was usually referred to in the court rolls as an infraction against the abbot, or (as above) as contrary to an "ordinance of the fair." However, when the merchants of Louvain and Malines were found engaging in the practice in 1315, it was called "contrary to the custom of the realm etc."<sup>179</sup> Stephen of Reedness that same year was accused of selling at the backs "to the contempt of the lord king and to the great damage of the said abbot"; he was ordered to appear to answer "the lord king and the abbot of Ramsey," and an inquest was begun "on behalf of the king etc."<sup>180</sup> And in pleading against Nicholas Crowthorpe of Northampton in 1288, the bailiff Philip Pollard cited as authorities the "ordinances of the fair," the "charter granted by the lord king," the "peace of the lord abbot and his bailiffs," and the "law and custom of the [St. Ives] fair" all at once.<sup>181</sup>

The fair court therefore cannot be seen as participating in a single legal tradition. The abbot's dictates, the king's statutes, the residents'

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178. 1 SCLM, *supra* note 1, at 92-93. The "damage" may result from the increased cost of royal prizes and purchases in the fair.

179. *Id.* at 93.

180. *Id.*

181. Pollard v. Crowthorpe (St. Ives Fair Ct. 1288), *in* 1 SCLM, *supra* note 1, at 35-36.

customs, the suitors' sense of justice—all these participated in an organic, 'living' law. The principles of the fair courts were not merely grounded in the will of the merchant community; instead, the authority of the lord and of the lord king were keenly felt in the fair's day-to-day administration. In this way, the fair court was very similar to the local and seignorial courts that were its contemporaries, and it is these similarities to which we now turn.

## 2. *The Law of Local Courts*

Another "remarkable fact" about the fair court, Scrutton's reader might conclude, is that the records from St. Ives *read* like records of other local courts. The fair court followed the same general procedures as its local contemporaries. The various judicial manuals of the period, written to help stewards manage their seignorial courts, describe the practices at St. Ives with surprising accuracy. In matters of substance, moreover, the fair court frequently applied principles common to its contemporaries, even on questions later historians have described as central to the law merchant. This evidence tells against the view of a law merchant "voluntarily produced" by an independent merchant community; neither in procedure nor in substance do the court rolls convey the impression of a radically independent institution operating outside the legal conceptions of its day.

The type of justice practiced by manorial and seignorial courts is possibly more ancient than that of the courts of common law, and it may have been more familiar to the litigants at St. Ives. Maitland's original study of the St. Ives rolls included them in a volume of "Manorial and Seignorial Courts," and in many respects—the style of record-keeping, the manner of presenting complaints and answers, the means of argument, the evidentiary tools of inquest and wager of law—the St. Ives court was operating in well-marked territory. After all, the abbot of Ramsey had many courts, and cases could be moved among them;<sup>182</sup> why would his steward conduct each of them so differently?

We can find further similarities in procedure by looking to the instruction manuals used by stewards of contemporary seignorial

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182. See *supra* text accompanying notes 123-25.

courts. The practices described in “The Court Baron,” a popular instruction manual for the stewards of seignorial courts in the late thirteenth and early fourteenth centuries, very closely resemble those of the fair court. In one sample case included in the text, a merchant defamed another and caused him to lose credit for a purchase; the defendant was allowed to wage his law six-handed (i.e., with five compurgators) at the next court.<sup>183</sup> Exactly the same procedure was followed in cases at St. Ives, such as *Rushbrooke v. Woodfool* and *Woodfool v. Pors*—even down to the number of compurgators required.<sup>184</sup> In a second sample, the defendant in a case of debt asked for a love-day in an attempt to settle the dispute. The steward granted the love-day, but did so “saving the right of the lord in all things”; an almost identical procedure occurred at St. Ives in *Cousin v. Huy*.<sup>185</sup> Two more manuscripts, entitled “The Manner of Holding Courts”—one composed *circa* 1307 for John de Longueville, a lawyer who represented the borough of Northampton in Parliament,<sup>186</sup> and another composed *circa* 1342 for the Abbey of St. Albans<sup>187</sup>—confirm the similarities between the procedure at St. Ives and in other local courts. These treatises, it must be remembered, were not written to address mercantile courts specifically; rather, they were intended to be generally applicable to seignorial courts throughout England.

Although many authors have emphasized the distinct procedures of mercantile courts—often extolling their “speed and informality”<sup>188</sup>—the court of St. Ives in fact retained many of the

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183. *The Court Baron*, *supra* note 132, at 40-41.

184. *Rushbrooke v. Woodfool* (St. Ives Fair Ct. 1293), in 1 SCLM, *supra* note 1, at 57; *Woodfool v. Pors* (St. Ives Fair Ct. 1295), in 1 SCLM, *supra* note 1, at 71. In the latter, the defendant fails in his law because he “came three-handed when he ought to have come six-handed.” *Id.*

185. *Cousin v. Huy* (St. Ives Fair Ct. 1270), in 1 SCLM, *supra* note 1, at 5.

186. *The Manner of Holding Courts—John de Longueville*, *supra* note 111; see also Maitland & Baildon, *supra* note 132, at 14.

187. *The Manner of Holding Courts—St. Albans Formulary*, in COURT BARON, *supra* note 111, at 93; see also Maitland & Baildon, *supra* note 132, at 15.

188. Benson, *Justice Without Government*, *supra* note 5, at 130; TRAKMAN, *supra* note 4, at 13; see also Kadens, *supra* note 20, at 57 (describing “merchant procedure” as “equitable procedure,” which relied “not on the rigor of the law but

worst formalities of existing procedure. Parties could lose a judgment should one of their compurgators accidentally name the plaintiff instead of the defendant, or by failing to mention the word “ox” in denying the plaintiff’s count word for word.<sup>189</sup> As Charles Donahue noted, the “default rules” of procedure at St. Ives were not provided by a distinct “body of customary law,” or by “an accepted body of mercantile procedural rules.” Instead, they were supplied by “the common customary law of the realm of England,” supplemented by “the common elements in the procedure of local courts.”<sup>190</sup>

The fair court did not merely adopt existing procedural rules, but much substantive law as well. This Article cannot attempt a complete comparison of St. Ives’ practices with those of other courts, and some of its practices may have been distinctively mercantile.<sup>191</sup> Yet

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on judging ‘*ex aequo et bono*,’ according to that which is fair and best for the parties and doing so in the simplest possible fashion”).

189. Langbaugh v. Bytham (St. Ives Fair Ct. 1287), in 1 SCLM, *supra* note 1, at 20; Legge v. Mildenhall (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 46-47; *see also* MITCHELL, *supra* note 4, at 17-18.

Moreover, although the St. Ives rolls—along with *Lex Mercatoria* and every other contemporary English source—are replete with examples of wager of law, this practice has been overlooked by many commentators. *See, e.g.*, 1 HOLDSWORTH, *supra* note 89, at 570 (“Wager of law was unknown among them.”); TRAKMAN, *supra* note 4, at 2 (“Commercial adjudicators . . . avoided the delays that would otherwise arise from the administration of oaths . . .”); Benson, *Justice Without Government*, *supra* note 5, at 130 (“[T]hese courts avoided lengthy testimony under oath . . .”).

190. Donahue, *supra* note 20, at 30.

191. *See generally* Kadens, *supra* note 20, at 48-56. For example, one common custom was that of releasing attached goods to plaintiffs after the defendant failed to appear for a year and a day. *See, e.g.*, Fairhead v. Tankus (St. Ives Fair Ct. 1295), in 1 SCLM, *supra* note 1, at 71. Royal records show the practice was common to other fair courts. In 1281, the fair court of Stamford held that distrains should be kept for a year and a day before turning them over to the plaintiff, “as the custom of merchants is [*prout moris est mercatorum*].” Chesterton v. Stanbourne (Assize at Lincoln 1281), in 2 SCLM, *supra* note 38, at 31. The assertion was made in the argument of a bailiff of the fair, but it went uncontested. *Id.* Similarly, the steward and bailiffs of the Boston fair claimed in 1301 that “there are divers customs in use among the merchants coming there and pleading according to the law of merchants [*secundum legem mercatoriam*]”—one of which was that defendants who failed to appear would have their goods delivered to the plaintiff and held until the next fair, at which time they would be appraised and used to pay the debt. Dispenser v. Cleasby (K.B. 1301), in 2 SCLM, *supra* note 38, at 66.

it is worthwhile to examine two fields, the enforcement of contracts and the transfer of debts, where the alleged distinctions between the law merchant and domestic English law have received particular emphasis—and where the St. Ives court clearly followed the local approach.

In cases of contract, the English royal courts for centuries required a writing under seal as “the only admissible proof of an agreement.”<sup>192</sup> The rule therefore denied relief to plaintiffs in cases concerning everyday agreements—such as carrying a cartload of hay—for which no formal deed (or “specialty”) would be executed.<sup>193</sup> The mercantile courts, however, had a far looser requirement, and routinely considered cases of covenant without requiring a sealed deed. For instance, the St. Ives court in 1291 heard the case of *Carlisle v. Halling*, concerning a covenant without specialty to sell a pair of tongs.<sup>194</sup> A number of authors have attributed this flexibility to the influence of the law merchant: Trakman noted that merchants traded “[u]ncumbered by formal documents under seal”;<sup>195</sup> Berman wrote that “informal agreements

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Even this practice may have had non-mercantile roots, however, in the tradition that possession pursuant to an exercise of jurisdiction could become ownership after a year and a day. See 1 SELECT PLEAS, *supra* note 14, at 31 (noting that one who claimed ownership of a lost sheep before the manor court of the abbey of Bec must “bind[] herself to restore it or its price in case it shall be demanded from her within [a] year and [a] day”); see also F. W. Maitland, *Possession for Year and Day*, 5 LAW Q. REV. 253, 260 (1889) (identifying the year-and-day as the period after which successful common-law plaintiffs could obtain a writ of execution, and after which intervenors could no longer claim that property disposed of by a court was actually their own).

192. John William Salmond, *The History of Contract*, in 3 SELECT ESSAYS, *supra* note 25, at 320, 325; cf. Thomas Corbet v. “B.,” 20 Edw. (Eyre of Salop 1292), in YEAR BOOKS OF THE REIGN OF KING EDWARD THE FIRST, YEARS XX AND XXI 222 (Alfred J. Horwood ed. & trans., Rolls Series 31, London, Longmans 1866) (concerning a covenant case supported only by good suit, against which the defendant requested “[j]udgment if we ought to answer his suit, in the absence of a writing &c”).

193. See *Anon v. A.*, 14 Edw. 2 (Eyre of London 1321), in 2 THE EYRE OF LONDON, 14 EDWARD II, A.D. 1321, at 286, 286 (Helen M. Cam ed., Year Books of Edward II 26 (Part 2), Selden Society 86, 1969) (requiring specialty to prove a covenant, noting that “we shall not undo the law for a cartload of hay”).

194. *Carlisle v. Halling* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 47.

195. Trakman, *E-Merchant Law*, *supra* note 5, at 274. Note, however, that the “writing obligatory” which Trakman saw as a replacement for such “formal

could be legally binding”;<sup>196</sup> and Cremades and Plehn praised the law merchant’s “abandonment of contractual formalities.”<sup>197</sup>

As we saw in the context of adjudication, however, this view is based primarily on the practices of royal courts. Before the period of the St. Ives rolls, much of commercial law had traditionally been a matter for local courts. The manor court of the Bishop of Ely at Littleport, for instance, heard a number of minor cases of covenant without requiring specialty. A jury inquest, not a sealed deed, revealed that William Peche “did not make the sedge of Oliver Beucosin in Hakonfen before Midsummer in [the] last year as he covenanted,” and Peche was ordered to pay damages and a 6d. fine.<sup>198</sup> Other examples abound<sup>199</sup>—as one should expect, for “[i]t is hard to believe that these Littleport villans, . . . when they made agreements about their petty affairs, . . . procured parchment and ink and wax and a clerk.”<sup>200</sup>

Historians are divided as to how the royal courts came to insist on specialty in actions of covenant.<sup>201</sup> Yet it is widely agreed that the requirement altered what had been the traditional modes of proof, which did not require specialty, and thus rendered the procedures of the central royal courts “different and distinct from what went on in local courts.”<sup>202</sup> The king’s jurisdiction was in certain respects a

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documents,” *id.*, could itself bear a seal. See Hoppman v. Welborne (St. Ives Fair Ct. 1302), in 1 SCLM, *supra* note 1, at 86-87 (“In witness whereof I have put my seal to the present writing.”).

196. Harold J. Berman, *The Law of International Commercial Transactions* (Lex Mercatoria), in 3 A LAWYER’S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS fol.3, at 5, 5 (2d ed. 1983).

197. Cremades & Plehn, *supra* note 5, at 319.

198. Beucosin v. Peche (Littleport Manor Ct. 1318), in COURT BARON, *supra* note 111, at 124-25.

199. See, e.g., Brewster v. Ilger (Littleport Manor Ct. 1325), in COURT BARON, *supra* note 111, at 144; COURT BARON, *supra* note 111, at 115.

200. COURT BARON, *supra* note 111, at 115-16.

201. See D. J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 24 (1999).

202. Joseph Biancalana, *Actions of Covenant, 1200-1330*, 20 LAW & HIST. REV. 1, 31 (2002). Robert Palmer argued that the specialty requirement emerged with the introduction of the *justicies* writ. See ROBERT C. PALMER, THE COUNTY COURTS OF MEDIEVAL ENGLAND 1150-1350, at 208-15 (1982); Robert C. Palmer, *Covenant, Justicies Writs, and Reasonable Showings*, 31 AM. J. LEGAL HIST. 97

recent innovation,<sup>203</sup> and the local courts it supplanted frequently did not require a formal deed in cases of covenant. The royal courts did not represent the entirety of English law. Rather than abandoning the law of the 'state' for that of the merchants, then, the court of St. Ives merely retained the pre-existing local practice.

The fair court also followed contemporary practice with regard to transferring debts. Medieval merchants are often said to have treated debts as transferable, a practice that culminated in the development of fully negotiable instruments.<sup>204</sup> Benson wrote that merchant

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(1987). Biancalana, however, contended that the requirement was not linked to the writ, but was rather intended to increase the popularity of royal courts among plaintiffs by limiting the options of the defendant. Biancalana, *supra*, at 31-32. Both would have agreed, however, that the requirement kept "central and local courts separate and distinct from each other." *Id.* at 31.

203. See generally ROBERT L. HENRY, CONTRACTS IN THE LOCAL COURTS OF MEDIEVAL ENGLAND 15-16 (1926); COURT BARON, *supra* note 111, at 116 ("[T]he king's court never . . . took upon itself to enforce the whole law of the land. Only by degrees and owing to the decay of the local courts did its catalogue of the forms of action become the one standard of English law."). Royal courts recognized the variety of local practices; damages could be assessed in county courts "according to the custom of the county," and writs to Ireland might direct a sheriff to do justice "according to the law and custom of those parts." PALMER, *supra* note 202, at 210.

204. According to the seventeenth-century trader Gerard Malynes, the practice of endorsing bills to others may have been "used amongst Merchants beyond the seas," but the "Common Law of England" stood "directly against this course; for they say there can be no alienation from one man to another of debts; because they are held Choses in Action." GERARD MALYNES, *CONSUEUDO, VEL LEX MERCATORIA* 97 (photo. reprint 1997) (London, Adam Islip 1622); see also Carter, *supra* note 18, at 241. Among merchants, however, Berman claimed that commercial instruments became fully negotiable in the "late eleventh and twelfth centuries." BERMAN, *supra* note 5, at 350, cited in Kadens, *supra* note 20, at 41 n.12. Others have argued that bills of exchange were commonly transferred in mid-fifteenth-century England, and that the law merchant had established their negotiability by this time. See, e.g., J.H. Munro, *English "Backwardness" and Financial Innovations in Commerce with the Low Countries, 14th to 16th Centuries*, in INTERNATIONAL TRADE IN THE LOW COUNTRIES 105 (Peter Stabel et al. eds., Studies in Urban Social, Economic and Political History of the Medieval and Early Modern Low Countries 10, 2000).

The emergence of negotiable instruments has long been treated as the paradigmatic innovation of the law merchant. See Carter, *supra* note 18, at 241 (reasoning that negotiability was one of the "peculiar features which the common law regarded with aversion"); Cremades & Plehn, *supra* note 5, at 319 (explaining that the law merchant is typified by "the legal recognition given to bearer bills of exchange"); North, *supra* note 33, at 32 ("The law merchant established certain

courts, unlike their contemporaries, “recognized debts as freely transferable through informal ‘written obligatory,’ a process developed by merchants themselves to simplify the transfer of debt.”<sup>205</sup> Trakman similarly claimed that “the medieval Law Merchant, realistically, originated the ‘writing obligatory,’ by which creditors could transfer freely the debts owed to them.”<sup>206</sup>

Trakman found authority for his position in the St. Ives case of *S. Michel v. Troner*—in which a group of Norwich merchants bought wine for £8 10s., “which they were bound to pay to the said Brun or any on his behalf bearing a certain obligatory writing made between them on Midsummer Day A.D. 1274.”<sup>207</sup> However, this case fails to provide an example of unlimited transferability. The debt was to be paid to Brun or another acting “on his behalf,” which likely indicates a collection agent designated by Brun, rather than an independent third party to whom the obligation had been endorsed.<sup>208</sup>

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‘choses in action’ called negotiable instruments.”); *see also* *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842) (“The law respecting negotiable instruments may be truly declared . . . not the law of a single country only, but of the commercial world.”); *cf.* 15 AM. JUR. 2D COMMON LAW § 7 (*defining* the law merchant as “the law regarding the negotiability of commercial paper as such law developed before the enactment of any statute on the subject”). *But see* ROGERS, *supra* note 20 (providing a wealth of evidence opposing the claim that the common law ‘incorporated’ negotiability from the law merchant); Stephen E. Sachs, *Burying Burton: Burton v. Davy and the Law of Negotiable Instruments* (May 21, 2002) (unpublished manuscript, on file with author), *available at* <http://www.stevesachs.com/papers/burton.pdf>.

205. Benson, *Justice Without Government*, *supra* note 5, at 130.

206. Trakman, *E-Merchant Law*, *supra* note 5, at 274.

207. *Id.* at 274 n.39; *S. Michel v. Troner* (St. Ives Fair Ct. 1275), *in* 1 SELECT PLEAS, *supra* note 14, at 152.

208. *Cf.* ROGERS, *supra* note 20, at 47 (making a similar argument with regard to the later case of *Burton v. Davy*). The record goes on to mention that “Brun and his representatives have often laboured at Boston and at Norwich” to retrieve the money, indicating that Brun did in fact designate such agents. 1 SELECT PLEAS, *supra* note 14, at 152. Even J. Milnes Holden, whom Trakman cited, noted that the action in this case “was no more than an ordinary plea of debt.” J. MILNES HOLDEN, *HISTORY OF NEGOTIABLE INSTRUMENTS IN ENGLISH LAW* 6 (1955) (internal citation omitted); Trakman, *E-Merchant Law*, *supra* note 5, at 275 nn.41 & 43.

This practice was not uncommon; plaintiffs who could not travel to St. Ives would frequently send attorneys in their stead. *See, e.g.*, *Bolton v. Rydon* (St. Ives Fair Ct. 1275), *in* 1 SELECT PLEAS, *supra* note 14, at 159; *Graffham v. Pope* (1291), *in* 1 SCLM, *supra* note 1, at 54; *Grantham v. Thorney* (St. Ives Fair Ct.

Moreover, even if a creditor had sought to transfer an obligation to an unrelated third party, the St. Ives court would have refused to enforce such transfers. In *Abingdon v. Martin*, the plaintiff claimed standing as a messenger of the London cloth merchant John of Abingdon, whom the defendant owed £11.<sup>209</sup> After initially challenging the plaintiff's standing, the defendant appeared in court two days later and presented what he claimed to be a written confirmation that the debt had been paid in full. The plaintiff immediately protested that the document was invalid, and asked for a jury to investigate. At this point, however, Martin argued that the plaintiff could not contest the document's validity, "since it is not lawful for him or for any other person to deny or abate the deed of another." The court agreed, Martin went free, and the unhappy plaintiff was fined for making a false claim.<sup>210</sup>

The record does not show whether Martin's written confirmation was valid or not. The document's validity, however, was clearly irrelevant to the court's procedure: even an obvious forgery could not be challenged by one who claimed to hold a transferred debt. As a result, it is hard to believe that many creditors transferred their debts at St. Ives, or that the court's approach to written instruments exemplified a more liberal merchant custom.

In general, the legal principles that can be gleaned from the St. Ives rolls do not leave a great deal of room for separate mercantile customs. Robert Henry compared the practices of mercantile, borough, communal, manorial, and seignorial courts, and found "comparatively little divergence" in the law they applied. Occasionally "a line can be drawn between the practice of borough and merchant courts on the one hand and manorial on the other, sometimes between borough and communal as against the manorial and merchant"; but in general there existed a "substantial

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1293), in 1 SCLM, *supra* note 1, at 63-64; *Vicker v. Foliot* (St. Ives Fair Ct. 1295), in 1 SCLM, *supra* note 1, at 70; see also Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 21 n.84 (1998) (describing the increasing number of "pleaders" at St. Ives).

209. *Abingdon v. Martin* (St. Ives Fair Ct. 1293), in 1 SCLM, *supra* note 1, at 65.

210. *Id.* at 65-67.

uniformity” in the substantive law of the various courts, with “much more of similarity than of dissimilarity.”<sup>211</sup>

The merchants of St. Ives did not “voluntarily produce[.]” a law so similar to that of local courts by sheer coincidence. Rather, the widespread similarities between the local courts and the court of St. Ives, on both procedural and substantive matters, argue that the two shared a common legal tradition, and that the latter was not an independent creature of the international merchant community.

### 3. *The Status of Merchants*

Even if separate mercantile customs could be identified, medieval mercantile law need not be viewed as a *private* law of merchants. William Mitchell portrayed the law merchant as a guild privilege, “in its origin a personal law, the law of a special class.” By virtue of their profession, merchants could be judged by the law merchant as opposed to the common law; this class-based choice of law was a “characteristic feature” of the law merchant “throughout the Middle Ages.”<sup>212</sup> More recent scholarship similarly describes the word “merchant” as a “term of art” indicating a “personal status” analogous to that of the clergy or nobility, a term not applied more widely until the seventeenth century.<sup>213</sup>

At St. Ives, however, appeals to mercantile law were by no means limited to a particular class of persons. Non-merchants could invoke the protection of the customs of the fair or even of decisions reached *secundum legem mercatoriam*. Additionally, the rolls contain

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211. HENRY, *supra* note 203, at 9-10.

212. MITCHELL, *supra* note 4, at 81. Mitchell argued largely on the basis of Continental examples, although he did have some evidence from England. *See also* BEWES, *supra* note 5, at vi (“The merchants carried their law, as it were, in the same consignment as their goods . . .”); BERMAN, *supra* note 5, at 345-46 (analogizing merchants’ privileges to those of churchmen in ecclesiastical courts); HERBERT ALAN JOHNSON, *THE LAW MERCHANT AND NEGOTIABLE INSTRUMENTS IN COLONIAL NEW YORK, 1664 TO 1730*, at 16 (1963) (explaining how the law merchant “became a personal law that accompanied the merchant on his travels”).

213. Kadens, *supra* note 20, at 44-45 (arguing that merchants “existed in a world apart from that shared by the retailers and artisans who bought and sold locally,” as the latter were uncontroversially subject to “local laws and customs” without raising issues of jurisdiction or choice of law). Note, however, that Kadens rejected much of the Romantic tradition.

theoretical arguments that men of all social classes can be considered “merchants” for the purpose of the law merchant’s protection. In other words, the records depict mercantile law as a general body of customs applying to commerce, rather than as a set of privileges granted to a specific class.<sup>214</sup>

The fair court records do not contain a single example of a challenge to a party’s social standing to have a case heard by the court or to be judged *secundum legem mercatoriam*. After all, questions of a theoretical nature were rarely raised in this very practical forum. Yet the records do establish that the jurisdiction of the fair court of St. Ives was in no way restricted to merchants. Some of those who came before the fair court were indeed members of merchant guilds or mercantile communities; Gottschalk of Almaine, who by his name was likely a German merchant, was also a “burgher of Lynn.”<sup>215</sup> However, individuals of all classes and occupations appear in the court rolls of St. Ives: in addition to merchants, local and foreign, we see a parade of monks,<sup>216</sup> knights,<sup>217</sup> townsmen,<sup>218</sup> bakers,<sup>219</sup> carters,<sup>220</sup> servants,<sup>221</sup> and those even lower on the social

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214. See 1 POLLOCK & MAITLAND, *supra* note 37, at 467 (stating that mercantile law “seems to have been rather a special law for mercantile transactions than a special law for merchants”); FREDERIC ROCKWELL SANBORN, ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW 345-46 (1930) (denying that the law merchant was the private law of a class).

215. 1 SCLM, *supra* note 1, at 9.

216. Ape v. Kirkstead (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 147.

217. Hereford v. Lyons (St. Ives Fair Ct. 1293), in 1 SCLM, *supra* note 1, at 62 (in which the plaintiff is a knight). *But see* Appleby v. Bailiff of the Count of Brittany (C.P. 1278-89), in 2 EARLIEST ENGLISH LAW REPORTS 359, 360 (Paul A. Brand ed., Selden Society 112, 1996) (recounting a pleader’s allegation—though without confirmation by the court—that a “knight of the county” is “not distrainable under the law merchant”).

218. See Cousin v. Huy (St. Ives Fair Ct. 1270), in 1 SCLM, *supra* note 1, at 3.

219. Cricklade v. Wellingborough (St. Ives Fair Ct. 1293), in 1 SCLM, *supra* note 1, at 57-58.

220. 1 SCLM, *supra* note 1, at 31.

221. Waite v. Hamon (St. Ives Fair Ct. 1287), in 1 SCLM, *supra* note 1, at 13.

scale.<sup>222</sup> St. Ives was in a rural area; before its incorporation in the late nineteenth century, it was not a city with independent legal status or a free town where merchants made the law. Some residents farmed, others provided services, and many did both; some residents were even quite well off. But they were almost all unfree and had various obligations to their lord, notably the pannage of pigs, hay-making, tallage, and payments on the marriage of daughters and for grazing pigs in the forest.<sup>223</sup> These individuals of servile status, who would be classified as villeins by the common law of the time, were judged in the fair of St. Ives under the same rules as great merchants.

Consider Nicholas Legge, a butcher of St. Ives found in the rolls as an ale taster and juror. In his case against Nicholas of Mildenhall in 1291, Legge sought to intervene in a contract between Mildenhall and another butcher, as he was allowed to do by “the usage of merchants.” Mildenhall admitted that “*lex mercatorum*,” the law of merchants, “does indeed allow every merchant to participate in a bargain made with a butcher”; clearly, both parties included Legge in the category of “merchant,” and the court raised no objection to the argument.<sup>224</sup> Yet Legge was a resident of the vill—he was elected constable among residents of Bridge Street in 1302—and there is no indication that he was of unusual status. In any event, he was certainly no international traveler, or even a member of a corporate merchant guild.<sup>225</sup>

One can also find in the fair rolls a rare theoretical discussion of the range of the term “merchant.” In the 1311 case of *Fulham v. Francis*, two servants of the abbot of Burton-on-Trent appeared in court to prove, “*secundum legem mercatoriam*,” that a horse being seized to pay a debt actually belonged to their master. When forced

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222. 1 SCLM, *supra* note 1, at 107 (“Richard Brewhouse receives the merry-andrews in the midst of the fair to the disturbance and peril of the merchants; therefore he [is fined] 6d.”).

223. MOORE, *supra* note 11, at 237. Redstone noted that the town did not receive its charter until 1874, and the inhabitants at the time of the fair paid a yearly rent, did customary works, owed obedience to the lord’s bailiff, and needed licenses from the lord for the marriage of widows or daughters. Redstone, *supra* note 11, at 216.

224. Legge v. Mildenhall (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 46-47.

225. See MOORE, *supra* note 11, at 162, 257.

to defend their right to testify, they cited a point of law and claimed that it applies to “any merchant . . . whosoever he may be, whether earl or baron, bishop or abbot, or any such person of rank.” More importantly, the plaintiff never contested this expansive definition of “merchant”—he only claimed that the servants should not be allowed to act as their abbot’s attorneys.<sup>226</sup>

This all-inclusive definition was accepted without objection by the court, which seems to settle the question of whether St. Ives court was part of a private legal system. If the classification of “merchant” has any meaning as an occupational description or as a name for a social class, it cannot include earls, barons, bishops, or abbots; these groups, especially the churchmen governed by ecclesiastical law, possessed a legal status profoundly distinct from that of merchants and townsmen. Indeed, the trader Gerard Malynes would later specifically exclude “clergymen, noblemen, gentlemen, soldiers, [lawyers], publick officers and magistrates” from the ranks of the “merchants” whom the law merchant could protect.<sup>227</sup>

As Frederick Pollock and F.W. Maitland noted, the term “merchant” was not used to indicate a personal status until well after the period of the court rolls.<sup>228</sup> The understanding at St. Ives seems to have been that a “merchant” is anyone who engages in trade—which would mean that the law applied at St. Ives was a commercial law of a general nature, not a personal one. If the law merchant were indeed the legal privilege of a mercantile class, that class must have been so inclusive as to be historically and legally meaningless.

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226. Fulham v. Francis (St. Ives Fair Ct. 1311), in 1 SCLM, *supra* note 1, at 89-90.

227. MALYNES, *supra* note 204, at 6.

228. 1 POLLOCK & MAITLAND, *supra* note 37, at 466-67 (“[I]n private law ‘merchandise’ . . . seems too indefinite and also seems to have few legal consequences to permit our calling it a status . . . . Until lately no one but ‘a trader’ could be made bankrupt; still we should hardly say that in 1860 ‘tradership’ was a status.”). In the eighteenth century, Wyndham Beawes complained of the “[c]onfusion of the terms Merchant and Trader” which had “prevailed for a long Time” in the past: “in the early Annals of England and Scotland we find Traders, who resorted to the Publick Fairs, indiscriminately stiled *Mercatores*; they are thus denominated in the publick Records in the Reign of Edward I.” WYNDHAM BEAWES, *LEX MERCATORIA REDIVIVA* 31 (Thomas Mortimer ed., London, R. Baldwin 5th ed. 1792) (1758).

## D. CONCLUSIONS

A later historian, comparing the procedure of the St. Ives courts to that, say, of the court of King's Bench, would doubtless find significant differences between them. In comparison to the royal courts, the merchants exercised more power over their own fate; as a community, they were allowed to share in making judgments, and the court was willing to take notice of their customs. But the central royal courts hardly represented the only legal tradition in England. A manual on "How to Hold Pleas and Courts," written *circa* 1274 by John of Oxford, a monk in the priory of Luffield, reminds the reader that there was one manner of pleading in the court of Common Pleas, another before the justices in eyre, another in county and hundred courts, and still another in the courts of knights, freeholders, or lay or religious lords.<sup>229</sup> These individual courts did not always enforce the common law of the royal courts, but might possess their own customs; a good steward "should know the customs of that county, hundred, court or manor, and the franchises pertaining to the premises, *for laws and customs differ in divers places.*"<sup>230</sup>

When viewed in this context, the experience of merchants at the fair of St. Ives was hardly exceptional. The appropriate conclusion from the evidence of the fair of St. Ives is not that the merchants were given a unique license by existing authorities and allowed to determine their own affairs. Instead, the fair court followed existing models of seignorial courts—a perfectly sensible conclusion given that it *was* a seignorial court, a court that "has a lord."<sup>231</sup> Indeed, it is only because so much of the jurisdiction of local courts was later

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229. *How to Hold Pleas and Courts*, in COURT BARON, *supra* note 111, at 68. The identification of author and date is found in Maitland & Baildon, *supra* note 132, at 11-13.

230. *How to Hold Pleas and Courts*, in COURT BARON, *supra* note 111, at 68 (emphasis added). For a later recognition that laws might differ even among unquestionably English courts, see Y.B. 4 Edw. 4, fol. 8, pl. 9 (C.P. 1464), reprinted in A.K.R. KIRALFY, A SOURCE BOOK OF ENGLISH LAW 259, 260-61 (1957) ("[T]he common law of the land in this case differs from the law of the Chancery on the point.").

231. 1 SELECT PLEAS, *supra* note 14, at 130.

absorbed by centralized royal institutions that modern scholars could be surprised by the local practice of mercantile law.<sup>232</sup>

One should not see the involvement of merchants in rendering decisions as legal independence, any more than one should interpret the participation of the unfree King's Ripton suitors as self-government. The mercantile courts of thirteenth-century England were not courts ruled by the merchants, nor were they specially reserved for them. Instead, in James Steven Rogers' phrase, they far

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232. In the traditional portrait, medieval merchants enjoyed a golden age of independence before succumbing to state control. Trakman described mercantile autonomy as serving the interests of "revenue and profit" as well as "growing trade relations"; the "medieval Law Merchant was notably able to deliver these results," he wrote, "until the evolving nation state diluted the result." Trakman, *E-Merchant Law*, *supra* note 5, at 297-98.

Unfortunately, the ability of merchant courts to "deliver these results" may be overstated. The case of *S. Michel v. Troner*—which Trakman cited for its mention of a "writing obligatory," arguing that "[l]ess procedural formality also meant the speedier dispensation of justice"—regarded an £8 debt arising out of an exchange almost two years earlier, "to obtain which money the [plaintiff] and his representatives have often laboured at Boston and at Norwich and as yet have not been able to get any part thereof." *S. Michel v. Troner* (1275), in 1 SELECT PLEAS, *supra* note 14, at 152; Trakman, *E-Merchant Law*, *supra* note 5, at 274. The defendant could not be found at St. Ives either, and such serial (and unsuccessful) prosecutions were far from uncommon in the St. Ives rolls.

Concern for the "dilut[ion]" caused by "the evolving nation state" is similarly out of place. As examples, Trakman described such royal actions as the Statute of Acton Burnell and the Statute of Merchants and argued that the system of formally enrolled bonds these statutes created was "largely rejected by the Law Merchant." *Id.* at 274 n.40. Although it is true that these statutes were rarely invoked at St. Ives, *see supra* text accompanying notes 169-171, they were designed to *improve* a plaintiff's ability to collect on debts, automatically establishing the validity of a claim—indeed, under the later statute, allowing for the defendant's immediate incarceration—whenever a formally enrolled bond was presented. The statutes did not in any way prevent plaintiffs from continuing to rely on more informal evidence in local courts, and were far more likely to have been welcomed as an alternative to the existing inefficient means of debt collection. (As is made clear in the preamble to the Statute of Merchants, the process of Acton Burnell, which allowed only for the seizure of goods rather than incarceration, was viewed by merchants as insufficiently harsh. Statute of Acton Burnell, 1283, 11 Edw. (Eng.), *reprinted in* 1 STATUTES OF THE REALM, *supra* note 51, at 53, 53; Statute of Merchants, 1285, 13 Edw. (Eng.), *reprinted in* 1 STATUTES OF THE REALM, *supra* note 51, at 98, 98.) Concern for "dilut[ion]" by the state appears only centuries later and in a dramatically different context.

more resembled “local courts of general jurisdiction held at places where a great deal of trade took place.”<sup>233</sup>

## II. “LAW UNIVERSAL THROUGHOUT THE WORLD”

In 1473, a foreign merchant sought an exemption in the court of Star Chamber from certain English shipping regulations. Although English law required that he register the number of sailors and the name of the vessel in exchange for safe-conduct, the merchant protested that he should not be “bound by [English] Statutes, which Statutes are *introductive of new law*.” As a foreigner who was unfamiliar with the peculiarities of English law, the merchant argued, he should be held to obey only those rules “*declarative of ancient right*, that is to say, Nature, etc.,” and his case should be “determined according to the law of Nature, in the Chancery.” Without deciding the merits of the case, the Chancellor agreed that the merchant should not be forced “to abide a trial by 12 men and other solemnities of the law of the land”; rather, his case should be heard in the Chancery according to “the law of Nature, which is called by some ‘Law Merchant,’ which is law universal throughout the world.”<sup>234</sup>

For hundreds of years after 1473, influential writers on English commercial law echoed the language of this case. In 1622, the merchant Gerard Malynes spoke of the law merchant as “a customary law, approved by the authority of all kingdoms and commonwealths, and not a law established by the sovereignty of any prince”; for Malynes, the “customary law of merchants” held a “peculiar prerogative” above all other customs and laws in that it “is observed in all places.”<sup>235</sup> Similarly, in his *Question Concerning*

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233. ROGERS, *supra* note 20, at 25.

234. Anon. v. Sheriff of London, Y.B. 13 Edw. 2, fol. 9, Pasch, pl. 5 (Ch. 1473), excerpted in 2 SCLM, *supra* note 38, at lxxxiv, lxxxv-lxxxvi. For a more complete account, see 2 SELECT CASES IN THE EXCHEQUER CHAMBER 30 (M. Hemmant ed., Selden Society 64, 1948) [hereinafter EXCHEQUER CHAMBER]; see also *infra* note 399.

235. MALYNES, *supra* note 204, at vi-vii, 3; see also BEAWES, *supra* note 228, at 38 (arguing that since the laws “of any one Realm” are insufficient for organizing commerce, “the Law-Merchant was established” to include those rules “to which all nations pay a just Regard”).

*Impositions*, seventeenth-century lawyer Sir John Davies stated that the “commonwealth of merchants hath always had a peculiar and proper law to rule and govern it. This law is called the Law Merchant, whereof the laws of all nations do take special knowledge.”<sup>236</sup>

Indeed, the vision of the law merchant as a single entity common to all nations has persisted in the work of modern historians. In his classic history of English law, William Searle Holdsworth argued that while “usages differed from place to place,” the courts of markets, fairs, and boroughs applied “a special law merchant, differing from the ordinary law”—a “species of *jus gentium*,” the law of nations, rather than “the law of a particular state.”<sup>237</sup> William Mitchell noted the “strongly marked international character” of the law merchant, asserting that “the main lines of [its] development were everywhere the same.”<sup>238</sup> More recent writers such as Benson have described a law merchant “regulat[ing] virtually every aspect of commercial transactions in *all of Europe* (and frequently outside Europe),” and Trakman found the “twenty-first-century Law Merchant” analogous to its medieval ancestor, in that it “is cosmopolitan in nature and transcends the parochial interests of nation states.”<sup>239</sup>

The rhetoric employed by Malynes, Holdsworth, Benson, or Trakman soars far above the unassuming arguments found in the fair court rolls. Some 200 years before the Chancellor’s decision, Gerard of Cologne was told that he was not sufficiently equipped to wage

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236. JOHN DAVIES, *THE QUESTION CONCERNING IMPOSITIONS* (1656), reprinted in 3 *THE WORKS IN VERSE AND PROSE OF SIR JOHN DAVIES* 12 (Alexander B. Grossart ed., Fuller Worthies’ Library, Blackburn, C. Tiplady 1876). Although the edition of Davies’ work here reprinted was not published until 1656, it was likely written while Davies occupied the office of attorney general, and his term of office ended in 1619. LMLP, *supra* note 20, at 133 n.37.

237. 5 HOLDSWORTH, *supra* note 89, at 66 (emphasizing the “cosmopolitan character of the Law Merchant”); 1 *id.* at 528-29.

238. MITCHELL, *supra* note 4, at 20; see also M.M. POSTAN, *MEDIEVAL TRADE AND FINANCE* 295 (1973) (“[I]n Northern Europe conventions of merchant law . . . differed comparatively little from country to country.”).

239. Benson, *Justice Without Government*, *supra* note 5, at 128; Trakman, *E-Merchant Law*, *supra* note 5, at 281; see also BENSON, *ENTERPRISE OF LAW*, *supra* note 5, at 32 (noting the evolution of the law merchant “into a universal legal system”).

his law “according to law merchant” and was sent back to find more compurgators; was this an invocation of a universal principle, a tenet of the Law of Nature?<sup>240</sup>

We cannot assume that the suitors at St. Ives were drawing on the same concepts as the writers of the early modern period or even the foreign merchants of the late fifteenth century. In fact, the best evidence from the original sources seems to be that they were not—that the law governing markets and fairs was not a “law universal throughout the world,” nor did the suitors of St. Ives act on the presumption that it was. Both within the St. Ives court and without, one can find evidence for significant variations in the principles of mercantile law—variations which may justify abandoning the notion of a universal law merchant.

#### A. “THE LAW MERCHANT” AT ST. IVES

What did the St. Ives court believe itself to be doing when it decided an issue *secundum legem mercatoriam*? Although the evidence is unclear, two general observations can be made. First, the court rolls do not portray an institution that saw itself as governed by and in turn implementing a specific code, whether customary or not. Second, in its relations with other fora, the St. Ives court displayed little awareness of any participation in a process extending beyond St. Ives, let alone one that spanned all of Europe. The very use of the phrase “*the law merchant*” may thus be inappropriate, as the rolls demonstrate substantial variety in the court’s conceptualizations of mercantile law and the principles established thereby.

##### 1. *Within the St. Ives Court*

As we have seen above, the eleven cases which cite *lex mercatoria* (or its variants) defy easy characterization. They may involve matters of procedure, such as how to dispose of the attached goods of a defendant in default,<sup>241</sup> but they may also include important

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240. 1 SCLM, *supra* note 1, at 5.

241. Fairhead v. Tankus (St. Ives Fair Ct. 1295), in 1 SCLM, *supra* note 1, at 71.

substantive questions such as when a sale is complete,<sup>242</sup> or specific usages concerning the right of outside butchers to participate in any sale of meat or fish.<sup>243</sup> Sometimes a special assembly of merchant communities invoked the law merchant's authority; at other times, the court included the phrase almost as an aside.<sup>244</sup>

Most importantly, an appeal to mercantile law might provide authority for a well-established point of law—but it also might provide a convenient label for a simple appeal to justice. Whatever *lex mercatoria* might provide, the court had substantial freedom to define its boundaries. Additionally, the terms the court adopted in making such appeals are highly variable, suggesting the absence of the sort of conceptual clarity that a universal, substantive law would provide.

The parties before the court occasionally invoked the authority of *lex mercatoria* in making a simple claim of justice. In 1302, Christine of Darlington claimed that “on Wednesday last in this present year [*die Mercurii ultimo preterita hoc anno*],” Adam Burser of Bury St. Edmunds accused her of theft and “assaulted her with vile words, calling her harlot, knave, and other enormities,” causing her to lose credit for six quarters of wheat. Burser denied wrongdoing and asked for judgment against Christine, for she had specified the day of the assault as being in “this present year,” when she ought to have specified “the twenty-ninth or thirtieth year of the reign of King Edward, as is the custom in every court.”<sup>245</sup> Darlington responded that her plea was sufficiently precise *secundum legem mercatoriam*, because “the day and year are sufficiently known to any one when the heading of the court [roll] specifies the thirtieth

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242. See *Tempsford v. Chaplain* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 44 (considering a sale complete as soon as the earnest money—a token down payment also called a “God’s penny”—had been paid).

243. *Bishop vs. Godsbirth* (St. Ives Fair Ct. 1315), in 1 SCLM, *supra* note 1, at 97; *Legge v. Mildenhall* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 46-47.

244. See, e.g., *Fulham v. Francis* (St. Ives Fair Ct. 1311), in 1 SCLM, *supra* note 1, at 89; 1 SCLM, *supra* note 1, at 5.

245. *Darlington v. Burser* (St. Ives Fair Ct. 1302), in 1 SCLM, *supra* note 1, at 85.

year of the reign of King Edward.”<sup>246</sup> She did not contest Burser’s claim of custom, or appeal to a widely-held understanding that mercantile law differs in this respect. Instead, she seems to have contended that reciting the year was unnecessary, and for that reason could not have been required *secundum legem mercatoriam*. The St. Ives court does not seem to have applied any consistent rule on the subject; many complaints mention the regnal year, but some do not.<sup>247</sup> Here, although both parties asked for a judgment of “the merchants and others,” the court appears to have been reluctant to issue a general ruling, and instead granted permission to settle. The case thus gives the impression that *lex mercatoria* could be used as a placeholder for commonsense principles of fair play—principles hardly unique to a mercantile setting.<sup>248</sup>

Certain cases in the St. Ives court rolls even seem to incorporate new principles as part of mercantile law. In 1311, two servants of the abbot of Burton-on-Trent intervened in the case of *Fulham v. Francis* to claim for their master a horse that had been wrongly attached.<sup>249</sup> The plaintiff argued that they should not be allowed to prove their case through oaths, citing a general principle that “when anyone should make proof of the ownership of any merchandise . . .

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246. *Id.* at 86.

247. *See, e.g.*, Langbaugh v. Bytham (St. Ives Fair Ct. 1287), in 1 SCLM, *supra* note 1, at 20 (concerning an assault “on Tuesday last”); Long v. Cam (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 39-40 (concerning a sale “on Friday after the feast of St. John”); Harker v. Lindsey (St. Ives Fair Ct. 1300), in 1 SCLM, *supra* note 1, at 78-79 (concerning a covenant made “on Friday after Ascension day in this year [*die Veneris prox’ post Ascensionem Domini hoc anno*]”). None of the parties in these cases drew attention to the date.

248. In this practice, as in others, the fair court followed its local equivalents. The records of local courts, as well as contemporaneous formularies, do not consistently require the regnal year. *See, e.g.*, Elm v. Fox (Littleport Manor Ct. 1317), in COURT BARON, *supra* note 111, at 123 (indicating no date); *The Court Baron*, *supra* note 132, at 43 (providing a form to hear an offense committed “on such a day and hour in this year that was”); *id.* at 48 (providing a form for defamation that does not mention the date); *cf. The Manner of Holding Courts—John de Longueville*, *supra* note 111, at 84 (“[I]t is not necessary in any plea to specify the hour at which a deed was done, except in the pleas of the crown or where there is breach of the king’s peace,” where one must “set down the place and the year and the hour”).

249. *Fulham v. Francis* (St. Ives Fair Ct. 1311), in 1 SCLM, *supra* note 1, at 89-90.

it is necessary that he whose ownership is alleged should appear in his own person to make [proof].”<sup>250</sup> The servants replied that whenever a merchant delivers his goods to a servant to have them put on sale, it would be “hard and inconsonant with right if such servants . . . should not be admitted to make such proof in the name of their lord.”<sup>251</sup> The emphasis is placed on issues of justice rather than of substantive law—to deny the servants their opportunity to make proof would be “hard and inconsonant with right,” rather than contrary to a specific and widely-acknowledged tenet of the “law merchant.” No consensus existed on the issue, for the court refused to decide the case without convening “all the merchants of the said fair, both natives and foreigners,” who eventually declared that the servants “may properly be admitted in this and similar cases” *secundum legem mercatoriam*—language that indicates a rule to be used in the future, rather than one of long standing in the past.<sup>252</sup> Indeed, after the servants succeeded in making their oath, they retrieved the horse “according to the law merchant hitherto approved”—a phrase giving the strong impression that something new had been introduced.<sup>253</sup>

Whatever authority *lex mercatoria* might have possessed, it did not deprive the court of significant discretion. For example, in *Tempsford v. Chaplain* and in *Fulham v. Francis*, only two oath-helpers were considered necessary *secundum legem mercatoriam* to establish ownership of goods that had been attached.<sup>254</sup> Yet when Gerard of Cologne was held “[in]sufficiently equipped” to claim his wine, he was given another chance, this time with five oath-

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250. *Id.* at 90.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Tempsford v. Chaplain* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 44-45; *Fulham v. Francis* (St. Ives Fair Ct. 1311), in 1 SCLM, *supra* note 1, at 89. Meanwhile, the anonymous treatise *De Legibus Mercatorum*, which Basile *et al.* believed to be an educational text composed in London in the late thirteenth century, states unambiguously that five compurgators are necessary. *LEX MERCATORIA*, *supra* note 20, at 42.

helpers—a favor not extended to Richard Matthew of Broughton or Perot de Douai, other parties who failed in their law.<sup>255</sup>

Given the flexibility with which principles could be attributed to mercantile law—the three cases above are more than a quarter of the total—is it still reasonable to use the phrase “*the law merchant*” to describe a coherent legal order?<sup>256</sup> In the case of Gerard of Cologne, the court did not demand more compurgators *secundum legem mercatoriam*, but “*secundum legem mercatorum*.”<sup>257</sup> Gross translates this phrase as “according to law merchant,” but the text provides no justification for this reading—a better translation would be “according to the law of merchants.”<sup>258</sup> Indeed, some authors have called into question the translation of *lex mercatoria* as “*the law merchant*,” implying the presence of a single entity. The phrase *secundum legem mercatoriam* might be rendered “according to law merchant,” “according to merchant law,” or the more comprehensible “according to mercantile law,” a phrase which carries no connotations of legal uniqueness or universal applicability. Basile *et al.* adopt the latter translation, and maintain that “the law merchant” has encouraged a distorted interpretation in the secondary literature.<sup>259</sup> Indeed, Rogers goes so far as to argue that the “sense of mystery and jurisprudential complexity” evoked by “the Law Merchant” results from “nothing more than [its] odd grammatical construction.”<sup>260</sup>

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255. 1 SCLM, *supra* note 1, at 5; Scot v. Matthew (St. Ives Fair Ct. 1293), *in* 1 SCLM, *supra* note 1, at 61; Nottingham v. Douai (St. Ives Fair Ct. 1293), *in* 1 SCLM, *supra* note 1, at 64.

256. As Bonfield noted, in order to infer the existence of substantive principles from court records, we must assume that the courts extended the parties substantive due process as well as equal protection; i.e., that “the decisions reflect a proper application of customary law regardless of the status of the parties involved and the equities of the dispute.” Bonfield, *supra* note 151, at 523. In the case of St. Ives, this assumption may not be justified.

257. 1 SCLM, *supra* note 1, at 5; *see supra* text accompanying note 1.

258. 1 SCLM, *supra* note 1, at 5. I am grateful to Thomas N. Bisson for assistance with the Latin text.

259. LMLP, *supra* note 20, at 7.

260. ROGERS, *supra* note 20, at 250 (“In English, when a noun is made into an adjective, a suffix is usually added, and adjectives in English generally precede rather than follow nouns. Moreover, in the twentieth century, we no longer employ such stylistic flourishes as capitalizing nouns, or rendering them into Latin.”).

If any number of terms could be used to render *secundum legem mercatoriam* into modern English, even more were used at St. Ives to express equivalent ideas in Latin. In 1312, the question arose of whether a shipment of licorice should be forfeited to the king “according to merchant law and custom etc. [*secundum legem et consuetudinem mercatoriam etc.*]”; the formulation is very similar to that of *secundum legem mercatoriam*, and the two seem to be used interchangeably in this case.<sup>261</sup> Similarly, in *Legge v. Mildenhall*, the plaintiff made a claim according to mercantile usage (“*secundum usum mercatoriam*”), and the defendant admitted that the usage is allowed by *lex mercatorum*, the “law of merchants”—with no distinction made between “law,” “custom,” and “usage.”<sup>262</sup> The “custom of the fair”<sup>263</sup> as well as the “law and custom of the said fair [*secundum legem et consuetudinem ferie predictae*]”<sup>264</sup> each describe principles applicable at St. Ives, and the phrases are used as if they were entirely synonymous. Their use implies that the practice of mercantile law at St. Ives was more flexible than the translation of “the law merchant,” with its reifying definite article, would imply. The other phrases support an interpretation of *secundum legem mercatoriam* as appealing to a loose concept of custom and fairness rather than a specific, well-defined body of law.

Records from contemporary courts outside St. Ives support this interpretation. For instance, the fair court of West Malling in *Dyer v. Stonehill* ordered a defendant attached by twenty-nine pieces of wool “according to the law of the fair [*secundum legem ferie*].”<sup>265</sup> A 1306 settlement between the city of Norwich and the prior and convent of Holy Trinity, recorded in a royal charter, specifies that the townsmen would be under the jurisdiction of the prior and convent during the fair “when any matter belonging to the law of fairs [*jus feriarum*]

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261. *Bedford v. Reading* (St. Ives Fair Ct. 1312), in 1 SCLM, *supra* note 1, at 91.

262. *Legge v. Mildenhall* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 46-47. Gross translated “*secundum usum mercatoriam*” as “according to the usage of merchants.” *Id.*

263. 1 SCLM, *supra* note 1, at 92-93.

264. *Pollard v. Crowthorpe* (St. Ives Fair Ct. 1288), in 1 SCLM, *supra* note 1, at 35-36.

265. *Dyer v. Stonehill* (W. Malling Fair Ct. 1364), in 1 SCLM, *supra* note 1, at 112.

requires.”<sup>266</sup> The county court of Southampton described a delivery of goods as having been conducted according to the customs of merchants (*secundum consuetudinem mercatorum*).<sup>267</sup> The central royal courts could do the same: one case in King’s Bench endorses a practice as being used “*in lege mercatoria*” as well as being justified “according to maritime law [*secundum legem marinam*].”<sup>268</sup> Another describes decisions being made both *secundum legem mercatoriam* and *secundum legem et consuetudinem mercatoriam*, as well as a party having recovered “according to the method of merchants [*per modum mercatorum*]” for good measure.<sup>269</sup>

The variability in the principles established “according to the law merchant,” as well as the terms used to express the concept, demonstrate the somewhat haphazard nature of the justice administered at St. Ives. The court sought above all to provide its community with “justice and equity,”<sup>270</sup> taking judicial notice of existing merchant customs (and occasionally creating new ones) to ensure the correct result. According to the evidence that can be gathered from the rolls, the St. Ives court did not rely on mercantile law as a well-defined set of principles, but rather invoked a complex, vague, and ever-changing body of “merchant law and custom.”<sup>271</sup>

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266. Charter to Norwich, 35 Edw., m. 22 (Dec. 4, 1306), in 3 CALENDAR OF THE CHARTER ROLLS PRESERVED IN THE PUBLIC RECORD OFFICE 73, 74 (1908) [hereinafter 3 CHARTER ROLLS].

267. Dunstable v. Le Bal (Assize at Romsey 1278), in 2 SCLM, *supra* note 38, at 29. Curiously, Hall translated this phrase as “according to the custom of the country.” *Id.*

268. Fulham v. Fleming, Coram Rege Roll No. 107, Michaelmas, m. 46 (K.B. 1287), in KING’S BENCH, *supra* note 129, at 169, 170. For comparison, if *secundum legem marinam* were translated in the same fashion as *secundum legem mercatoriam*, it would be rendered as the unusual phrase “according to the law maritime.”

269. Saxby v. Bedford, PRO Curia Regis Roll 155, Michaelmas, m. 1d (K.B. 1255), in 2 SCLM, *supra* note 38, at 5.

270. 1 SELECT PLEAS, *supra* note 14, at 153.

271. Reading v. Bedford (St. Ives Fair Ct. 1312), in 1 SCLM, *supra* note 1, at 91.

## 2. *St. Ives and Other Courts*

It is difficult to make any conclusions about national or international similarities based primarily on court records from only one limited area (the fair of St. Ives) and period of time (1270-1324). As was noted earlier, very few questions of substantive law were argued in a way that is accessible to us from the records—too few to support any systematic investigation of whether foreign or local merchants had a more accurate understanding of the law applied at St. Ives.<sup>272</sup> Yet one can examine the supposed universality of the law

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272. See *supra* text accompanying note 137. Of the 332 cases that Gross and Maitland examined, thirty-two involved some kind of default—an error of procedure or substantive law that resulted in the loss of a case. However, of these cases, many involved “miskennings,” mistakes in a defendant’s pleading, or other technical errors. These errors would have resulted in defaults in other English courts as well, and so do not point to any deficiency in the defendants’ knowledge of mercantile law. In other cases, the defendants were unable to find a sufficient number of compurgators. See, e.g., *Risborough v. Russell* (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 150-51. This may indicate that they did not know how many to bring, but it may also indicate that the defendants were widely known to have been guilty, or that few others could swear to their innocence.

In all, only four examples can be clearly identified in which a case was lost due to an error of law or a substantively incorrect legal theory. (Given that Gross and Maitland selected cases to illustrate the law applied at St. Ives, it is unlikely that many more examples remain in the unpublished documents.) William of Abingdon lost his case for the reasons explained above. See *supra* text accompanying note 209. John Woodfool sued Peter of Tooting in 1287 on the assumption that the latter would be bound by agreements made in his name by the servant of a third party; the court rejected his plea, stating that there was no need to sue the defendant if the servant “survives in flesh and bone, and the said John can bring an action against him if he desires.” *Woodfool v. Tooting* (St. Ives Fair Ct. 1287), in 1 SCLM, *supra* note 1, at 23. *But cf.* Benson, *Justice Without Government*, *supra* note 5, at 127, 130 (“[T]hese courts . . . considered actions by agents in transactions valid without formal authority.”). A similar question appears in *Fulham v. Francis* (St. Ives Fair Ct. 1312), in 1 SCLM, *supra* note 1, at 89, in which the plaintiff unsuccessfully contested an agent’s ability to make a claim of ownership on his master’s behalf. Finally, Sarah Poke claimed that she could not be held liable for damages caused by her live-in handmaid, but the court denied her claim and the inquest jury found in the plaintiff’s favor. *Redknavv v. Poke* (St. Ives Fair Ct. 1316), in 1 SCLM, *supra* note 1, at 101. (In one additional case, *Fleming v. Tanner* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 52, the plaintiff made an error of law that did not cause him to lose the case. William Fleming sought to wage his law after the defendant disputed the terms of the contract between them; he was not allowed to do so, and a jury inquest was held. However, the inquest eventually decided in the plaintiff’s favor.)

merchant in reverse; rather than ask whether other courts resembled St. Ives, one can inquire to what extent St. Ives sought to follow other courts.

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

The court of St. Ives frequently heard cases that had first arisen in faraway places, involving disputes to which St. Ives had no connection other than being the temporary location of both plaintiff and defendant. Because merchants traveled regularly from fair to fair, contracts would often be written in one place to be performed in another.<sup>273</sup> The 1293 dispute between William of Abingdon and William Martin was based on a debt incurred in London, with the payment to take place in the next fair of Stamford; St. Ives was neither the place of the contract's formation nor the place of performance, yet the fair court could serve as the forum for the dispute.<sup>274</sup> Nor was the 'transmunicipal' element of such contracts

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Unfortunately, this selection is far too small for any rigorous analysis of whether foreign or local merchants were more likely to make errors of this kind. Presumably there are more examples of such errors hidden within the jury process; but if the jurors considered any substantive legal arguments, these arguments were not recorded on the rolls and are therefore lost to us.

273. Volckart and Mangels, who argued that "the importance of universally accepted commercial institutions in the Middle Ages has hitherto been vastly overrated," did so on the claim that all but a fraction of European trade prior to the fourteenth century was "simultaneous" and therefore unlikely to give rise to complex legal disputes. Volckart & Mangels, *supra* note 20, at 427, 436, 446. However, non-simultaneous exchange (with payment separated from delivery in time and space) was routine in medieval England, and was even institutionalized by the royal prise system, in which payment for each prise would be due in the next major fair. See MOORE, *supra* note 11, at 9.

274. Abingdon v. Martin (St. Ives Fair Ct. 1293), *in* 1 SCLM, *supra* note 1, at 65. Other cases can be found involving the towns of Boston and Westminster, Hereford v. Lyons (St. Ives Fair Ct. 1293), *in* 1 SCLM, *supra* note 1, at 62, Boston and Northampton, Curteis v. St. Romain (St. Ives Fair Ct. 1287), *in* 1 SCLM,

necessary for St. Ives to claim jurisdiction; in 1292, a wine merchant sued a deadbeat buyer in the St. Ives court, although the contract was formed in the town of Boston and was to have been performed there as well.<sup>275</sup>

In an age of slow communications and expensive transportation, the incentives for defendants to slip out of town rather than face a lawsuit must have been rather strong. The general principle applied by the St. Ives court appears to be that the plaintiff could sue wherever the defendant was found; faced with a defendant who was without assets (and thus judgment-proof), the plaintiff in *Gavelock v. Trot* received a tally “whereby he can prosecute against the said Richard for the recovery of his said debt, wherever it seems to him most expedient.”<sup>276</sup> This wide-ranging jurisdiction was not limited to cases of contract and debt. In 1315, Edmund of Winchester sued Alexander of Nailsworth in the St. Ives court for a simple assault that took place in the town of Northampton the previous year.<sup>277</sup> These cases seem to support the description advanced by Rogers, that the fair courts were “local courts of general jurisdiction” and not specialized institutions limited to commercial pleas arising out of the fair.<sup>278</sup>

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*supra* note 1, at 26, and *Stourbridge and Haddenham, Treasurer v. Haddenham* (St. Ives Fair Ct. 1317), *in* 1 SCLM, *supra* note 1, at 103, among others.

275. *Titchwell v. Burdon* (St. Ives Fair Ct. 1293), *in* 1 SCLM, *supra* note 1, at 59. Similarly ‘internal’ cases can be found arising out of actions in Stamford, *Risborough v. Russell* (St. Ives Fair Ct. 1275), *in* 1 SELECT PLEAS, *supra* note 14, at 150, Bedford, *Saddington v. Langbaurgh* (St. Ives Fair Ct. 1287), *in* 1 SCLM, *supra* note 1, at 22, Bury St. Edmunds, *Ribaud v. Russell* (St. Ives Fair Ct. 1287), *in* 1 SCLM, *supra* note 1, at 15, and many other English cities.

276. *Gavelock v. Trot* (St. Ives Fair Ct. 1300), *in* 1 SCLM, *supra* note 1, at 83.

277. *Winchester v. Nailsworth* (St. Ives Fair Ct. 1315), *in* 1 SCLM, *supra* note 1, at 96.

278. ROGERS, *supra* note 20, at 25. As was noted in Part I, this general jurisdiction was exercised contrary to royal statute; the first Statute of Westminster in 1275 had prohibited the officers of anyone but the king from attaching individuals’ goods for “Contracts, Covenants, and Trespasses done out of their Power and their Jurisdiction . . . nor within their Franchise where their Power is . . . .” Statute of Westminster I, 1275, 3 Edw., cl. 35 (Eng.), *reprinted in* 1 STATUTES OF THE REALM, *supra* note 51, at 33, 35; *see also supra* note 172. Gross noted that “the trial of actions concerning contracts or other matters that did not arise in the fair” was widely seen as among the fair courts’ “abuses of jurisdiction,” and future statutes were issued to remedy it. Gross, *supra* note 15, at xviii; *see also* Statutes Made at Westminster, 1477, 17 Edw. 4, cl. 2 (Eng.), *reprinted in* 2 STATUTES OF

Yet if the mercantile courts were partners in the administration of a universal law merchant, one might expect some sort of organized division of labor among them. This is especially true given that cases in the St. Ives court might be simultaneously litigated elsewhere: the plaintiff in *Tooting v. Woodfool* brought a lawsuit after an insult made in the vill of St. Ives, but Gross noted that he also began litigation for the same cause that day at Huntingdon, and the Monday before he had done so at Boston.<sup>279</sup> What principles mediated the contacts between St. Ives and its sister courts, and how were conflicts between them resolved?

Some occasional mentions of external courts appear in the St. Ives rolls. However, such examples are exceedingly rare, and generally represent other aspects of court process rather than true collaboration. For instance, in *Beeston v. Chesterton*, the plaintiff's case turned in part on a letter patent from the bailiffs of Graffham, describing past proceedings in that manorial court. Yet the letter was never presented as evidence in the St. Ives court, which eventually came to the opposite conclusion from the court of Graffham.<sup>280</sup> Similarly, the parties in *Waite v. Hamon* had earlier litigated in the Boston fair court, but its judgment had been followed by an agreement, and the enforcement of *this agreement*, rather than the foreign judgment, occupied the court of St. Ives.<sup>281</sup>

Although the St. Ives court was willing to pass judgment on controversies arising out of foreign cities and fairs, it did not appear to recognize the courts of those areas as participating in a special and shared transnational jurisdiction. Decisions reached in the courts of other cities or communities could be challenged and even reversed in the fair court. Some of these reversals seem to be unintentional,<sup>282</sup>

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THE REALM, *supra* note 51, at 452, 461; An Act for Tryall of Matters in Courts of Pypowder Held in Fayres, 1483, 1 Rich. 3, cl. 6 (Eng.), *reprinted in* 2 STATUTES OF THE REALM, *supra* note 51, at 477, 480-82.

279. *Tooting v. Woodfool* (St. Ives Fair Ct. 1302), *in* 1 SCLM, *supra* note 1, at 84-85.

280. *Beeston v. Chesterton* (St. Ives Fair Ct. 1275), *in* 1 SELECT PLEAS, *supra* note 14, at 153-54. The letter presumably would have been relevant to an inquest, but the defendant was allowed to wage his law instead.

281. *Waite v. Hamon* (St. Ives Fair Ct. 1287), *in* 1 SCLM, *supra* note 1, at 13.

282. *In Saxby v. Bedford*, a burgess of Beverley won a judgment in the Archbishop of York's court in Beverley for £7. The defendant later found the

but many more examples show a clear intent on the part of the St. Ives court to reject the authority of another forum. In *Hamerton v. Cambridge*, the plaintiff claimed that the court of Cambridge failed to “do right to him,” and he brought suit in the court of St. Ives to correct the error.<sup>283</sup> In 1275, Brun de S. Michel of Bordeaux brought suit in St. Ives only after failing to collect his debts in the courts of Boston and Norwich.<sup>284</sup> William of Fleetbridge and his wife Amice successfully sued the entire community of Leicester in 1275 by claiming that the court of Leicester had “made default of justice” when they tried to collect a debt.<sup>285</sup> The court of St. Ives even claimed power to oversee how another abbot ran his market, as when Thomas of Grantham sued to protest an uncustomary toll that was taken from him in the market of Yaxley.<sup>286</sup>

Nor was the St. Ives court necessarily respectful of claims of custom from other areas. The case of *Dederic v. Ramsey* illustrates how different communities may have lacked a consensus on the substance of mercantile law.<sup>287</sup> In 1315, Simon Dederic of Guisnes, a cloth merchant, sued the abbot of Ramsey and one of his bailiffs in the court of King’s Bench, arguing that the fair court had wrongfully seized goods under the care of his servant Eustace. The goods had been attached in execution of Eustace’s debts; they were held in custody until the end of the fair, when they were transferred to Eustace’s creditors. Simon argued that the goods of an alien merchant, “brought from a strange land,” ought to be kept “in the

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original plaintiff in St. Ives, falsely claimed that the £7 had been stolen, and promptly won the money back. See *Saxby v. Bedford*, PRO Curia Regis Roll 155, Michaelmas, m. 1d (K.B. 1255), in 2 SCLM, *supra* note 38, at 5; see also *supra* note 126.

283. *Hamerton v. Cambridge* (St. Ives Fair Ct. 1270), in 1 SCLM, *supra* note 1, at 3.

284. *S. Michel v. Troner* (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 152. I am not aware of any examples of contact between the St. Ives court and a court outside of England. The evidence of letters sent regularly between courts in London and Paris is contested. See *supra* note 67.

285. *Fleetbridge v. Leicester* (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 14; see also *supra* note 76 (discussing collective liability).

286. *Grantham v. Thorney* (St. Ives Fair Ct. 1293), in 1 SCLM, *supra* note 1, at 63-64.

287. See *Dederic v. Ramsey*, Coram Rege Roll 221, 8 Edw. 2, m. 93d (K.B. 1315), in 2 SCLM, *supra* note 38, at 86; see also *supra* note 126.

custody of the lord of that fair until the fair of the same place in the following year,” when the owner could appear to retrieve them; he further claimed that *lex mercatoria* “is this in all and every fair throughout the whole realm, etc.”<sup>288</sup> The St. Ives bailiff, however, asserted that *lex mercatoria* “is this” for both “alien and native born”: that if judgment is entered against a party, and he alleges that the goods belong to someone else, unless the owner appears “during that fair to claim those goods and merchandises, etc.,” the goods “so attached at the close of that fair ought to be immediately appraised . . . and execution made thereof, etc., without further delay.” Both parties asked for an inquest, and a jury of forty-eight merchants was eventually summoned to declare the custom.<sup>289</sup>

No final result is recorded in this case, so we do not know what verdict the jury returned. It is quite possible that there was no single custom on this subject. The St. Ives court generally did not impose a default judgment until a year had passed; yet there is no case in the rolls where such delay was required *after* a final judgment, or where the true owners of contested goods failed to appear within the same fair.<sup>290</sup> More importantly, however, Dederic never claimed that the bailiff acted contrary to the order of the court—meaning that the merchants of St. Ives who had been suitors at the fair court had *agreed* with the bailiff’s description of the custom, and had discarded that of Simon and Eustace. The current practices at St. Ives and of Guisnes in northern France could well have diverged on this point, and the jury of merchants may not have had any more authoritative a view.<sup>291</sup>

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288. Dederic v. Ramsey, Coram Rege Roll 221, 8 Edw. 2, m. 93d (K.B. 1315), *in 2 SCLM*, *supra* note 38, at 87.

289. *Id.* at 88. Some might interpret the ruling as an attempt to enforce uniformity, in that a party disadvantaged by local practice could bring suit in royal court and have the custom declared by a more widely representative jury, drawn from various trading cities. However, the question went to the jury in general terms partly because the bailiff *agreed* that there is a uniform tradition, and *requested* a jury of merchants to declare it.

290. See generally *supra* note 191 (discussing the year-and-day rule); Graffham v. Pope (St. Ives Fair Ct. 1291), *in 1 SCLM*, *supra* note 1, at 54; Stanwick v. Wyllye (St. Ives Fair Ct. 1295), *in 1 SCLM*, *supra* note 1, at 67-68 (on contested ownership of distrained goods).

291. The possibility of such variance in procedure would not have been considered out of place in the royal courts; a request for information from the city

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

## B. MERCANTILE LAW BEYOND ST. IVES

It is far beyond the scope of this study to compare systematically the commercial regulations of jurisdictions across Europe—or even across England—during this period. However, it is possible to find some direct evidence of variations in the theory and practice of mercantile law within England; such evidence is available in both contemporary treatises and the records of cities and towns. Although some similarities may have existed in the regulation of commerce, these similarities fail to support the notion of a “law universal” governing commerce; rather, they are soon lost amid the clutter of municipal customs and local idiosyncracies.

### 1. Lex Mercatoria

If there were a single, universal law merchant, what did it say? The enticingly entitled treatise *Lex Mercatoria*, believed to have been composed by a London lawyer in the late thirteenth century (perhaps the 1280s), purports to describe the contemporary state of commercial law in England.<sup>292</sup> Ellen Wedemeyer Moore, whose treatise on medieval English fairs otherwise shows a profound familiarity with the St. Ives court, used *Lex Mercatoria* to fill in the gaps the court rolls leave regarding its procedure, concluding that “all of the principles [*Lex Mercatoria*] describes accord perfectly with the practice of merchant law as revealed in the St. Ives fair court

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of Bordeaux in 1276 was answered by an inquisition “made according to the manner of that country [*ad modum patrie illius factam*],” and the court accepted the results of the inquisition willingly. *Nova Villa v. Bernard*, Coram Rege Roll 17, 4 Edw., m. 17d (K.B. 1276), *in* 2 SCLM, *supra* note 38, at 15.

292. LMLP, *supra* note 20, at 110, 116.

records of 1270-1324.”<sup>293</sup> Holdsworth went even further in discussing *Lex Mercatoria* and the St. Ives records, saying that “it is clear from these authorities that these piepowder courts were of the same general type as the fair courts of the Continent.”<sup>294</sup>

However, the treatise does not give the supporter of the universal law merchant as much ammunition as Holdsworth might hope. The second chapter of *Lex Mercatoria* describes the “law of the market,” saying that it “differs from the common law of the kingdom in three general ways”: it delivers a judgment more quickly, it holds the defendant’s pledges responsible for all damages and court costs in the event of an adverse judgment, and it does not allow the defendant to wage his law.<sup>295</sup> In all other matters, including “prosecutions, defenses, essoins, defaults, delays, judgments, and executions of judgments,” the treatise suggests that “the same process should be used in both laws.”<sup>296</sup>

This is an oversimplification, of course—if it were literally true, there would be no need for the subsequent nineteen chapters of the treatise. But the fact remains that *Lex Mercatoria* does not present mercantile law as an entirely independent legal system, with its origins in the laws of Nature and of nations; instead, it was highly dependent on the English common law, “which is the mother of mercantile law and which endowed her daughter with certain privileges in certain places.”<sup>297</sup> If the parties would rather litigate at common law than at mercantile law, “they certainly can, and they do so more often than not throughout the whole kingdom.”<sup>298</sup> These plaintiffs chose to litigate at common law despite its elaborate procedures, which allowed defendants to delay judgment for months or years at a time. Such a description is hardly commensurate with the portrait of mercantile law as entitled to exclusive jurisdiction

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293. MOORE, *supra* note 11, at 168 n.96.

294. 5 HOLDSWORTH, *supra* note 89, at 106. In an earlier volume, he claimed that “it is clear from the records of the courts of [fairs such as St. Ives] that they were of the same type as the courts of similar fairs which existed all over Europe.” 1 *id.* at 536.

295. *LEX MERCATORIA*, *supra* note 20, at 2-3.

296. *Id.* at 3.

297. *Id.* at 18.

298. *Id.* at 2.

over commercial cases, or as an escape from an oppressive, archaic common law.<sup>299</sup>

Examining *Lex Mercatoria* does reveal some general principles followed by the St. Ives court—for instance, the speedy process of justice. However, contrary to Moore's account, the differences between the procedures described in the treatise and those implemented in the fair court are striking and fundamental. A first example of such discrepancies regards the disposition of attached goods when their owner is absent. Merchant courts moved quickly; most pleas were addressed in a single day or perhaps over two days. According to *Lex Mercatoria*, those defendants who did not appear in three consecutive courts were to be declared in default, in which case the plaintiffs would be able to offer proof in their absence and subsequently seize those goods that had been attached to secure the defendants' appearance. The author of *Lex Mercatoria* notes this procedure and recognizes the difficulties that might attend it, especially for defendants who are far away from the fair grounds when the case is brought. After briefly considering whether such a procedure is just, the author then notes that "it is ordained" that if those attached are in distant parts, they are to receive a grace period of several days depending on the distance, so that they will be able to reach the court in time to defend their goods.<sup>300</sup>

Yet this discussion of attached goods weakens, in three distinct ways, the view of mercantile law as universal. First, although the language used in the passage of *Lex Mercatoria* is similar to that used when the author refers to a royal statute or other formal ordinance, no such statute has been found.<sup>301</sup> The "ordained" procedure seems to represent wishful thinking on the part of the

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299. Indeed, Holdsworth interpreted the limited differences asserted in *Lex Mercatoria* as evidence of the creeping incorporation of the law merchant into the common law. The author of the treatise, he wrote, "regards the Law Merchant as a mere off-shoot of the common law," and "can only point to three specific differences." 1 HOLDSWORTH, *supra* note 89, at 539. But if *Lex Mercatoria* accurately describes the system in use across Europe, as Holdsworth also maintained, *see* 5 *id.* at 106; *see also supra* note 294, then of what differences from the common law does the law merchant consist?

300. *See LEX MERCATORIA*, *supra* note 20, at 7-10; LMLP, *supra* note 20, at 69-71.

301. *See LEX MERCATORIA*, *supra* note 20, at 9; LMLP, *supra* note 20, at 69-71.

author rather than actual practice of the thirteenth and fourteenth centuries.<sup>302</sup> Second, the passage notes significant discrepancies in the procedures of various courts. In criticizing the current procedures for addressing attachment, it notes that the distrains were handled “in such different ways in different parts [of the kingdom] that no one at all was able to know or learn the process of mercantile law in this respect,” a description that contrasts sharply with a view of mercantile law as substantially uniform.<sup>303</sup> Third, the rapid disposition the author described as widespread does not seem to have been the practice at the court of St. Ives, which regularly delayed disposition of attached goods—sometimes only until the close of the fair, but often for a year or more. At the fair of 1299, for example, Adam of Yarmouth sued John Fick of Hawley, who failed to appear; a white horse of Fick’s was attached, but Adam did not receive the value of the horse until the close of the fair of 1300, after more than a year of repeated defaults.<sup>304</sup>

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302. This is not the only instance in which the author of *Lex Mercatoria* failed to distinguish between his preferences and existing practice. We have already encountered the treatise’s declaration that “every judgment ought to be rendered by merchants of the same court and not by the mayor or by the seneschal of the market.” *LEX MERCATORIA*, *supra* note 20, at 20; *see supra* text accompanying note 83. However, although the author identified a specific writ in royal court as the proper corrective for a steward who has overstepped his bounds, there is no extant writ of the form he described, nor is there any record of a trespass action brought against a steward or mayor on these grounds—leading Basile *et al.* to conclude that this ‘ordinance’ is a recommendation instead of an existing statute. *LMLP*, *supra* note 20, at 74-76.

303. *LEX MERCATORIA*, *supra* note 20, at 9. Scrutton made a similar admission with regard to the seventeenth and eighteenth centuries:

And as the Law Merchant was considered as custom, it was the habit to leave the custom and the facts to the jury without any directions in point of law, with a result that cases were rarely reported as laying down any particular rule, because it was almost impossible to separate the custom from the facts; as a result little was done towards building up any system of Mercantile Law in England.

Scrutton, *supra* note 25, at 13.

304. *Yarmouth v. Fick* (St. Ives Fair Ct. 1299), *in* 1 *SCLM*, *supra* note 1, at 81. This appears to have been the standard practice, whereby there were no defaults from fair to fair. *See Ulting v. Hardwick* (St. Ives Fair Ct. 1315), *in* 1 *SCLM*, *supra* note 1, at 97 (delaying the final execution by a year); 1 *SCLM*, *supra* note 1, at 101 (punishing one of the sureties for goods attached in *Ulting* for failing to answer for their value); *see also supra* note 191 (surveying customary attachment of goods).

More damningly, the strictures of *Lex Mercatoria* also contradict St. Ives practice regarding such fundamental procedures as the nature of proof, a subject central to the functioning of any court. The treatise states unambiguously that mercantile law differs from the common law in that “it does not admit anyone to [wager of] law on the negative side, but in this law it always belongs to the plaintiff to prove, for example, by suit or by deed or both, and not to the defendant.”<sup>305</sup> As noted above, it lists this distinction as one of the three general differences between mercantile and common law.<sup>306</sup> In medieval English courts, proof was an advantage rather than a burden; a defendant who could wage his law—take a solemn oath, together with a specified number of oath-helpers, that the allegations against him were false—could establish his innocence at once.<sup>307</sup> The treatise later repeats this provision, noting that although common law might allow the defendant to wage his law when no tally, writing, or other record of the sale has been preserved, mercantile law says otherwise—“in no way ought [the defendant] be admitted to this.” The author went on to explain that merchants often sell their goods on credit without tallies or writings, and it would be “hard and very tedious and a kind of burden and continuous obstacle to them” if plaintiffs were forced to record in full detail even the most minor of transactions.<sup>308</sup>

Despite the strength of the author’s convictions on this point, the St. Ives fair rolls show precisely the opposite procedure. In 1275, Ralph Raven sued Alan Cobbler of St. Ives for a debt of 8s. in silver in payment for tanned hides. Cobbler waged his law, and the next day he swore successfully and was released. The court then fined Raven 6d. for making a false claim.<sup>309</sup> This is only one among scores

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305. *LEX MERCATORIA*, *supra* note 20, at 3.

306. *Id.*; see also 2 FLETA, *supra* note 76, ch. 63 (“The position is different, however, in cities and fairs and among merchants, in whose favour, by the grace of the prince, it is granted that proof shall be the privilege of the party asserting the claim, in accordance with the law merchant [*secundum legem mercatoriam*] . . .”).

307. The fact that the word “law” is used as a synonym for “oath” shows the respect accorded to solemn oaths in this period. See LMLP, *supra* note 20, at 63.

308. *LEX MERCATORIA*, *supra* note 20, at 11. A tally was a notched stick that was used as a record of debts.

309. Raven v. Cobbler (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 144-45.

of cases settled by a defendant's wager of law, which appears to have been the accepted practice in St. Ives. In fact, the translated records appear to contain only two instances of a plaintiff's wager of law.<sup>310</sup> Clearly, the oaths of defendants in pleas of debt were given full weight in the St. Ives court, just as they were in other seignorial and fair courts.<sup>311</sup> It is hard to overstate the importance of this fundamental discrepancy, given that the features said to be unique to mercantile courts are almost entirely procedural in nature.<sup>312</sup>

A final argument against *Lex Mercatoria* providing the substance of a universal law merchant is that it does not address a number of questions that were resolved *secundum legem mercatoriam* at St. Ives. Whether the victim of an assault must specify the day of the year the assault occurred, or whether a butcher can intervene in a sale of meat or fish by crying "Halves," are never considered in this

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310. In the case of *Holywell v. Beverley* (St. Ives Fair Ct. 1270), in 1 SCLM, *supra* note 1, at 7, Michael of Holywell is recorded to have made his law sufficiently against Stephen of Beverley and his fellow Nigel, whom he had accused of detaining 5 marks and 5s. payment on eleven treys of barley. However, the earlier proceedings in the case are not preserved; depending on what occurred before the records begin, it is possible that this case is consistent with the rest of the case law in denying plaintiffs the opportunity to wage their law. A similar explanation can be provided for *Lattener v. Goodrich* (St. Ives Fair Ct. 1293), in 1 SCLM, *supra* note 1, at 59, in which the defense rests on a counterclaim; Henry noted that "the defendant has become plaintiff and the plaintiff defendant," so that "it is not strange to see the plaintiff allowed to prove payment by his law." HENRY, *supra* note 203, at 31. A plaintiff was also permitted to wage his law in the archbishop's court of Beverley, after his tally had been denied by the defendant; the parties eventually came before the fair court of St. Ives, which rendered a contrary decision. See *Saxby v. Bedford*, PRO Curia Regis Roll 155, Michaelmas, m. 1d (K.B. 1255), in 2 SCLM, *supra* note 38, at 5; see also *supra* note 126.

311. The defendant's wager of law, even in cases of debt, is presented as standard practice for seignorial courts in *The Manner of Holding Courts—John de Longueville*, *supra* note 111, at 84. The same practice was adopted by the fair court of Leicester; in 1347, Nicholas of Austrey sued Richard of Mansfield and his wife Agnes for a debt of 15s., and Richard was allowed to make his law. *Austrey v. Mansfield* (Leicester Fair Ct. 1347), in 2 RECORDS OF THE BOROUGH OF LEICESTER, *supra* note 18, at 73.

312. To Maitland, for example, the law merchant "would . . . have been found chiefly to consist of what would now be called rules of evidence, rules about the proof to be given of sales and other contracts." 1 POLLOCK & MAITLAND, *supra* note 37, at 467.

treatise,<sup>313</sup> indeed, they would seem quite out of place. Yet if the author considered himself to be presenting a complete description of a complete legal system—as the enumeration of differences from the common law would imply—these omissions seem to indicate either that the author was unaware of the customs practiced at St. Ives, or that he did not consider those customs to be part of mercantile law.

Thus, *Lex Mercatoria* does not accurately describe the practice of commercial law at St. Ives. But if the text contains deliberate or accidental falsehoods as to the widely-recognized content of mercantile law, one would expect those falsehoods to have been caught, refuted, or corrected by readers familiar with its terms.<sup>314</sup> Alternatively, mercantile law may have been sufficiently malleable and variable across distances that fundamentally different procedures could be used in St. Ives without a concerned and learned author sixty miles away in London becoming aware of it.<sup>315</sup> In that case, Malynes' claim that the law merchant was uniformly "observed in all places" seems entirely without foundation.<sup>316</sup>

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313. *Darlington v. Burser* (St. Ives Fair Ct. 1302), in 1 SCLM, *supra* note 1, at 85; *Legge v. Mildenhall* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 46-47.

314. Indeed, at least one portion of the text seems to have been added by a later writer, namely the purported exchange of letters between the merchant courts of London and Paris noted in Part I. *See supra* note 67. The exchange is probably fictional; some letters are dated both to the calendar year and to the regnal year of Phillip the Fair, but the two dates do not correspond. A sample letter dated 1296 mentions King Phillip "of glorious memory," but he did not die until 1314. Furthermore, the proposed letter from Paris refers to the city's "guildhall," an institution that was well known in London but which had no known equivalent in Paris at this time. Basile *et al.* speculated that the choice of Paris as the correspondent city may have been intended to show solidarity between merchant communities even in a time of war between England and France. *See LEX MERCATORIA*, *supra* note 20, at 38-40; LMLP, *supra* note 20, at 103-05. Holdsworth, however, cited these letters to demonstrate "the communications maintained between the courts of different fairs, whether in England or abroad." 5 HOLDSWORTH, *supra* note 89, at 107.

315. In at least one mercantile court of thirteenth-century London, however, the decisions were rendered by the warden together with the aldermen—not merely merchants at large, but holders of a recognized municipal office. *See* H.G. Richardson, *Law Merchant in London in 1292*, 37 ENG. HIST. REV. 245 (1922).

316. MALYNES, *supra* note 204, at vi-vii, 3. In fact, the mercantile law described in *Lex Mercatoria* may be nothing like the commercial law with which Malynes was familiar. *Cf.* Paul R. Teetor, *England's Earliest Treatise on the Law Merchant*,

## 2. Cities and Towns

Mercantile law, *Lex Mercatoria* states in its first chapter, “is thought to come from the market,” emerging from the practice of trade.<sup>317</sup> Given that markets are said to have been found in five places—“cities, fairs, seaports, market-towns, and boroughs”—we might do well to look at the practice of mercantile law in English cities, market-towns, and boroughs.<sup>318</sup> Holdsworth added that whether or not a borough held a separate piepowder court, the fact that it was a center of trade “often caused the customary law administered in its court to be better suited to the needs of commerce than the common law”; the emphasis on equity “clearly made for the reception and recognition of reasonable mercantile customs, and enabled such courts, when necessary, to administer the law merchant.”<sup>319</sup>

Was Holdsworth correct in his assessment, and did cities and towns govern their commercial activity through a shared law merchant? It would be a significant undertaking to consider the records of cities, towns, and boroughs across England in the same level of detail that has been applied to St. Ives. However, from a limited examination of customals and other documents stating the local laws on mercantile matters, two observations arise.

First, the records present the customs as part of a body of law specific to the town, with no external justification in a universal law merchant or general regulatory principles. The Bristol customal (c. 1240) echoes the language of *Lex Mercatoria*, but not its reasoning—burgesses and strangers could plead among themselves “from day to day, without writ, according to the custom of the town.”<sup>320</sup> Similarly, if a merchant in the town of Grimsby refused to

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6 AM. J. LEGAL HIST. 178, 180 (1962) (noting that while the ancestry of the “law merchant” of Justices Holt and Mansfield can be found in seventeenth-century authors, *Lex Mercatoria* depicts “a rudimentary commercial law so different in many respects as to raise serious questions about the nature of its connection with the later ‘law merchant’ despite the identity of names”).

317. *LEX MERCATORIA*, *supra* note 20, at 1.

318. *See id.*

319. 1 HOLDSWORTH, *supra* note 89, at 538.

320. 2 BOROUGH CUSTOMS 184 (Mary Bateson ed. & trans., Selden Society 21, 1906).

acknowledge a debt, according to the 1259 town charter he would “enjoy the law and custom of the said town” in proving his case—recognizing that customs could differ from place to place.<sup>321</sup> To the author of *Lex Mercatoria*, these matters would be properly covered by mercantile law; the towns regarded them simply as part of local custom. Occasionally the local records invoked mercantile law explicitly, as in the case of the 1291 Ipswich customal, which guarantees to plaintiffs in certain circumstances a “good inquest according to merchant law [*solom ley marchaunde*] in the form below written.”<sup>322</sup> These references to mercantile law appear only in the context of a local rule; the customals advance no claim that courts elsewhere in England were obliged to follow the same procedure.

Second, the differences among the local customs found in the records are significant. These cannot be dismissed as minor variations in procedure, peculiarities that should be expected in a legal environment where communication is slow and record-keeping expensive; to judge from the references at St. Ives, much of mercantile law consists of procedure.<sup>323</sup> If one were to ignore the areas of law for which the variations were extensive, very little of a shared “law merchant” would remain.

Consider the subject of earnest money, frequently invoked by historians identifying differences between the law merchant and the common law. In St. Ives, the payment of a “God’s penny” or other earnest money signaled the conclusion of a sale; in *Tempsford v. Chaplain*, the assembled merchants declared that a buyer had “according to the law merchant . . . sufficiently concluded the purchase of the said horse by giving a God’s penny” to the seller.<sup>324</sup>

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321. 1 BOROUGH CUSTOMS 126 (Mary Bateson ed. & trans., Selden Society 18, 1904). According to a 1280 charter, the fairs of St. Edward at Westminster were to observe “the same customs . . . as in the fair of St. Giles of Winchester,” and their wardens were to “show full justice . . . according to the custom of the fair of Winchester.” Confirmation of the Charters of the Abbot and Monks of Westminster, 9 Edw., m. 15 (Nov. 24, 1280), in 2 CHARTER ROLLS, *supra* note 41, at 239, 239.

322. 2 BOROUGH CUSTOMS, *supra* note 320, at 188.

323. See *supra* note 312.

324. *Tempsford v. Chaplain* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 44-45.

A similar policy is found in the 1249 *Statuta Gilde* of Berwick, in which anyone who had already paid the God's penny or other earnest money "shall pay the merchant from whom he bought the said goods according to the bargain made, without breach of contract or breach of the earnest."<sup>325</sup> However, such rules were not unique to merchants, as is shown by non-mercantile sources such as Bracton and "The Court Baron."<sup>326</sup> Nor was the rule necessarily uniform, for other jurisdictions did not treat sales as final once earnest money had been paid—or, at the very least, made them conditional on the seller's acceptance of the earnest. The twelfth-century Preston custumal states that a seller may cancel the bargain before delivery by repaying double the buyer's earnest; in the case that the buyer has already handled the goods, "he must either have them or 5s. from the seller."<sup>327</sup> In 1303, *Carta Mercatoria* attempted to standardize the law on this point, stating explicitly that "neither of the merchants can withdraw or retire from that contract after God's penny shall have been given and received between the principal contracting persons."<sup>328</sup> Yet exceptions still remained; in Waterford, an early fourteenth-century custumal allows buyers to "repent" of having given the "God's silver" for a payment of 10s.<sup>329</sup>

One could also compare the local customs on wager of law. We have already noted the divergence of St. Ives practice from that of *Lex Mercatoria*, as well as the significant discretion the fair court enjoyed in applying its own rules on the subject.<sup>330</sup> Yet a very brief

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325. 1 BOROUGH CUSTOMS, *supra* note 321, at 217.

326. 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 182 (Samuel E. Thorne trans., 1968) (ca. 1220-1250) [hereinafter 2 BRACTON] ("A purchase and sale is contracted when the contracting parties agree on the price, provided the seller has received something in the name of earnest, for what is given by way of earnest is evidence that a purchase and sale has been concluded."); *The Court Baron*, *supra* note 132, at 40.

327. 2 BRACTON, *supra* note 326, at 217. For a separate account of the same practice written *circa* 1290, see 2 FLETA, *supra* note 76, ch. 58 ("[T]he custom of merchants . . . lays it down, in accordance with the law merchant [*secundum legem mercatoriam*], that the seller in this case is either to deliver to the buyer the thing bought or to pay five shillings for every farthing of earnest-money.").

328. *Carta Mercatoria*, *supra* note 163, at 213.

329. 1 BOROUGH CUSTOMS, *supra* note 321, at 218.

330. See *supra* text accompanying notes 254-255, 305-312.

examination of town and borough documents reveals a myriad of customs on the manner of proof. Some towns followed the practice set out in *Lex Mercatoria*, whereby the responsibility of proof fell entirely on the plaintiff. In the Irish town of Kilkenny, a fourteenth-century custumal states that “every plaintiff ought to prove his action by the suit of two lawful men brought with him,” and defendants were given no opportunity to offer proof in their defense.<sup>331</sup> Similarly, a 1291 Ipswich custumal notes that in minor transactions “it is not usual for merchants to make writing or tally for the speedy payment,” and the buyer therefore “shall not be allowed in pleading to defend by his law,” so long as the sale or delivery “can be proved or averred by good inquest according to merchant law [*solom ley marchaunde*].”<sup>332</sup> However, a number of other towns allowed the defendant to wage his law three-handed (with two oath-helpers) in cases of debt, even if the plaintiff brought a suit of witnesses.<sup>333</sup> A 1348 custumal in Northampton allows defendants in small cases with less than 12d. at issue to wage their law without a single compurgator, and twelfth-century London did the same for foreigners who could not find six countrymen to join them (although the defendant was required to repeat his oath at the six nearest churches).<sup>334</sup>

A final example can be found in the practice of “market overt.” In St. Ives and elsewhere, buyers were allowed to retain stolen goods if they were purchased in good faith.<sup>335</sup> However, although this principle has been described as a major element differentiating the law merchant from the common law,<sup>336</sup> the practice was not

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331. 2 BOROUGH CUSTOMS, *supra* note 320, at 187.

332. *Id.* at 188.

333. Examples include the 1301 Manchester custumal, 1 BOROUGH CUSTOMS, *supra* note 321, at 180-81, and the twelfth-century Preston custumal, *id.* at 178. “Suit” here again refers to the *secta*. See *supra* note 91.

334. 1 BOROUGH CUSTOMS, *supra* note 321, at 177, 181; *cf.* 2 FLETA, *supra* note 76, ch. 63 (describing it as a “custom among merchants” that a repudiated tally can be proven if the defendant goes to nine churches and swears upon nine altars).

335. See *Tanner v. Francis* (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 48; 1 BOROUGH CUSTOMS, *supra* note 321, at 59-60 (describing the customs of Fordwich).

336. See *Carter*, *supra* note 18, at 243; Peter M. Smith, *Valediction to Market Overt*, 41 AM. J. LEGAL HIST. 225, 229 (1997).

universally shared. In Chester, Exeter, and Waterford, for example, the custom was the exact opposite; even a good-faith buyer would as a matter of course lose the goods to their original owner.<sup>337</sup>

In even a short survey of local practices, one finds a series of unique customs, each stranger than the next. If a citizen of Waterford bought from a foreign merchant and could not make the payment before the merchant made ready to return overseas, then the citizen had “only three ebbs and three floods as delay,” after which the bailiffs would pay the merchant and recover from the debtor.<sup>338</sup> Under the early-fourteenth-century Norwich customal, whether a plaintiff could “exclude his adversary from his law” depended on whether the trespass was committed within the bounds of the market; if not, a jury would be selected from “that neighbourhood where the deed was done.”<sup>339</sup> Finally, under the Ipswich customal of 1291, a group of ten compurgators was customarily winnowed to four using a random selection procedure involving a thrown knife.<sup>340</sup>

None of these practices were found at St. Ives or in *Lex Mercatoria*, and none seem consistent with the narrative of universal rather than local regulation of trade. Nor is there evidence that local principles were usually conceptualized as part of a common legal tradition. Towns occasionally borrowed customs from each other, but this imitation occurred piecemeal, and would sometimes be *opposed* by those towns whose laws were imitated.<sup>341</sup>

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337. The charters and customals of Chester, Exeter, and Waterford prescribe strict measures for stolen goods. See 1 BOROUGH CUSTOMS, *supra* note 321, at 57-59.

338. 2 BOROUGH CUSTOMS, *supra* note 320, at 184-85.

339. *Id.* at 189.

340. 1 BOROUGH CUSTOMS, *supra* note 321, at 179-80.

341. In 1284, John of Gaunt requested that certain customs of the city of Hereford “be certified for the use of the men of [Cardiff] then desiring the same, also for the use of other [villages] whose necessity should require them.” 1 CARDIFF RECORDS 13 (John Hobson Matthews ed., Cardiff, Elliot Stock 1898); RICHARD JOHNSON, THE ANCIENT CUSTOMS OF THE CITY OF HEREFORD 26 (London, J.B. Nichols & Sons 1868). Hereford had no objection to sharing its customs with other royal towns, but would not do so for towns held by “divers[e] lords of the kingdom,” which were “not of our condition” and would have to pay a fee. JOHNSON, *supra*, at 27. Customs were often requested by lords in order to grant equal privileges to another town, which may explain Hereford’s desire to

In the end, Holdsworth himself concluded that the borough courts do not fit his model of the law merchant. Although commercial needs may have influenced their procedures, he noted that “commercial law does not . . . hold a large place in the borough customals,” and one must look to the courts of the fairs, rather than those of the boroughs, to “trace the development of commercial law” in medieval England.<sup>342</sup>

Given that the evidence from fairs is largely restricted to St. Ives, these discrepancies call into question the very notion of a shared body of mercantile law. A more compelling understanding might be that the merchants who asked that their cases be judged *secundum legem mercatoriam* were not necessarily all asking for the same thing. Perhaps these merchants wanted only to be judged with fairness and in accordance with commercial practice, and used general terminology even if those practices were not themselves universal.

### C. THE COUNTER-ARGUMENT: ROYAL RECOGNITION

The above discussion has documented substantial variation in the governance of trade within and among medieval English courts, and has suggested that there was no *unified* body of law deserving the name “the law merchant.” Yet the phrase *lex mercatoria* appears in the documents, and it must have had some meaning to the lawyers and clerks who wrote them. This section will therefore examine two such documents, the *Carta Mercatoria* and the Statute of the Staple, which are traditionally interpreted as strong evidence that their contemporaries recognized a distinct law merchant transcending local boundaries.<sup>343</sup> These documents clearly describe *lex mercatoria* as the proper means of deciding certain mercantile cases. However, one can invoke the concept of mercantile law without necessarily recognizing any particular provisions as being part of one “law

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protect its elevated status. *See id.* at 9 (describing the process for the village of Drussellane).

342. 5 HOLDSWORTH, *supra* note 89, at 105-06.

343. *See, e.g.,* John H. Munro, *The International Law Merchant and the Evolution of Negotiable Credit in Late-Medieval England and the Low Countries*, in *BANCHI PUBBLICI, BANCHI PRIVATI E MONTI DI PIETÀ NELL'EUROPA PREINDUSTRIALE* 49, 53 (Dino Puncuh ed., *Atti della Società Ligure di Storia Patria*, n.s., 31, no. 1, 1991); Benson, *Justice Without Government*, *supra* note 5, at 131.

merchant.” Indeed, the best evidence from the charter and the statute, as well as from the courts that they governed, indicates that the practice of mercantile law differed from court to court—and, more importantly, that contemporaries tolerated and expected this variation.

For the *Carta Mercatoria*, issued by Edward I in 1303, the case is easy to make. Among the many other privileges granted in the charter to foreign merchants, the king ordered “all bailiffs and ministers of fairs, cities, boroughs and market-towns” to do “speedy justice to the merchants . . . who complain before them from day to day without delay according to the Law Merchant touching all and singular complaints which can be determined by the same law.”<sup>344</sup> Yet the charter states two clauses earlier that if disputes should arise over contracts sealed with a God’s penny—in other words, disputes over sales, the most common source of business for a merchant court—then “proof or inquisition shall be made thereof according to the uses and customs of the fairs and towns where the said contract shall happen to be made and entered upon.”<sup>345</sup> Evidently, as William Mitchell noted, “the usages and customs of fairs differed.”<sup>346</sup> Similar language can be found in a charter issued to the merchant vintners of Aquitaine a year earlier; although it requires the localities to do “speedy justice . . . according to the law merchant,” it also provides that in contractual disputes, proof would be made “according to the uses and customs of the fairs and towns where the said contract was made.”<sup>347</sup> Far from establishing a single legal code throughout the realm, the *Carta Mercatoria* guaranteed a more rapid method of dispute resolution, which followed the various uses and customs of the commercial towns and fairs.

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344. *Carta Mercatoria*, *supra* note 163, at 213.

345. *Id.*

346. MITCHELL, *supra* note 4, at 6.

347. Charter to the Merchants of Aquitaine, 30 Edw., m. 2 (Aug. 13, 1302), in 3 CHARTER ROLLS, *supra* note 266, at 29, 29-30; *see also* Charter to the Burgesses of Melecumbe, in 2 CHARTER ROLLS, *supra* note 41, at 223.

The Statute of the Staple, issued by Edward III in 1353, poses a more complex issue.<sup>348</sup> This statute established certain staple towns (among them York, Canterbury, and Westminster) with a joint monopoly over the trade of wool, leather, and lead. Although this statute falls outside the period of the St. Ives rolls, it is frequently cited as evidence that a substantive law merchant was recognized as separate from the common law or the varying local customs. Clause 8 of the statute gives exclusive jurisdiction over the staple to the officials who oversee it, and explicitly provides that the merchants coming to the staple towns “shall be ruled by the Law-Merchant [*la lei marchant*], of all Things touching the Staple, and not by the common Law of the Land, nor by Usage of Cities, Boroughs, or other Towns[.]”<sup>349</sup>

However, there are five reasons to doubt that the *lei marchant* of the statute was a uniform, substantive body of law. First, when viewed in context, the protection granted in clause 8 appears to be primarily jurisdictional in nature, concerning the choice of forum rather than the choice of law. The clause reads more fully,

the Mayors and Constables of the Staple shall have Jurisdiction and Cognisance within the Towns where the Staples shall be . . . of all Manner of Things touching the Staple; and that all Merchants coming to the Staple . . . shall be ruled by the Law-Merchant, of all Things touching the Staple, and not by the common Law of the Land, nor by Usage of Cities, Boroughs, or other Towns; and that *they shall not implead nor be impleaded before the Justices of the said Places* [i.e., ‘Cities, Boroughs, or other Towns’] in Plea of Debt, Covenant and Trespass, touching the Staple, but shall implead all Persons of whom they will complain, as well such as be not of the Staple, as those that be of the Staple, . . . only before the Mayor and Justices of the Staple.<sup>350</sup>

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348. Statute of the Staple, 1353, 27 Edw. 3, stat. 2 (Eng.), *reprinted in* 1 STATUTES OF THE REALM, *supra* note 51, at 332 (also described as the “Ordinance of the Staples”).

349. *Id.* cl. 8, *reprinted in* 1 STATUTES OF THE REALM, *supra* note 51, at 336.

350. *Id.* (emphasis added).

The effect of this passage was not to eliminate all variation in the laws applied by staple courts, but rather to guarantee that claims arising out of the staples would be heard *there*, in the staples, rather than in *other* “Cities, Boroughs, or other Towns” under their own laws.<sup>351</sup> The danger was that merchant plaintiffs might confront defendants who claimed, as did William of Fleetbridge at St. Ives, that they could only be sued in London or in some other jurisdiction.<sup>352</sup> If a plaintiff chose to sue elsewhere, however, he would have the right to do so. Clause 8 explicitly identifies the purpose of its own provisions: they were instituted “so always that of all Manner of Contracts and Covenants . . . the Party Plaintiff shall [choose] whether he will sue his Action or Quarrel before the Justices of the Staple by the Law of the Staple [*la lei de lestaple*], or in other Place [e.g., in royal courts] [at] the common Law.”<sup>353</sup>

Second, the statute’s repeated references to the “Law of the Staple” blur the distinction between a mercantile law meant to apply

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351. The insistence that cases be heard by the justices of the staple is also found in Clause 5, which provides that the staple courts will not be interrupted by a general eyre (in which royal justices hear all the cases arising within a county, and local systems of justice are suspended). *Id.* cl. 5, reprinted in 1 STATUTES OF THE REALM, *supra* note 51, at 335.

352. Fleetbridge v. Coventry (St. Ives Fair Ct. 1275), in 1 SELECT PLEAS, *supra* note 14, at 155. After the Statute of the Staple, the Mayor of London began to invoke his concurrent status as Mayor of the Staple of Westminster in claiming authority to decide mercantile cases. See Senyger v. Pope (1380), in 2 CALENDAR OF PLEA AND MEMORANDA ROLLS 277 (A.H. Thomas ed., 1926) [hereinafter PLEA AND MEMORANDA ROLLS] (“[The Mayor] inform[s] the parties that he was Mayor of the Staple of Westminster as well as Mayor of the City of London, and that the law merchant was pleadable before him both in the Staple and the Chamber of the Guildhall.”); Mageri v. Grameny (1380), in PLEA AND MEMORANDA ROLLS, *supra*, at 283. Such authority was not required merely to decide cases in which merchants were a party. In what may be the earliest recorded example of English soccer violence, a group of London tailors and furriers were imprisoned in 1373 for having “made an assembly, under colour of playing with a football, in order to assault others, occasion disputes, and perpetrate other evil deeds against the peace . . .” PLEA AND MEMORANDA ROLLS, *supra*, at 152. See generally ERIC DUNNING ET AL., THE ROOTS OF FOOTBALL HOOLIGANISM: AN HISTORICAL AND SOCIOLOGICAL STUDY (1998).

353. Statute of the Staple, 1353, 27 Edw. 3, stat. 2, cl. 8 (Eng.), reprinted in 1 STATUTES OF THE REALM, *supra* note 51, at 336. Additionally, the staple courts were intended to be sources of “contracts of record,” which would be styled as judgments. Restricting future litigation to the staple courts would have helped to ensure the effectiveness of such contracts.

to all trade and the specific laws applied by the various staple courts. The phrase “Law of the Staple” appears far more frequently in the statute than the phrase “Law-Merchant,” and in certain instances, the statute uses the terms *lei marchant* and *lei de lestaple* interchangeably. Clause 20 mandates that when foreign merchants suffer “Outrages” outside the bounds of the staple, the justices of that place “shall do speedy justice to them after the Law-Merchant from Day to Day, and from Hour to Hour, without sparing any Man or [driving] them to sue at the common Law.”<sup>354</sup> Almost identical language is used to describe the procedure for dealing with one who levies unlawful taxes on foreign merchants; clause 2 states that “speedy and ready Process shall be against him from Day to Day, and from Hour to Hour, according to the Law of the Staple, and not at the Common Law.”<sup>355</sup> Similarly, clause 21 specifies that the mayors of the staples are to have “Knowledge of the Law-Merchant, to govern the Staple”; yet at the same time, they are to punish violators “after the Law of the Staple.”<sup>356</sup> Clause 23 of the statute requires that merchants agree to the mayor and constables’ exercise of jurisdiction “according to the Law and Usage of the Staple [*la lei & usage de lestaple*]” and that the merchants also preserve the staple “and the Laws and Usages of the same [*les leis & usages dycelle*], without fraud or deceit.”<sup>357</sup> The conceptual plurality of these laws and usages does not sit easily with the vision of a single, invariant law merchant.

Third, the practical application of the *lei marchant* and the *lei de lestaple* portrays the law of the staple courts as more local than universal. Although few records of staple court proceedings survive, we find in the records of two very late cases that the concept of the *lei de lestaple* allowed for variations from place to place.<sup>358</sup> The

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354. *Id.* cl. 20, reprinted in 1 STATUTES OF THE REALM, *supra* note 51, at 340.

355. *Id.* cl. 2, reprinted in 1 STATUTES OF THE REALM, *supra* note 51, at 334.

356. *Id.* cl. 21, reprinted in 1 STATUTES OF THE REALM, *supra* note 51, at 340-41. This clause might read more sensibly if it were translated as requiring “knowledge of mercantile law to govern the staple.”

357. *Id.* at cl. 23, reprinted in 1 STATUTES OF THE REALM, *supra* note 51, at 341.

358. As Gross noted, so few staple court records are extant that some historians have been led to think that no such records were kept; these records survived only because they were copied from the original rolls and sent to the Chancery. See Gross, *supra* note 15, at xxvii.

plaintiff in *Pope v. Davy* sued for debt in the staple court of Exeter “*secundum legem mercatoriam et stapule predicte*.” The phrase, which Gross rendered as “according to the law merchant and the law of the said staple,” indicates not two distinct laws but a single entity.<sup>359</sup> In this case, the court repeatedly recognized a law that had as much to do with a particular staple as it did with mercantile practice. Even more flexibility was shown in *Eliot v. Dyne*; here the staple court of Westminster found that a plaintiff in a case of debt could wage his law singlehandedly, as long as his account-book recorded the debt and the defendant had no written evidence that it had been paid. This judgment—which would never have been accepted at St. Ives a hundred years earlier—was rendered by the court “*solom leur usages et custumes par leye marchant*,” which Gross rendered as “according to their usages and customs and according to the law merchant.”<sup>360</sup> However, another translation might be “according to their usages and customs *by* mercantile law”—implying that “*leye marchant*” provides for the application of the suitors’ usages and customs, not of any independent substantive principles of law. After he was found guilty, the defendant was committed to prison “according to the usage of the said staple [*solom lusage du dicte estaple*].”<sup>361</sup>

Fourth, the terms *lei marchant* and *lei de lestaple* seem to be used in the statute as catch-all phrases for the customs of the court—useful concepts, but not necessarily demonstrative of the existence of an independent law. In clause 19, merchants are held not to be liable for the deeds of their servants, unless a servant acts at his master’s command, in the capacity of his office, or “in other Manner, that the Master be holden to answer for the Deed of his Servant by the Law-Merchant, as elsewhere is used.”<sup>362</sup> Because merchants cannot stay long in any one place, “speedy Right” should always be done “from

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359. *Pope v. Davy* (Exeter Staple Ct. 1428), in 1 SCLM, *supra* note 1, at 116.

360. *Eliot v. Dyne* (Westminster Staple Ct. 1401), in 1 SCLM, *supra* note 1, at 114. Although the institution of account-books developed after the time of St. Ives, that court would have rejected any suggestion that a plaintiff could win judgment solely on the evidence of his own paper records.

361. *Id.*

362. Statute of the Staple, 1353, 27 Edw. 3, stat. 2, cl. 19 (Eng.), reprinted in 1 STATUTES OF THE REALM, *supra* note 51, at 340.

Day to Day, and from Hour to Hour, according to the Laws used in such Staples before this Time holden elsewhere.”<sup>363</sup> The merchant plaintiffs were to have access to speedy procedure, and thus could not be required to sue in royal courts and at the common law; beyond that, however, the statute gives little indication of what the *lei marchant* or the *lei de lestaple* might contain. One is reminded of the grant of the fair to the abbey of Ramsey “with all customs such as any fair in all England has”; the clause indicates the presence of regulations without identifying any individual regulations in particular.<sup>364</sup> In the same way, the use of *lei marchant* and *lei de lestaple* may have been a means of referring to principles of mercantile law, but without implying that the drafters of the statute—or even the merchants for whom it was enacted—had any specific principles in mind.

Fifth, if it were a distinct legal order, the law merchant the statute describes would fail an essential test of autonomy. Both the statute and the charter grant privileges to merchants only in their capacity as *plaintiffs*, giving them the option to sue in staple courts as well as in the royal courts at common law. The defendants are given no such choice; though defendants would have generally preferred the common law, with its far more elaborate procedures and many opportunities for delay, it is not hard to imagine reasons why they might have chosen a different procedure.<sup>365</sup> The grants of the *Carta Mercatoria* and the Statute of the Staple provide no process whereby common-law claims can be removed to mercantile courts against the wishes of the plaintiff. If the customs of merchants are to serve as the principles of a *separate* legal system, rather than merely one parasitical on English law, then the principles that favor defendants must be just as binding as those favoring plaintiffs—but because of the plaintiff’s opportunities for forum-shopping, only the latter are given effect.

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363. *Id.*

364. See Charter to the Abbot of Ramsey, *supra* note 37, at 119-20.

365. For instance, eleven compurgators may be required for wager of law in a royal court, while only two or five might be required at St. Ives. See BAKER, *supra* note 20, at 87; Tempsford v. Chaplain (St. Ives Fair Ct. 1291), in 1 SCLM, *supra* note 1, at 45; 1 SCLM, *supra* note 1, at 5.

The *Carta Mercatoria* and the Statute of the Staple therefore do not establish the law merchant as a *body* of commercial law—a distinct set of substantive principles to govern trade. At a time when the common law itself, as Nathan Isaacs noted, “was little more than a series of technical rules of evidence and procedure,” references to *lex mercatoria* “indicated merely a different set of similar rules” for simpler procedure. “This,” Isaacs continued, “rather than the adoption of an imaginary code, is the purpose of the *Carta Mercatoria* . . . in promising certain foreign merchants speedy justice, *secundum legem mercatoriam*.”<sup>366</sup>

Nor can the charter and statute be viewed as creating a legal sphere beyond the reach of local authorities. We have already seen the influence of Crown and abbot at the fair court of St. Ives, and the *Carta Mercatoria* and the Statute of the Staple explicitly preserve the king’s appellate jurisdiction over mercantile courts.<sup>367</sup> Rather, they seem to protect the rights of traders to plead their cases in certain fora, subject to customs that may have been as various as the courts in which they were declared. In no sense, then, can one say that the charter and the statute subjected the commerce of medieval England to a uniform, cosmopolitan law merchant.

#### D. CONCLUSIONS

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

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366. Nathan Isaacs, *The Merchant and His Law*, 23 J. POL. ECON. 529, 530-31 (1915).

367. *Carta Mercatoria* states that bailiffs and ministers who fail to do “speedy justice” to the merchants “shall be punished in respect of us as the guilt demands.” *Carta Mercatoria*, *supra* note 163, at 213. Clause 21 of the Statute of the Staple provides that “if any Merchant will complain of the Mayor of the Constables, that they have failed of Right . . . it shall be speedily redressed by the Chancellor and our Council without Delay.” Statute of the Staple, 1353, 27 Edw. 3, stat. 2, cl. 21 (Eng.), *reprinted in* 1 STATUTES OF THE REALM, *supra* note 51, at 341.

customs, in a legal environment, were referred to under the general heading of *lex mercatoria*.

But none of this demonstrates that the merchants who sought to have their pleas adjudged *secundum legem mercatoriam* were all asking to be judged by the same law. The evidence cited above strongly implies that “*lex mercatoria*” was a general phrase for whatever law was *appropriate* to mercantile transactions, not necessarily a term for a specific body of principles actually applied to them. As in the staple court of Westminster, decisions were reached according to the courts’ usages and customs by mercantile law.<sup>368</sup> Such an interpretation would be consistent with the linguistic practices of the time; as John Hudson wrote, the Latin term *lex* was used in medieval England not only to refer to a specific body of law, but also to mean “all Law or laws, written or unwritten,” or—most importantly for our inquiry—to “indicate in a general sense what is lawful or what is considered correct procedure.”<sup>369</sup> And if different populations determined what was correct in each forum, then “the law applied would be the local mercantile understanding of what the law of the particular situation was.”<sup>370</sup>

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

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368. *Eliot v. Dyne* (Westminster Staple Ct. 1401), in 1 SCLM, *supra* note 1, at 114.

369. HUDSON, *supra* note 37, at 3. This indeterminate language seems to have been a feature of the medieval approach to law. For example, in 1199, King John granted various privileges to the city of Leicester, “saving to us and to others the just and due customs.” 1 RECORDS OF THE BOROUGH OF LEICESTER, *supra* note 18, at 7. It was a common practice in contemporary documents to refer to “just and due customs” without specifying precisely what those might be.

370. Jones, *supra* note 5, at 448.

There is little direct evidence to suggest that the conceptions of jurisprudence governing transactions in a court encompassed the regularity of application of rules either within a jurisdiction or throughout the kingdom required to support an argument that any decision reflected the collective cultural position . . . . Our preliminary sketch of cases suggests that the outcome of disputes touching fundamental issues of customary law seem to vary. I am not arguing here for contrary positions on individual issues of law[,] but rather that law in its modern sense may be absent, regardless of how judgments are articulated.<sup>371</sup>

How, then, could historians such as Mitchell have maintained that mercantile law was “possessed of a certain uniformity in its essential features?”<sup>372</sup> Though he recognized that “each country, it may almost be said each town, had its own variety of Law Merchant,” Mitchell added that they were all “varieties of the same species. Everywhere the leading principles and the most important rules were the same, or tended to become the same.”<sup>373</sup> When describing the “broad general principles” of the law merchant,<sup>374</sup> however, he offered only *procedural* descriptions—the system provided merchants with a process of justice that was equitable and swift and that took judicial notice of their customs.<sup>375</sup> These descriptions may not always apply

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371. Bonfield, *supra* note 151, at 530-31.

372. MITCHELL, *supra* note 4, at 10.

373. *Id.* at 9. However, the categorization here seems quite arbitrary. No matter how numerous the “minor points” on which mercantile law “differed . . . from place to place,” without an understanding of which features are essential, one can always assert that it possessed “a certain uniformity in its essential features.” *Id.* at 10.

374. *Id.*

375. *See id.* at 10-11 (“[The law merchant was] in the main customary law . . . . Everywhere, in commercial transactions, custom held sway, and even where the State legislated it had often merely to confirm or slightly modify the rules that had long before been established through custom.”); *id.* at 12 (“[Its jurisdiction was] summary . . . . Its justice was prompt, its procedure summary, and often the time within which disputes must be settled was narrowly limited.”); *id.* at 16, 20 (describing the law merchant as “characterized by the spirit of equity,” and stating that its development in England, France, and Italy emphasized “plain justice[,] good faith disregard of technicalities and regard for ‘the sole truth of the matter’”); *id.* at 20 (arguing that the “most striking feature” of the law merchant was “its strongly marked international character”). It is worth noting that the fourth principle is entirely circular; the “uniformity in its essential features” is what is to

to the proceedings at St. Ives;<sup>376</sup> yet even had this phenomenon occurred simultaneously in all Christendom, it still would not provide a single substantive principle that could be considered part of the “law merchant.”

Mitchell’s chapter on sale and contract reinforces this view. On nearly every substantive question he examined—whether the principle of market overt protects good-faith buyers of stolen goods;<sup>377</sup> whether unwritten contracts are binding;<sup>378</sup> whether written contracts must include consideration;<sup>379</sup> whether debts contracted at a fair must be documented by a sealed bond;<sup>380</sup> whether the lands of a debtor could be seized to pay a debt;<sup>381</sup> whether merchants can be held liable for a fellow townsman’s debts;<sup>382</sup> whether partnership must be registered with the civil authorities;<sup>383</sup> whether individual partners can enter into contracts binding on the firm;<sup>384</sup> etc.—substantial and perhaps complete disorder reigned among various European jurisdictions.<sup>385</sup> This disagreement may explain why none of Mitchell’s broad principles are substantive in nature: there were

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be proved, and one cannot use as proof an unsupported assertion that its “main lines of development were everywhere the same.” *Id.*

376. As Mitchell admitted,

The records of the Fair Court of St. Ives show that formalism and technicalities still held their ground. Verbal accuracy was required of the defendant and it was possible for a debtor to defraud his creditor and prevent attachment of his goods by going through the farce of a mock sale.

*Id.* at 17-18; *see also supra* text accompanying note 189 (describing technicalities at St. Ives).

377. MITCHELL, *supra* note 4, at 93-102; *see also supra* text accompanying note 335 (discussing market overt).

378. MITCHELL, *supra* note 4, at 102-05.

379. *Id.* at 105-07.

380. *Id.* at 110-11.

381. *Id.* at 118-19.

382. *Id.* at 122-24.

383. *Id.* at 130-32.

384. *Id.* at 132-36.

385. Consider various other passages from a single page: “The Great Fairs of Champagne had their own style, usage, and customs”; “The Merchants of Antwerp refused to submit to the law of London”; “In Italy the special codes of commerce that almost every great city possessed, show greater or smaller discrepancies in almost every section . . .” *Id.* at 2.

exceedingly few such principles that were actually shared across all of commercial Western Europe, let alone the entire world. If the law merchant is only what is held in common, then it will certainly be universal, but it may also be substantively empty. Though he insisted that the law merchant was “in its broadest sense the body of commercial rules observed throughout Western Christendom,” Mitchell had to concede that “each country developed to a certain extent upon its own lines,” and he even admitted a sense in which “an ‘English Law Merchant’ may be said to have existed”—which is *exactly* what the foreign merchant in 1473 denied before the Chancery.<sup>386</sup>

It may seem unnecessary to quibble with arguments presented more than a century ago, but the conclusions of historians such as Mitchell and Holdsworth have flowed unfiltered into much recent scholarship. Recent historians have also accepted the theoretical approach of older scholars, conceding wide gaps in actual practice in order to preserve the integrity of the law merchant in theory. In 1901, Albert Thomas Carter described the law merchant as “slightly affected, perhaps by local variations,” but maintained that it was still “really Law, and it was really International.”<sup>387</sup> Similarly, Trakman wrote in 2003 that “[l]ocal lords certainly had a significant impact on both the inception and application of the medieval Law Merchant,” but continued to describe it as a single phenomenon even as it “acquired a distinctly local flavour.”<sup>388</sup> How various must legal practices be—and how distant from the contemporary sources must be the notion of a universal body of substantive law—before one abandons the terminology of a unitary law? Why not settle for studying the common elements in customs, while accepting that different substantive law may have been applied in different jurisdictions?<sup>389</sup>

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386. *Id.* at 115. To be fair, one should note that Mitchell had a far better command of the primary sources than many other historians who have written on the law merchant. This may be the source of the logical tensions underlying his argument. Mitchell wrote as if he were aware of the cracks in the dike, but was unwilling to reject the historiographical tradition and to revise the prevailing interpretation.

387. Carter, *supra* note 18, at 232.

388. Trakman, *E-Merchant Law*, *supra* note 5, at 276, 290.

389. This was the very sensible approach of Kadens, *supra* note 20, at 63-64,

Indeed, even Holdsworth was compelled to this conclusion after his examination of the English sources. The law merchant *must* have been “essentially cosmopolitan” in character, he argued, for only a law “from which national technicalities were as far as possible eliminated . . . would suffice for [merchants’] needs.”<sup>390</sup> Unfortunately, Holdsworth was unable to find among English merchants, with their “peculiar customs” and “peculiar privileges,” evidence in accord with this description.<sup>391</sup> After recommending that one look to the fair courts, rather than those of the boroughs, to “trace the development of commercial law,”<sup>392</sup> he found that the English fairs “made no permanent contribution to the growth of special commercial courts.”<sup>393</sup> One passage on the subject is worth reproducing at length:

The impression which the published records of our fair courts leaves upon me is that they were courts which dealt for the most part with petty transactions, and that consequently, the law there administered had not much chance to develop. *The forms of action, the procedure, and the rules of law possess*

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with regard to Continental sources.

390. 1 HOLDSWORTH, *supra* note 89, at 543; 5 *id.* at 109. Others might think that historians ought not to assume such “legislative functions.” BERTRAND RUSSELL, *On the Notion of Cause*, in *MYSTICISM AND LOGIC AND OTHER ESSAYS* 180, 180 (1918) (making the same point for philosophers). Before concluding that mercantile law “necessarily differed at many points from the ordinary law,” 1 HOLDSWORTH, *supra* note 89, at 543 (emphasis added), one should perhaps start by determining what the differences *were*, and then for explanation look to the needs that they might have satisfied. Carter similarly fell into the trap of inferring from present requirements to historical events: “[I]t is incredible that [the merchants] would have administered a system where their rights varied with the locality, they themselves being both litigants and judges. Owing to the exigencies of trade, merchants, of all men, require that the law should be known with precision.” Carter, *supra* note 18, at 236. However, Carter himself provided no evidence—and little can be found elsewhere—as to the precise identities of those who served as suitors of the fair courts, and it is entirely plausible that the composition of a fair court might have varied dramatically from place to place. (As Carter himself admitted, the merchant courts were no different from other English local courts in their “popular” aspect. *See supra* note 99.) Given the myriad examples of variation in legal practices, one should not ignore the documentary evidence we possess in favor of an anachronistic reading of the needs of merchants.

391. 5 HOLDSWORTH, *supra* note 89, at 66.

392. 5 *id.* at 106; *see also supra* text accompanying note 342.

393. 5 HOLDSWORTH, *supra* note 89, at 113.

*the same primitive characteristics as marked the business in other local courts.* Compurgation meets us at every turn. There is no clear line between tort and contract. . . . Neither in our fair nor our borough records do we read much of the beginnings of those legal doctrines of our modern commercial law which were beginning to spread from Italy and south-western Europe to the great fairs of France and the trading cities of the Netherlands.<sup>394</sup>

One might infer from this evidence that such commercial doctrines simply were not supposed to be there, that England possessed various mercantile customs but no cosmopolitan law merchant. Yet Holdsworth and his followers could not accept this view, for two reasons. The first reason is that the universal law merchant is thought to arise naturally from the practice of commerce and exchange, in England as elsewhere.<sup>395</sup> If the principles of the law merchant need not be approved by any sovereign legislator, the usages of trade must, in Harold Berman's phrase, be "inherently binding," and no less so in England.<sup>396</sup> The second and more problematic reason is that the evidence these authors cited to distinguish the law merchant from the ordinary law of the land is in large part derived from English sources.<sup>397</sup> *Carta Mercatoria* and the Statute of the Staple are part of the English legal tradition, not any continent-wide heritage. Even the terms used to state the thesis of a distinct law merchant suggest an English origin—especially the references to a "common law" that is not the *ius commune* of Continental merchant towns. If there is no

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394. 5 *id.* at 113-14 (emphasis added).

395. An example of this argument can be seen in Holdsworth's statements on the role of the notary. Even though the notary never held a significant position in English commerce, it is considered *natural* that he should have:

I cannot but think that if Englishmen had had much need to use the commercial instruments which these notaries drew, if these instruments had come with any frequency before the courts, we should have seen a similar class arising in England. That no such class arose in the Middle Ages points, I think, to the fact that the larger commerce was mainly in foreign hands, and that the litigation arising from it did not trouble the English courts.

5 *id.* at 115.

396. Harold J. Berman & Felix J. Dasser, *The "New" Law Merchant and the "Old": Sources, Content, and Legitimacy*, in *LEX MERCATORIA AND ARBITRATION*, *supra* note 9, at 21, 32.

397. See, e.g., 1 HOLDSWORTH, *supra* note 89, at 543.

universal law merchant in the court of an English fair, then where did it appear, and how is it known to be cosmopolitan rather than simply the expression of certain Continental customs?

The evidence from St. Ives and elsewhere encourages a different approach. Commercial regulations may simply have been part of domestic law—influenced by mercantile custom, perhaps, for reasons of efficiency, but claiming no universal authority derived from the law of Nature. Indeed, it should be difficult to convince anyone that crying “Halves!” to intervene in sales of meat and fish—however common a practice—could have long been considered “law universal throughout the world.” How this interpretation could have survived over the centuries, and why it has enjoyed such popularity among modern historians, is the story of Part III.

### III. MERCHANT LAW AND POLITICS

As Parts I and II have established, the regulation of commerce at St. Ives was not exclusively dependent on the will of the merchant community or on a set of principles known as “the law merchant.” Furthermore, no universal body of substantive law was recognized to govern trade, replacing or superseding local law that conflicted with its tenets. Why, then, do historians still invest the medieval law merchant with such authority, and still consider the merchants to have ruled their own affairs?

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

In the twentieth century, as the primary documents received closer scrutiny, historians’ understanding of medieval commercial law underwent substantial revision. In the last generation, however, the

universalist claims have again returned in the context of globalization. As international trade has grown more pervasive and complex, legal scholars have sought a uniform replacement for the crazy-quilt of local regulations that multinational corporations might face. Like the civil lawyers and the German Romantics, they have seen in the medieval law merchant what they wanted to see—in this case, a model of legal uniformity outside the framework of national governments and existing authorities. The potential implications of such a *lex mercatoria* for modern politics have clouded historians' vision of commercial law as it was practiced in the Middle Ages.<sup>398</sup>

#### A. THE CIVILIANS AND THE MERCHANT COURTS

Tendentious descriptions of mercantile law did not begin with the modern era. The 1473 Chancery decision described in Part II, which declares the law merchant “law universal throughout the world,” was ultimately rooted in jurisdictional concerns.<sup>399</sup> The central question of the case is whether a carrier of goods had committed a felony by converting the goods to his own use; if so, the king could claim the goods as waif. The law merchant is mentioned only in discussing whether “this matter ought to be determined at common law [i.e., in the common-law courts] and not here,” before the Council. The references to the “law of nature” thus served merely to establish the personal prerogative of the King (and his Council) to dispose of the case.<sup>400</sup> The case was then discussed in the Exchequer Chamber, which considered the conversion to be felonious under English law. Yet the owner was allowed to keep the goods, because the King had granted him “safe and secure conduct, both for his goods and his person.” The result was dictated by domestic law and by a royal

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398. This Article cannot provide the complete historiography of the law merchant. The discussion below is limited to those authors who have exercised the greatest influence on later scholars. For a more general survey, see Isaacs, *supra* note 366, at 536; LMLP, *supra* note 20, at 123-88.

399. See *Anon. v. Sheriff of London*, Y.B. 13 Edw. 2, fol. 9, Pasch, pl. 5 (Ch. 1473), *excerpted in* 2 SCLM, *supra* note 38, at lxxxv, lxxxvi; *see also supra* text accompanying note 234.

400. EXCHEQUER CHAMBER, *supra* note 234, at 32. The owner of the goods was an alien who traded “by reason of the King’s seal,” giving “the King . . . jurisdiction over [him].” *Id.*

grant of safe conduct; the universal law merchant played no role except as a pretext for preserving the Chancellor's jurisdiction.<sup>401</sup>

As a rhetorical tool for asserting jurisdiction, the law merchant continued to be employed in the battle between civil-law and common-law traditions. By the early sixteenth century, the civil law had come to dominate the High Court of Admiralty, and the civilians had significant institutional influence in the Chancery and in the Court of Requests.<sup>402</sup> The civilians soon found themselves fighting the common lawyers for jurisdiction, as the common-law writ of prohibition was used to block Admiralty proceedings and to force commercial cases into the common-law courts.<sup>403</sup> Much of the battle between civilians and common lawyers was waged in the political realm; yet it also provoked fierce ideological disputes, in which the partisans of each side tried to demonstrate why theirs was the proper law to govern commerce.<sup>404</sup> The law merchant, which had never been discussed formally in England by any major treatise since *Lex*

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401. *Id.* at 33-34. *Contra* 1 HOLDSWORTH, *supra* note 89, at 405 (asserting without further argument that the case "depended on the law of nature and not upon municipal law").

402. See DANIEL R. COQUILLETTE, *THE CIVILIAN WRITERS OF DOCTORS' COMMONS*, LONDON 29-30 (Comparative Studies in Continental and Anglo-American Legal History [*Vergleichende Untersuchungen zur kontinentaleuropaischen und anglo-amerikanischen Rechtsgeschichte*] 3, 1988).

403. *Id.* at 31.

404. By this period, the regulation of commerce on the Continent had been strongly influenced by the civil law. The followers of the great fourteenth-century scholar Bartolo di Sassoferrato had long attempted to create a modern system of law based primarily on the *Corpus Juris Civilis*. The political and social chasm between Italian principalities and Justinian's Empire led to intractable theoretical conflicts and "considerable intellectual agony," in Daniel Coquillette's phrase; the tensions were resolved only through the acceptance of contemporary custom as law where it did not conflict with the Roman tradition. *Id.* at 42-43. Thus, the civil tradition has been described as more flexible and providing more substantive commercial content than the English common law. *Id.*; see also *id.* at 94. Additionally, international trade brought into English courts a number of foreign traders who were familiar with the civil law's terms but who knew nothing of the common-law tradition. In 1607, the civilian Sir Thomas Ridley relied on this point to argue for civilian jurisdiction over commercial cases, writing that "[b]usiness many times concerns not only our own countrymen, but also strangers, who . . . live in countries ordered by the Civil Law." *Id.* at 120. (Spelling has been modernized in this and all quotations below.)

*Mercatoria*, suddenly became the focus of a great deal of legal attention.<sup>405</sup>

The question of which courts should hear mercantile cases turned in part on whether mercantile law was distinct from the law of the land. A number of early civilian treatises attempt to unify the civil and common law, and they portray mercantile law as merely one more aspect of this single legal framework. In the early sixteenth century, Christopher St. German separated the “law of reason” and the “law of man” into two camps, and in the latter he included both the “general customs” of the realm and those of the courts “Pypowdres.”<sup>406</sup> Yet the attempt at unity was short-lived—for if mercantile law were simply part of human law, then commercial cases might belong in the common-law courts, which were competent to interpret and apply the “general customs” of the realm. Only if mercantile law were separate from the common law, and instead part of a transnational tradition, could it be retained in separate courts staffed by the civil lawyers.<sup>407</sup>

This position was argued ably in the early seventeenth century by Sir John Davies, attorney general for Ireland under James I. In his *Question Concerning Impositions*, Davies claimed that the king had power to impose taxes on foreign trade without an act of Parliament.<sup>408</sup> He justified this claim by arguing that international trade was governed not by the common law, but by the civil law, which on his understanding granted far more authority to the sovereign. Davies began his case for mercantile exceptionalism by noting that the community of merchants “hath always had a peculiar and proper law to rule and govern it,” namely the Law Merchant, “whereof the laws of all nations do take special knowledge.”<sup>409</sup> Cases concerning merchants were therefore not to be decided by “the peculiar and ordinary Laws of every Country, but by the general Law

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405. Plucknett noted that there is no systematic treatment of the law merchant in a formal textbook in England until after the end of the Middle Ages. T.F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 659 (5th ed. 1956).

406. COQUILLETTE, *supra* note 402, at 52.

407. *Id.* at 35.

408. DAVIES, *supra* note 236, at 18.

409. *Id.* at 12.

of Nature and Nations,”<sup>410</sup> of which the Law Merchant was “a branch.”<sup>411</sup> As this Law of Nations “is nothing else but that which common reason hath established among all men,” the Law Merchant was therefore “universal and one in the same in all Countries in the World . . . [T]here is not one Law in England, another in France . . . but the same rules of reason, and the like proceedings of the Law Merchant are observed in every nation.”<sup>412</sup>

Once he had established that the laws of commerce were not local to England, Davies could then argue that the question of impositions was best addressed within an external legal tradition. The civil law had not been adopted in England as it had on the Continent, but it still prevailed within the Admiralty. The common law, Davies claimed, therefore governed “causes arising within the land only”; for cases “concerning merchants . . . crossing the seas,” civil law was more appropriate, and indeed “our Kings have ever used the Roman Civil Law for the deciding . . . thereof.”<sup>413</sup> The civil law accepted impositions, as did the Law of Nations as Davies understood it, and thus the king could claim more authority in this sphere than the common law of England would allow.

This expansive view of the Law Merchant was not limited to apologists for the Crown. The trader Gerard Malynes wrote his *Consuetudo, vel Lex Mercatoria* for the use of the practicing merchant, and much of the book discusses various types of traded goods or foreign weights and measures.<sup>414</sup> Yet Malynes was unabashed in his description of the law merchant as superior to local law. “Every man knoweth,” he wrote, of the “great diversity amongst all nations” in their “manners and prescriptions” for administering justice; yet since Biblical times, the law merchant “hath always been found . . . constant and permanent without abrogation, according to

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410. *Id.* at 18.

411. *Id.* at 17.

412. *Id.*

413. *Id.* at 20.

414. MALYNES, *supra* note 204. Malynes explicitly drew on the civilian tradition, naming as sources Bartolus, Benvenuto Stracca and Rodericus Suarez, among others. However, his was not the civilian’s approach; the books of those learned authors were “full of quilllets and distinctions over-curious and precise.” *Id.* at 5.

her most ancient customs, concurring with the law of nations in all countries.”<sup>415</sup> As a result, the “customary law of merchants” fulfilled the definition of Cicero—“*vera lex est recta ratio, naturae congruens, diffusa in omnes, constans sempiterna*”—and enjoyed “a peculiar prerogative above all other customs.”<sup>416</sup>

Under the influence of the scholars of civil law, the law merchant had been characterized as both independent from and superior to local law. Yet placing the law merchant within the “general Law of Nature and Nations” was not necessarily in the civilians’ best interest. A law “observed alike in all Nations,” to use the phrase of Sir Thomas Ridley, might be considered part of the domestic law of those nations, and thus might be enforced along with other laws of England in the common-law courts.<sup>417</sup>

Indeed, that is in large part what happened. The common lawyers effectively destroyed the Admiralty monopoly on commercial cases and created a new monopoly of their own. In 1622, the same year that Malynes wrote his *Consuetudo*, Chief Justice Hobart ruled that “the custom of merchants is part of the common law of this kingdom,”<sup>418</sup> and under Chief Justices Holt and Mansfield, the common-law courts took ever greater control of mercantile cases—a process that has often been interpreted as “incorporating” the law merchant into the English common law.<sup>419</sup> In the 1759 case of *Luke v. Lyde*, Lord Mansfield concluded that “the Maritime Law is not the Law of a particular Country, but the general Law of Nations,” and at

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415. *Id.* at ii.

416. *Id.* at v-vi, 4.

417. COQUILLETTE, *supra* note 402, at 129. Writing in the early seventeenth century, Ridley explicitly stated that the law merchant was *not* part of the *ius gentium*, the law of nations “which common reason hath established among men, and [which] is observed alike in all Nations.” Instead, he described it as part of the *ius civile*, the law “which the old Romans used” and which is, “for the great wisdom and equity thereof . . . the common law of all well governed Nations, a very few [only] excepted.” *Id.* Ridley knew full well that England was one of these exceptions, and identified the law merchant with a foreign legal tradition that was not officially recognized by—and thus still independent from—the common law.

418. *Vanheath v. Turner*, Winch 24, 25, 120 Eng. Rep. 20, 21 (C.P. 1621), *quoted in* BEWES, *supra* note 5, at 1.

419. For detailed criticism of this “incorporation” theory, see ROGERS, *supra* note 20.

the same time assured its mercantile counterpart of a permanent place in the common-law courts.<sup>420</sup> The civilians' campaign for exclusive jurisdiction had failed, and commercial cases became entirely subject to English common-law courts.

### B. THE ROMANCE OF THE LAW MERCHANT

The triumph of the common lawyers in the seventeenth and eighteenth centuries brought about what Berthold Goldman considered the first disappearance of the English law merchant—the jurisdiction of common-law courts over commercial cases.<sup>421</sup> Yet the concept of a transnational, customary law merchant was revived in the mid-nineteenth century for reasons that would have been anathema to the civil lawyers. While the civilians had sought to portray the law merchant as part of the universal Roman heritage, the law merchant's greatest champions of the nineteenth century saw it as an escape from foreign Roman influences.

The Romantic movement in nineteenth-century Europe placed strong emphasis on national and ethnic identity over the claims of universal or multinational empires. In disunited Germany, the Romantics advanced the claim that proper law was not imposed from above, but rather grew out of the customs of the *Volk*.<sup>422</sup> A case should not be decided on the basis of Romanist principles, but on the “*Natur der Sache*—the nature of the matter.”<sup>423</sup> Already in the eighteenth century, J.G. Busch had called on judges to “distance themselves from all juristic notions and simply use their common sense . . . to grasp and master the nature of the transaction *die Natur*

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420. *Luke v. Lyde*, 2 Burr. 882, 887, 97 Eng. Rep. 614, 617 (1759), *quoted in* COQUILLETTE, *supra* note 402, at 289. It was in this form that the doctrines entered American jurisprudence. *Swift v. Tyson*, 41 U.S. 1, 19 (1842) (stating that the true interpretation of commercial law was “to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence”). Justice Story, writing for the court, cited Mansfield to argue that the law of negotiable instruments was “not the law of a single country only, but of the commercial world.” *Id.* *But see* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (overruling *Swift*, and holding that “[t]here is no federal general common law”).

421. Goldman, *supra* note 9, at 3.

422. Whitman, *supra* note 8, at 159.

423. *Id.* at 160.

*des Geschafte*.”<sup>424</sup> After the Revolution of 1848, serious efforts began to expel Roman jurisprudence from German systems of commercial law, under the leadership of a young lawyer named Levin Goldschmidt.

Goldschmidt, who may have done more than anyone to revive scholarly interest in the medieval law merchant, felt a profound aversion to the claim of the civilians and Cicero to derive true law from right reason. Instead, Goldschmidt argued that “[e]very fact-pattern of common life . . . carries within itself its appropriate, natural rules, its right law.” This law “is not a creature of mere reason,” nor is it “eternal nor changeless nor everywhere the same”; rather, it is “in-dwelling in the very circumstances of life.” The task of the law-giver consists in “uncovering and implementing this immanent law.”<sup>425</sup> Goldschmidt decried the “orgy of statute-making” he saw around him, for immanent law was best revealed in the flexible “will of the *Volk*” rather than in “the inflexible will of the legislator.”<sup>426</sup> Because they incorporated commercial custom, he saw the medieval merchant courts as the “judicial organs of merchant legal consciousness,” giving expression to the true will of the international merchant community.<sup>427</sup>

Goldschmidt’s proposed commercial code was profoundly influential; many of its principles were enacted into law after Germany’s unification in 1871, and the American legal scholar Karl Llewellyn brought them into the Uniform Commercial Code in the 1940s.<sup>428</sup> Yet Goldschmidt’s assessment of the medieval law merchant also found a willing audience. His ideas were introduced into English and American historiography largely through the work of William Mitchell, who portrayed the law merchant as a transnational law, separate from the control of existing authorities

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424. *Id.* at 162 (quoting 2 J.G. BUSCH, *THEORETISCH-PRAKTISCHE DARSTELLUNG DER HANDLUNG IN DEREN MANNIGFALTIGEN GESCHAFTEN* 366 (Hamburg, B.G. Hoffmann 1792)).

425. *Id.* at 158 (quoting 1 LEVIN GOLDSCHMIDT, *HANDBUCH DES HANDELSRECHTS* 302 (Stuttgart, F. Enke 3d ed. 1875)).

426. *Id.* at 165.

427. *Id.* (quoting 2 LEVIN GOLDSCHMIDT, *HANDBUCH DES HANDELSRECHTS* 242-43 (Erlangen, F. Enke 2d ed. 1864)).

428. *Id.* at 157-58.

and founded on the custom of the merchant community. Mitchell quoted with approval Goldschmidt's pronouncement on "the grandeur and significance of the medieval merchant," creating "his own laws out of his own needs and his own views."<sup>429</sup> Perhaps because of his focus on the English law merchant, Mitchell also managed to incorporate the universalist claims of the English civilians that Goldschmidt would have abhorred—repeating Davies' claim that the law merchant is part of "the law of nature and nations," derivable from the "rules of reason" and "the same in all countries of the world."<sup>430</sup> Although he did note that Davies' description may be "too sweeping," Mitchell retained the fundamental claim that the law merchant "was a body of rules and principles . . . distinct from the ordinary law of the land" and "possessed of a certain uniformity in its essential features."<sup>431</sup>

Mitchell's work was cited widely among Anglophone historians, including Holdsworth,<sup>432</sup> and their work was well received in an era in which business claimed increasing prestige. Wyndham Bewes' *Romance of the Law Merchant*, published in 1923, ranges easily from the days of the Phoenicians to the seventeenth century,

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429. MITCHELL, *supra* note 4, at 10.

430. *Id.* at 1.

431. *Id.* at 1, 10.

432. 1 HOLDSWORTH, *supra* note 89, at 538, 570. The influence of Mitchell and Goldschmidt, as well as the documentary work of F.W. Maitland, led Charles Gross in *The Court of Piepowder* to note the increased "attention [that] has been devoted to the history of the law merchant." Gross, *supra* note 60, at 231. Gross relied on those authors extensively, arguing that "the procedure of the court of piepowder resembles the procedure of the international law merchant as it was administered in all European tribunals." *Id.* at 245. As a result of the preliminary study, Gross urged that "the local archives should be exploited for more data concerning this interesting branch of the judicature," *id.* at 247, and two years later he published the first volume of *Select Cases Concerning the Law Merchant*. 1 SCLM, *supra* note 1. In fact, Gross read Mitchell's work and met with him while working on the St. Ives records. For more details on the history of the volume's publication, see LMLP, *supra* note 20, at 168.

The earlier English authors had influenced Maitland as well; he considered the law merchant as "a *ius gentium* known to merchants throughout Christendom." At the same time, however, Maitland insisted that the law merchant primarily consisted of "rules of evidence" and was "not so much the law for a class of men as the law for a class of transactions." 1 POLLOCK & MAITLAND, *supra* note 37, at 467.

chronicling the deeds of merchants.<sup>433</sup> The foreword describes the tales of “perils by sea, endurance, sacrifice, courage” to be found in the annals of commerce,<sup>434</sup> and Bewes’ description of the medieval law merchant is just as breathless: “There was no substantial difference in the customary law in the various trading nations. . . . It appears all at once, like Minerva sprung fully armed from the brain of Jove.”<sup>435</sup> Although Mitchell and Holdsworth were far more careful in their work, their influence on Bewes is clear from his citations. Goldschmidt’s Romanticism continued to find new expression among those who sought to romanticize the law merchant.

### C. REINTERPRETATION AND RENEWAL

Together, the works of Goldschmidt, Mitchell, and Holdsworth cast a very long shadow. Into the mid-1950s, one finds editions of T.F.T. Plucknett’s *Concise History of the Common Law* repeatedly citing Holdsworth and arguing for “a movement from local law towards a cosmopolitan law” promoted by the “international character of commerce.”<sup>436</sup> Even in 1991, John H. Munro described Malynes’ tendentious work as “the best and most famous compilation” on the law merchant, “by a merchant with wide commercial and legal experience in both the Low Countries and England.”<sup>437</sup>

This shadow has unfortunately obscured the efforts of a new, skeptical school of authors to return to the original sources.<sup>438</sup> As

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433. BEWES, *supra* note 5.

434. Richard Atkin, *Foreword* to BEWES, *supra* note 5, at iii.

435. BEWES, *supra* note 5, at 8.

436. PLUCKNETT, *supra* note 405, at 659.

437. Munro, *supra* note 343, at 53 n.11.

438. The skeptical view was enunciated as early as 1903, when John S. Ewart described medieval mercantile law as “nothing but a heterogeneous lot of loose undigested customs, which it is impossible to dignify with the name of a body of law.” John S. Ewart, *What is the Law Merchant?*, 3 COLUM. L. REV. 135, 138 (1903) (responding to Frances M. Burdick, *What is the Law Merchant?*, 2 COLUM. L. REV. 470 (1902)). To Ewart, the attempt to decide cases according to a universal law was “nothing but a particularly happy method by which the law [could be] brought into harmony with current notions of justice.” *Id.* at 145. This description seems to coincide with that of Lord John Campbell, who wrote that before Lord Mansfield fixed the customs of contemporary merchants into the common law, “no

early as the 1930s, L. Stuart Sutherland chided her contemporaries for ignoring the primary documents, calling it “useless” to rely on seventeenth-century writers in describing thirteenth-century courts.<sup>439</sup> From his studies of royal courts, J.H. Baker argued that *lex mercatoria* was not considered to be “a distinct body of substantive law,” but rather “an expeditious procedure especially adapted for the needs of men who could not tarry for the common law,” which generally “followed the ordinary medieval principles of English law relating to customs.”<sup>440</sup> In examining the history of bills and notes, James Steven Rogers found that merchants had hardly avoided the central royal courts in England—their cases had merely been recorded in ways that disguised their commercial nature.<sup>441</sup> And the translators of the treatise *Lex Mercatoria* discovered “little transnational substantive content” in the mercantile law of thirteenth-century England.<sup>442</sup> However, in general, similar attention has not been paid in a systematic way to the records of the merchant courts themselves—nor have the skeptics yet succeeded in overcoming the ‘critical mass’ of authorities created by the previous historiographical tradition.

Since World War II, moreover, political changes have again made fashionable the vision of a universal law merchant.<sup>443</sup> The significant increase in the pace, volume, and complexity of international trade

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one knew” how mercantile cases were to be determined; a jury in a mercantile case would decide “according to their notions of what was fair, and no general rule was laid down.” *Id.* at 151.

439. L. Stuart Sutherland, *The Law Merchant in England in the Seventeenth and Eighteenth Centuries*, 17 *TRANSACTIONS ROYAL HIST. SOC'Y* 151, 151-52 (4th ser. 1934). Sutherland even lent a sympathetic ear to the “heretics” who claimed that “the merchant customs in the Middle Ages were too indefinite to be called by the name of Law Merchant at all.” *Id.* at 152-53.

440. BAKER, *supra* note 20, at 345, 347, 366.

441. ROGERS, *supra* note 20, at 18. Baker also discussed this possibility: even though the common-law courts would not have necessarily recognized a bill of exchange as conclusive evidence in a plea of debt, the plaintiff could still sue on the underlying obligation. Although the bill might be shown to the jury, it would not be mentioned in their decision, nor would it enter into the record if the defendant waged his law. BAKER, *supra* note 20, at 350.

442. LMLP, *supra* note 20, at 179.

443. *Cf.* Cremades & Plehn, *supra* note 5, at 320 (attributing the movement for a new *lex mercatoria* to conflicting legal regimes following post-war decolonization).

has brought with it a desire for legal predictability and for uniformity across the globe, as multinational actors seek to reconcile the various demands of local laws.<sup>444</sup> Berman, for example, saw in today's patterns of global trade an echo of medieval universality; the "high degree of uniformity" observed in modern contract practices is not due only to "common commercial needs," but also to the fact that merchants constitute a "transnational community which has had a more or less continuous history . . . for some nine centuries."<sup>445</sup> Influenced by Malynes, Goldschmidt, and Mitchell, he concluded that "the universal character of the law merchant, both in its formative period and thereafter, has been stressed by all who have written about it."<sup>446</sup> Drawing on the same sources, Trakman similarly claimed that the medieval law merchant "reflected the ultimate move away from local law towards a universal system of law, based upon mercantile interests,"<sup>447</sup> for the only law that could "effectively enhance the activities of merchants" would be a law that "recognized the capacity of merchants to regulate their own affairs through their customs."<sup>448</sup> These interpretations were then carried forward by Bruce Benson, who employed the example of the medieval law merchant to argue that modern governments could relinquish to private-sector institutions the various tasks of law enforcement.<sup>449</sup>

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444. As illustrations, consider such harmonizing institutions as the International Institute for the Unification of Private Law ("UNIDROIT"), or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

445. Berman, *supra* note 196, at 1-2.

446. BERMAN, *supra* note 5, at 342.

447. TRAKMAN, *supra* note 4, at 8.

448. *Id.* at 9. As noted, Trakman later modified, but did not abandon, this position. See *supra* note 27; *supra* text accompanying note 239.

449. To Benson, the development of the law merchant "effectively shatters the myth that government must define and enforce 'the rules of the game.'" Because the law merchant "developed outside the constraints of political boundaries" and because it "escaped the influence of political rulers," it provides "the best example of what a system of customary law can achieve." BENSON, ENTERPRISE OF LAW, *supra* note 5, at 30; see also Benson, *Justice Without Government*, *supra* note 5, at 127 (claiming that the "historical experience" disproves the political claim that "an effective legal system and coercive state power must inevitably go hand in hand").

## D. CONCLUSIONS

The persistent survival of the private, cosmopolitan law merchant, despite the best efforts of some historians to eliminate it, would be bad enough. Even worse, however, it is this flawed interpretation that has been most influential to those outside the field, and much new research still relies on an erroneous historical account. Economists have analyzed the game-theoretic consequences of merchant courts on medieval trade, while assuming that they were voluntary institutions powerless to enforce their decisions.<sup>450</sup> Political scientists have considered the law merchant a uniquely stateless system of justice, an instructive example for an era when the nation-state is in decline.<sup>451</sup>

Such characterizations effectively demonstrate how the historiography of mercantile law has turned into a game of "Telephone," with one generation interpreting the works of previous authors and the next interpreting the interpretations. Unfortunately, those scholars seeking to revise our understanding of the law merchant based on the original sources and the primary documents have not yet caught the public eye. The thesis of a universal, substantive law merchant is politically suggestive; the thesis of a truly medieval mercantile law, bereft of immediate political implications, far less so. One can only hope that scholarship rather than politics will soon take the upper hand.

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450. See generally Milgrom et al., *supra* note 33 (emphasizing the courts' role as disseminators of information on the credit-worthiness of indebted merchants, and asserting that such institutions helped make possible the revival of European trade); North, *supra* note 33; SCHWARTZ, *supra* note 34.

451. Joseph Nye compared medieval merchants, who developed the *lex mercatoria* as a "private set of rules for conducting business," to software programmers and technology companies "developing the code and norms of the Internet partly outside the control of formal political institutions," which "add a layer of relations that sovereign states do not effectively control." JOSEPH S. NYE, JR., UNDERSTANDING INTERNATIONAL CONFLICTS 218-19 (4th ed. 2003). Nye's description of "a new cyber-feudalism, with overlapping communities and jurisdictions laying claims to multiple layers of citizens' identities and loyalties," invokes Hedley Bull's conception of a "new medievalism," a "system of overlapping authority and multiple loyalty" that serves as "a modern and secular equivalent of the kind of universal political organization that existed in Western Christendom in the Middle Ages." *Id.* at 218; HEDLEY BULL, THE ANARCHICAL SOCIETY 245 (2d ed. 1995); see also NEIL MACCORMICK, QUESTIONING SOVEREIGNTY 20 (1999).

#### IV. EPILOGUE: *LEX MERCATORIA* AND *LEX CYBERSPACE*

This Article is concerned only with the character of commercial law in medieval England; a debate on the proper means of regulating contemporary commerce goes far beyond its scope. But it is important to note that the current political debates are founded on a certain interpretation of the medieval law merchant, an interpretation that may be profoundly flawed. As Trakman wrote, “[h]istory *does* provide lessons for the future. The Medieval Law Merchant does reveal the ability of merchants to regulate their business affairs within the broad framework of a suppletive legal order.”<sup>452</sup> Justice will not prevail “when judges are unduly preoccupied with applying local public policies and indigenous legal rules to transregional business”; the medieval law merchant “is a light whose vision cannot be ignored if we are to promote productive trade across national boundaries in modern times.”<sup>453</sup>

These claims, though presented as inferences from the historical example of the medieval law merchant, are clearly political in nature. The decision of a private arbitrator to ignore municipal laws, enacted by an elected legislature, is one with significant implications for the distribution of power in commercial disputes. Indeed, to Berman, the customs of the international trading community form “an autonomous body of law, *binding on national courts*”;<sup>454</sup> he praised

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452. TRAKMAN, *supra* note 4, at 17.

453. *Id.* at 4, 21. Again, Trakman did not entirely abandon this view. See Trakman, *E-Merchant Law*, *supra* note 5, at 303 (“The twenty-first century cyberspace Law Merchant heralds a pragmatic vision of merchant regulation.”); *cf.* Cremades & Plehn, *supra* note 5, at 320 (analogizing multinational enterprises “to the medieval merchants whose activities were superimposed on a patchwork of local sovereignties”); *id.* at 320, 324 (arguing that nation-states, “like the feudal lords of the medieval period,” should recognize that “piecemeal regulation” through national laws “impedes the growth of global trade” and instead “permit[s] businessmen to avoid the application of national law”); Juenger, *supra* note 9, at 497 (noting the “qualitative superiority” of the “new law merchant” over state regulation).

454. Berman, *supra* note 196, at 49 (emphasis added); see also *id.* at 49-50 (arguing that “the law of the international mercantile community”—the law merchant—“antedates the emergence of a system of nation-states by some centuries,” and thus “should be recognized as legally binding by national courts as well as by commercial arbitrators, independent of its incorporation into national

arbitrators for deciding cases “according to international commercial custom” or “according to the law of international trade,” and one hears in his words the faint echo of *secundum legem mercatoriam*.<sup>455</sup>

In the past twenty years, the medieval experience has become the foundation for a new political movement, aimed at replacing the national regulation of foreign trade with a transnational, customary law. To supporters of such a view, international commerce has a “*sui generis* character that warrants a special, separate regime of governance. . . . Domestic requirements simply are too ensconced in national habits and culture to serve as the governing predicate for non-national relationships.”<sup>456</sup> Partisans of this “new” *lex mercatoria* look forward to a day when arbitrators will be free to decide cases according to the custom of merchants, relaxing a national regulation when it is “not fit for international trade.”<sup>457</sup> Such a vision has not been without its critics,<sup>458</sup> yet the scholars who oppose it on public

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legal systems”). Baker objected strenuously to such an approach, claiming that it would allow the merchant community “to devise new forms of transaction which defy existing law, and [entitle them] to have force breathed into them without the sanction of legislation.” BAKER, *supra* note 20, at 344-45. See generally Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG*, 5 CHI. J. INT'L. L. 157 (2004).

455. Berman, *supra* note 196, at 55; see also Berman & Dasser, *supra* note 396, at 34 (describing a provision in French law allowing a private arbitrator, under certain circumstances, to decide disputes “according to the rules of law he deems appropriate”).

456. Carbonneau, *supra* note 9, at 14.

457. Lowenfeld, *supra* note 9, at 51. Goldman, to whom colleagues attribute “a prominent role in defining [the law merchant’s] sources and character,” e.g., Thomas E. Carbonneau, *Preface to LEX MERCATORIA AND ARBITRATION*, *supra* note 9, at xi, has celebrated instances where “a principle or a rule, not taken from a national law or even from international law . . . has been applied by arbitral tribunals or even by state courts.” Berthold Goldman, *Introduction I, in LEX MERCATORIA AND ARBITRATION*, *supra* note 9, at xv, xvi.

458. See, e.g., F.A. Mann, *Introduction II, in LEX MERCATORIA AND ARBITRATION*, *supra* note 9, at xix, xx (describing a procedure such as Lowenfeld’s as “nothing but palm-tree justice”); William W. Park, *Control Mechanisms in the Development of a Modern Lex Mercatoria, in LEX MERCATORIA AND ARBITRATION*, *supra* note 9, at 109 (asking if *lex mercatoria* were “a fig leaf to hide an unauthorized substitution of [arbitrators’] private normative preferences in place of the parties’ shared expectations under the properly applicable law”); OKEZIE CHUKWUMERIE, *CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* 130 (1994) (noting that such a theory “would grant arbitrators the power to dictate which rules of national laws would be applied in the national

policy grounds still generally accept the same distorted account of history.<sup>459</sup>

As scholarship on the law merchant spins further and further away from its documentary base, it has begun to breathe even the rarified air of cyberspace. Building on the doctrine that international activity is of a “*sui generis* character” and “warrants a special, separate regime of governance,”<sup>460</sup> lawyers facing new questions of jurisdiction and conflict of laws on the Internet have turned to the Romantic vision of the law merchant as a model for creating a new legal order—a “Law Cyberspace”—without the involvement of sovereign nation-states, implemented through private “cyberspace arbitration.”<sup>461</sup> David R. Johnson and David Post described a medieval world in which merchants could not resolve their disputes in feudal courts, “nor could the local lord easily establish meaningful rules for a sphere of activity that he barely understood and that was executed in locations beyond his control.”<sup>462</sup> Instead, those who “cared most about and best understood their new creation” formed and championed the new law—and those who care most about and

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arena, a rather strange prospect”); Keith Highet, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613, 628 (1989) (arguing for the use of the term “*principia mercatoria*” rather than *lex*—signifying general principles and common sense, but not a body of autonomous law); see also Lisa L. Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Celia Wasserstein Fassberg, *Lex Mercatoria—Hoist With Its Own Petard?*, 5 CHI. J. INT’L. L. 67 (2004).

459. Cutler criticized the “Modern Law Merchant” for its role in expanding the “global legal hegemony and imperialism” of a Western “*mercato*cracy.” Cutler, *supra* note 82, at 490. Yet she did so by contrasting it with an age when “medieval merchants, their law, and their institutions” legitimately and truly “operated *outside* the political economy of the time” *Id.* at 486, 490; see also A. Claire Cutler, *Global Capitalism and Liberal Myths*, 24 MILLENNIUM 377 (1995); A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY 10 (2003) (emphasizing the “autonomous nature of the [medieval] merchant class and the merchant courts”); cf. CHUKWUMERIJE, *supra* note 458, at 110 (“[I]n the Middle Ages, international merchants . . . developed customs and usages to regulate their trade. These customs and usages . . . were handed down orally by merchants and their binding effect was presumed by these merchants.”).

460. Carbonneau, *supra* note 9, at 14.

461. Hardy, *supra* note 9, at 1037.

462. Johnson & Post, *supra* note 9, at 1389. The abbot of Ramsey might have disagreed.

best understand their new creation, the Internet, should play a similar role.<sup>463</sup>

Again, though they find their inspiration and examples in history, such proposals are in fact concerned with the proper distribution of power in contemporary society. For online activities that only “minimally affect the vital interests of sovereigns,” Johnson and Post argued, the self-regulation of system administrators is “better suited to dealing with the Net’s legal issues.”<sup>464</sup> Joel Reidenberg suggested that a “*Lex Informatica*” empower “technologists” instead of public actors, setting policy on topics such as data privacy through software rather than legislatures.<sup>465</sup> And Matthew Burnstein called for “the medieval *lex mercatoria*” to serve as a “conceptual framework for a new body of cyber-law” that would not be “subject to any state’s exclusive jurisdiction.”<sup>466</sup>

It is not for this Article to decide whether such a transnational, customary body of law would be desirable for governing today’s commerce, let alone tomorrow’s Internet. What seems more certain is that there is little evidence such a law was in effect at the medieval fair court of St. Ives.

The twentieth-century revival of the law merchant conceives of this law as a solution to the legal problems created by cross-border trade—as a substantive replacement for complicated doctrines of conflict of laws. Thus Maitland’s tentative description of the law merchant as the “private international law” of the Middle Ages;<sup>467</sup> thus Goldman’s conception of “the law proper to *international economic relations*”;<sup>468</sup> thus also its proposed use in cyberspace,

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463. *Id.* at 1389-90.

464. *Id.* at 1390-91.

465. Reidenberg, *supra* note 9, at 587.

466. Burnstein, *supra* note 9, at 103, 108. He considered the use of admiralty law as a model, but rejected its use of “the law of the flag as a choice of law device.” *Id.* To judge from their citations, these scholars generally obtained their understanding of the law merchant from the works of Berman, Trakman, Bewes, and Mitchell.

467. 1 SELECT PLEAS, *supra* note 14, at 133.

468. Berthold Goldman, *The Applicable Law: General Principles of Law—The Lex Mercatoria*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 113 (Julian D. M. Lew ed., 1986), *quoted in* Keith Highet, *The Enigma of the Lex*

where cross-border transactions are routine, and the application of choice-of-law principles unclear. Within a single jurisdiction, it is assumed, municipal regulation can be uncontroversially applied; but when legal authorities begin to overlap, some new substantive arrangements are required that only a separate law merchant can provide.<sup>469</sup>

This was not the understanding at St. Ives. Nowhere in the fair court's records do we read a concern for anything that might be described as conflict of laws in the modern sense—whether, for instance, to apply the laws of Leicester or Rouen to a given dispute, or whether to enforce another set of substantive rules in the absence of agreement.<sup>470</sup> The St. Ives rolls—again, the best records available for fair courts of the period—do not indicate that the court treated international merchants as possessing any unique status or legal autonomy, especially as compared to other manorial and seignorial courts of the period. Furthermore, while English mercantile courts may have occasionally given effect to the customs of merchants, they were often commercial customs of a local nature, rather than the universally shared customs of an international merchant class.

Perhaps the best description of what medieval merchants meant when they invoked principles *secundum legem mercatoriam* was unwittingly offered by Goldman, when he defined *lex mercatoria* as “the law proper to international economic relations.”<sup>471</sup> When used to argue for the application of custom to modern commercial disputes, this definition is, as Hightet noted, “completely circular.”<sup>472</sup> However, when considered in the context of medieval demands that courts do

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Mercatoria, in *LEX MERCATORIA AND ARBITRATION*, *supra* note 9, at 102 (emphasis added).

469. Cf. Kadens, *supra* note 20, at 46 (distinguishing those medieval “traders and artisans engaged in purely local commerce,” who could be governed by local laws, from those engaged in interjurisdictional activities: “the critical characteristic of merchant law arguably lay in the fact that merchants either did business outside the jurisdiction of their native law or did business with other merchants who lived under different laws”). In order to “get around” the various legal and practical disadvantages of alien traders, a solution was found in “[t]he creation of special laws that merchants could apply amongst themselves.” *Id.* at 47.

470. See, e.g., Curteis v. St. Romain (St. Ives Fair Ct. 1287), in 1 SCLM, *supra* note 1, at 26.

471. Goldman, *supra* note 468, at 113, quoted in Hightet, *supra* note 468, at 102.

472. Hightet, *supra* note 468, at 102.

'right' and 'justice' to the parties before them, an understanding of *lex mercatoria* as 'mercantile law,' as 'the law appropriate to govern trade,' makes perfect sense. It best explains the strange mixture of equity and custom applied at the fair court of St. Ives—as well as the manner in which merchants could seek the protection of a general 'law' without necessarily asking for specific and uniform rules of substance and procedure. The suitors of the St. Ives court could all agree that cases ought to be decided by principles of *lex mercatoria*, even if the content of those principles were a matter of dispute. Though modern-day authors may envision a single, cosmopolitan body of law to govern international commerce, the same cannot necessarily be said of the medieval traders whose examples they invoke.

The story of the wine merchant Gerard of Cologne is not over; cross-border wine sales occupy the attention of the Supreme Court much as they did the fair court of St. Ives.<sup>473</sup> But whatever Gerard's experience may reveal of thirteenth-century Huntingdonshire, it has little to offer the architects of a new legal order. The proceedings at St. Ives must be understood in contemporary terms, and not as medieval prototypes of the laws we would seek today.

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473. See *Granholt v. Heald*, 544 U.S. 460 (2005).