

# The Strange Death of the Law Merchant

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## 1. INTRODUCTION

A major problem of English commercial law, today, is that too much of it is fragmented. And, too much of it is obsolete. It belongs to the Victorian era or earlier, while we live in an electronic age. This fragmentation, and obsolescence, severely hinders the clarity, and cohesion, of our commercial law. Prior articles have pointed out areas which should be modernized - such as the law on deeds,<sup>1</sup> guarantees<sup>2</sup> and bailment.<sup>3</sup>

The purpose of this article is to consider the concept of the '*law merchant*' - a term which was always been obscure and confused<sup>4</sup> and to assert that it should be abolished since it has now been subsumed into the concept of '*commercial law*'.<sup>5</sup> Indeed, this article asserts that all legislative and common law material which might have been circumscribed within the ambits of this term has either been repealed, or was obsolete, by 1898. Hence, a reference to the '*strange death*' of the law merchant. It departed, not with a bang but a whimper. Further, this term was so obscure that it spawned - down the centuries - a number of myths and mis-perceptions. Ones which this article seeks to correct. In particular, this article asserts the following:

- **Meaning of 'Merchant'**. There have been, at least, 3 changes in the legal meaning of the word '*merchant*' through its history.
  - In early times, it was a general expression which included anyone who bought, or sold, goods as a profession;<sup>6</sup>
  - By the 17<sup>th</sup> century, it tended to be interpreted to exclude artisans (i.e. those who made and sold their own goods), shopkeepers, fair and market traders and retailers. However, it included bankers and exchange brokers (forex brokers);<sup>7</sup>

<sup>1</sup> There is no good reason, nowadays, for treating deeds (and specialities) any different to other documents in writing which are of a legal nature. See GS McBain, *Abolishing Deeds, Specialties and Seals* (2006) 20(1) Commercial Law Quarterly ('CLQ'), pp 15-54 and 20(2), pp 3-28.

<sup>2</sup> Under English law, indemnities do not have to be in writing. However, anomalously, guarantees do, as a result of the ancient Statute of Frauds 1677, s 4. Although the Law Commission recommended the abolition of this section in 1937 - and decisions such as *Actionstrength Ltd v International Glass Engineering Spa* [2003] 2 AC 541 have highlighted the anomalies resulting from this - s 4 has still not been abolished. See GSMcBain, *Abolishing the Statute of Frauds 1677, s 4* [2010] Journal of Business Law ('JBL'), issue no 5, pp 420-43.

<sup>3</sup> The concept of the common carrier is redundant - not least since there do not appear to be any left and it should be abolished. See GSMcBain, *Time to Abolish the Common Carrier* [2005] JBL, Sept issue, pp 545-96. The strict liability imposed on hotelkeepers (innkeepers) is also not required. See GS McBain, *Abolishing the Strict Liability of Hotelkeepers* [2006] JBL, October issue, pp 705-55. Many common law liens are also obsolete. If they were excised, the law on the liens and pledges could be placed in legislation without difficulty. See GS McBain, *Codifying Common Law Liens* (2006), vol 20(4), CLQ, pp 3-47 and GS McBain, *Codifying the Law on Consensual Security: Pledges and Liens* (2006) vol 21(1), CLQ, pp 24-47. Further, the codification of the law on bailment could be achieved, see GS McBain, *Modernising and Codifying the Law of Bailment* [2008] JBL, issue 1, pp 1-63.

<sup>4</sup> C Blackburn, *A Treatise on the Effect of the Contract of Sale on the Legal Rights of Property and Possession in Goods, Wares, and Merchandise* (1<sup>st</sup> ed, 1845), p 207 'There is no part of the history of English law more obscure than that connected with the common maxim that the law merchant is part of the law of the land.'

<sup>5</sup> Some Victorian texts referred to '*mercantile law*'. However, this term soon disappeared in favour of a reference to '*commercial law*'.

<sup>6</sup> Thus, the Oxford English Dictionary ('OED')(*merchant*) noted that the merchant originally applied to '*a person whose occupation was the purchase and sale of marketable commodities for profit*'. A treatise, *Lex Mercatoria* (c. 1280), regarded a '*merchant*' as someone who '*lives and ought to live off his movable goods and merchandise*,' see ME Basile *et al* (ed), *Lex Mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and its Afterlife* (Cambridge, Ames Foundation, 1998), ch 5, p 8. L Roberts, *The Merchant's Map of Commerce* (3<sup>rd</sup> ed, 1677), pp 6-7 defined '*merchants*' as those who transferred goods and commodities (including coin) from one place to another.

- After the Municipal Corporations Act 1835 opened up trade to everyone,<sup>8</sup> the term faded away since there was no need to distinguish a ‘*merchant*’ from a shopkeeper, market trader, wholesaler or retailer. Further, ‘*merchant*’ guilds no longer existed and banks had become subject to their own distinct regulation with ‘*bankers*’ not being referred to as merchants any longer.

Today, the word ‘*merchant*’ is obsolete in normal and legal speech;<sup>9</sup>

- **Part of the Common Law.** One of the abiding myths concerning the law merchant is that - in early times - it was distinct from the common law. However, there is no evidence of this. It was part (a branch) of the common law which, itself, is a synonym for the ‘*common customs*’ of the realm. The customs of merchants (a more modern description would be ‘*business practices*’) became part of the common law when they were accepted by the courts.
  - The writer of a legal treatise in c. 1280 made it clear that the law merchant was part of the common law. So did Coke and Blackstone. However, other writers thought that the early law merchant was distinct.<sup>10</sup> Modern research supports Coke and Blackstone;
  - Further, many customs said to comprise the ‘*law merchant*’ were, actually, London customs. Ones which derived from Ordinances on London issued by Plantagenet kings (especially, Edward I (1272-1307)) or which were approved by Magna Carta 1215, chapter 13 which confirmed that London ‘*shall have its ancient liberties and free customs [i.e. customs of freemen]. And, that all other cities, boroughs, towns and ports shall have all their ‘free customs’;*
- **Terminology.** The law merchant - in latin - was often called the *consuetudine mercatorum* (custom of merchants) or *usus mercatorum* (practice of merchants) or *lex mercatorum* (law of merchants) as well as *consuetudo mercatoria* (custom of the market) or *lex mercatoria* (law of the market or law merchant).<sup>11</sup> With the supplanting of latin by English it tended to be referred to as the ‘*law merchant*’ or ‘*law of merchants*.’ By Victorian times, this term - one antiquated and ungrammatical<sup>12</sup> - became subsumed into references to ‘*mercantile law*’ or to ‘*commercial law*. Today, it is best described as the law of the market or commercial law’;
- **Phases.** The meaning of the term ‘*law merchant*’ has altered over time, something common to many legal concepts. There may be said to be 3, relatively distinct, phases:
  - (a) *Period from c.1280 to the 17<sup>th</sup> century: Domestic concept.* In this period, the law merchant was associated with a simplified legal process - including in relation to evidence - available to merchants in piepowder (fair) courts, local maritime courts and the High Court of Admiralty (‘HCA’). However, by the early 17<sup>th</sup> century, piepowder and maritime courts were in terminal decline and the HCA had had much of its jurisdiction usurped by the common law courts;
  - (b) *Period from 17<sup>th</sup> century to 1898: Part of Ius Gentium.* In this period, the law merchant was

<sup>7</sup> See, e.g. J Godolphin, *A View of the Admiralty Jurisdiction* (London, 1661). See also **Appendix A**.

<sup>8</sup> The Municipal Corporations Act 1835, s 14, ‘And whereas in divers cities, towns, and boroughs a certain custom hath prevailed, and certain byelaws have been made, that no person, not being free of a city, town, or borough, or of certain guilds, mysteries, or trading companies within the same, or some or one of them, shall keep any shop or place for putting to show or sale any or certain wares or merchandize by way of retail or otherwise, or use any or certain trades, occupations, mysteries, or handicrafts for hire, gain, or sale within the same’ be it enacted, that notwithstanding any such custom or bye law, *every person in any borough may keep any shop for the sale of all lawful wares and merchandizes by wholesale or retail, and use every lawful trade, occupation, mystery, and handicraft, for hire, gain, sale, or otherwise, within any borough*. (italics supplied)

<sup>9</sup> Today, we tend to refer to shopkeepers, market-stall holders, retailers and wholesalers (with even the latter two words being less used nowadays).

<sup>10</sup> This idea of a ‘*distinct*’ law merchant was promoted by Davies (c.1614-21) and followed by Malynes (1622), Godolphin (1661), Zouch (1663) and Molloy (1676), all in connection with the idea of a mercantile *ius gentium*. See **19**. Its modern incarnation was promoted by MacDonell (1890) who was followed by Scrutton (1891), Holdsworth (1901) *et al*. See **25**. Their thesis was that there were 3 stages of development of the law merchant - the first being up to the time when Coke became CJ (in 1606), in which stage the law merchant was distinct to the common law.

<sup>11</sup> Basile, n 6, p 28 (referring to the interchangeable use of ‘*usus mercatorum*’ and ‘*lex mercatorum*’ in the courts rolls of the fair at St Ives). *Cramlington v Evans* (1689) 1 Show 5 (89 ER 410) per Holt CJ at p 5 ‘I know no distinction between *lex mercatoria*, and *consuetudo mercatorum*.’

<sup>12</sup> JS Rogers, *The Early History of the Law of Bills and Notes* (Cambridge UP, 1995), p 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.’

associated with financial instruments such as bills of exchange ('BOE') and promissory notes as well as maritime and insurance matters. Various writers - including non-lawyers - asserted that it was part of a universal law ('*ius gentium*').<sup>13</sup> While this reflected a philosophical '*spirit of the age*', it was inaccurate in the legal sphere since there was no such law prevailing. Instead, there were differing customs and legislation (including in respect of commercial matters) on the Continent and elsewhere. This theory, however, masked the reality that the term '*law merchant*' had become confused and obsolete;

(c) Period from 1898 to Modern Times: Commercial Law. In this period, the term '*law merchant*' became an archaic reference to commercial (also called, mercantile) law. Today, it only survives in a few pieces of Victorian legislation, which references can (safely) be repealed.<sup>14</sup>

In conclusion, the law merchant was the legal equivalent of the *dodo*. Difficult to describe and locate; difficult to determine exactly when it became extinct. This article considers the legal history. However, for those who like to '*fast forward*', the conclusion to this article may be stated at the outset:

- In the period up to 1290 (when fairs were at their height in England) the law and the courts accorded merchants some leniency in the legal process and evidence in respect of their trading activities (which included maritime activities). This was to augment trade as well as recognizing the peripatetic activity of merchants. However, this '*law merchant*' was not a distinct area of law. It was treated as part of the common law and many of these customs of merchants were, primarily, London customs which were extended to merchants;
- By the 16<sup>th</sup> century, maritime, insurance and financial activity had increased and the older customs of merchants - as well as fair courts and local maritime courts - died out. New business practices (customs) of merchants developed, which '*law merchant*' the common law accepted - if reasonable and well established - just as it had done, in the past, with other local (including London) customs;
- This process continued until 1898 - despite being obscured by the incorrect assertion that the law merchant comprised part of a universal law. By 1898, all commercial activities formerly limited to '*merchants*' were open to every citizen. And all legislation that might have applied at one time, or another, to merchants, had been repealed or was obsolete.

Today, the concept of '*law merchant*' should be abolished. It is not only confusing to layman and lawyer alike; it is obsolete and unnecessary. Abolishing it will not affect, one wit, the ability of the English courts to recognise business practices - whether local or international.<sup>15</sup> Nor will it affect the ability of the English courts to recognize certain customs - including those relating to trade - and, thereby, make them part of the common law.<sup>16</sup> That said, this is somewhat unlikely today. As unlikely as the courts recognizing new London (or town) customs.<sup>17</sup> What abolition will do, is to remove a great wodge of old material (and commentary) which used to apply to merchants, since '*merchants*' no longer exist as a specific category of persons. Nor do their specific

<sup>13</sup> As DR Coquillette, *The Civilian Writers of Doctors' Commons, London* (Duncker & Humblot, 1988), pp 33-5, pointed out, the concept of *ius gentium* had different meanings in Roman, and later, law. Thus, it might refer to: (a) *ius naturale* (natural law); or (b) the Roman magistrate applying the custom of traders, and not the *ius civile*, in the case of foreign transactions; or (c) the law which governed the relations of Rome with other states (public international law).

<sup>14</sup> See: (a) Bills of Exchange Act 1882, s 97(2); (b) Sale of Goods Act 1979, s 62(2); and (c) Marine Insurance Act 1906, s 91(2).

<sup>15</sup> Thus, international practice can be recognised by: (a) the UK ratifying (or acceding to) treaties or conventions on trade matters; or (b) UK legislation incorporating the terms of foreign treaties or conventions or international practices; or (c) English courts upholding contracts between parties, which contracts incorporate international practices, by reference; something now very frequent (e.g. letters of credit being governed by the ICC Rules on documentary credits or derivative contracts being governed by ISDA standard terms). None of (a)-(c), were (or are) part of the law merchant.

<sup>16</sup> *Cramlington v Evans* (1689) 1 Show 5 (89 ER 410) per Holt CJ at p 5 'An universal custom is a law.' E Coke, *Institutes of the Laws of England* (W Clarke & Sons, London, last ed, 1824, which is cited), vol 1 (on Littleton), 110b 'a custom cannot be alleged generally within the kingdom of England; for that is the common law. TA Street, *The Foundations of Legal Liability* (1906), vol 2, p 347 noted that, in 1542, a plea of a 'custom between merchants throughout the whole realm' was held bad on the ground that a custom through the whole realm was the common law. He cited R Brooke, *La Graunde Abridgement* (1586), title '*Customs*', pl 59. See also YB 2 Hen 4 pl 6 fo 18a-b (1401), Seipp no 1401.034 'the common law of this realm is the common custom of this realm' (*comen ley de c'est realme est comen custome de realme*). See also W Cranch, *Promissory Notes before and after Lord Holt* in *Select Essays in Anglo-American Legal History* (1909) ('AALH'), vol 3, p 73. Also, RW Aske, *The Law relating to Custom and the Usages of Trade* (Stevens & Sons, 1909). *Day v Savadge* (1614) Hob 86 (80 ER 235) per Hobart CJ at p 86 'the general customs of the whole kingdom, being the common law.'

<sup>17</sup> Today, new commercial instruments are either recognised in legislation or incorporated by reference into contracts. Further, all English towns and cities being inter-linked, it would be unusual for separate commercial practices to grow up, unlike in the past. Thus, local custom in the commercial field (and, indeed, generally) is effectively obsolete.

privileges (customs).

***In conclusion, the law merchant should be abolished. There is no longer a category of persons called ‘merchants’. Further, such law as may have applied to them in times past no longer exists.***

## **2. INTRODUCTION**

There have been, down the centuries, a number of texts written by merchants as well as by lawyers on the law merchant. However, it should be noted that many of these were partisan. Others were written with an ulterior purpose. Thus, writers sought, *inter alia*, (a) to defend the Crown prerogative to tax; or (b) to defend the jurisdiction of the HCA; or (c) to emphasise the extent to which English law was based on (or received) Roman or Continental laws; or (d) to defend a ‘*pet*’ theory. As to texts:

- Early writers included: Davies (writing in 1614-21),<sup>18</sup> Zouch (1663),<sup>19</sup> Molloy (1676),<sup>20</sup> Beawes (1752)<sup>21</sup> and Malynes (1622);<sup>22</sup>
- Writers in Victorian times and the early 20<sup>th</sup> century, included: Twiss (1871);<sup>23</sup> Gross (1890);<sup>24</sup> Scrutton (1891);<sup>25</sup> Holdsworth (1901);<sup>26</sup> Carter (1901);<sup>27</sup> Burdick (1902);<sup>28</sup> Ewart (1903);<sup>29</sup> Mitchell (1904);<sup>30</sup> Bateson (1904);<sup>31</sup> Thornely (1904);<sup>32</sup> Street (1908)<sup>33</sup> and Bewes (1923);<sup>34</sup>
- Writers in more recent times include: Sanborn (1930);<sup>35</sup> Thomas (1932),<sup>36</sup> Sutherland (1934),<sup>37</sup> Baker (1979 and 2000),<sup>38</sup> Trakman (1983),<sup>39</sup> Coquillette (1988)<sup>40</sup> as well as contributors to texts edited by Piergiovanni (1987 and 2005).<sup>41</sup>

<sup>18</sup> J Davies, *The Question concerning Impositions, Tonnage, Poundage, Prizage, Customs etc* (London, 1656, but written c. 1614-21). Davies was a lawyer and Attorney-General in Ireland to James I (1603-25) to whom he dedicated this work - one designed to provide political support to the Crown which argued that it had a prerogative to impose customs and to tax, without the authority of Parliament.

<sup>19</sup> R Zouch, *The Jurisdiction of the Admiralty of England Asserted* (1<sup>st</sup> ed, 1663, last ed 1686, the last edition of which is in Malynes, n 22, vol 1). Zouch was a judge of the High Court of Admiralty and keen to assert its jurisdiction against the encroachment of common lawyers.

<sup>20</sup> C Molloy, *De Jure Maritimo et Navali or a Treatise of Affairs Maritime and of Commerce* (1<sup>st</sup> ed, 1676; 9<sup>th</sup> ed, 1769). Molloy was a barrister.

<sup>21</sup> W Beawes, *Lex Mercatoria Rediviva or the Merchant's Directory* (1<sup>st</sup> ed, 1752). Beawes was a merchant.

<sup>22</sup> G Malynes, *Consuetudo vel Lex Mercatoria or the Ancient Law Merchant* (1<sup>st</sup> ed, 1622; 3<sup>rd</sup> ed, 1686 which contains the text of Zouch, see n 19). Malynes was a merchant.

<sup>23</sup> T Twiss (ed), *The Black Book of the Admiralty* (1871).

<sup>24</sup> C Gross, *The Guild Merchant* (Clarendon Press, 1890) (‘**Gross I**’). Also, C Gross, *The Court of Piepowder* (1906, a reprint from the Quarterly Journal of Economics, vol 20, Feb, 1906) (‘**Gross II**’) and C Gross (ed), *Select Cases concerning the Law Merchant AD 1270-1638*, Selden Society (‘**SS**’), vol 23 (1908) (‘**Gross III**’) See also H Hall (ed), *Select Cases concerning the Law Merchant*, SS, vols 46 (1239-1633) & 49 (1251-1779).

<sup>25</sup> TE Scrutton, *The Elements of Mercantile Law* (1891).

<sup>26</sup> W Holdsworth, *A History of English Law* (Sweet & Maxwell, 2009 rep).

<sup>27</sup> AT Carter, *The Early History of the Law Merchant in England* (1901) 17 LQR 232-51.

<sup>28</sup> FM Burdick, *What is the Law Merchant?* (1902) Columbia LR 470-85. It also comprises a chapter, FM Burdick, *Contributions of the Law Merchant to the Common Law* in AALH (1909), vol 3, pp 34-50.

<sup>29</sup> JS Ewart, *What is the Law Merchant?* (1903) 3 Columbia LR 135-54.

<sup>30</sup> W Mitchell, *An Essay on the Early History of the Law Merchant* (Cambridge, 1904).

<sup>31</sup> M Bateson, *Borough Customs*, SS, vols 18 & 21 (1904-6).

<sup>32</sup> W Thornley, *The History of the Law Merchant and Negotiability* (1904).

<sup>33</sup> Street, n 16.

<sup>34</sup> WA Bewes, *The Romance of the Law Merchant* (Sweet & Maxwell, 1923).

<sup>35</sup> FR Sanborn, *Origins of the Early English Maritime and Commercial Law* (The Century Co, 1930).

<sup>36</sup> AH Thomas (ed), *Calendar of Select Pleas and Memoranda of the City of London AD 1381-1412* (Cambridge UP, 1932), pp vii-xxix (introduction, concerning the law merchant).

<sup>37</sup> L Stuart Sutherland, *The Law Merchant in England in the Seventeenth and Eighteenth Centuries*, RHS Tr (4<sup>th</sup> series), xvii (1934), pp 149-76.

<sup>38</sup> J Baker, *The Law Merchant and the Common Law before 1700* (‘**Baker I**’) and ‘*Law Merchant*’ as a Source of English Law (‘**Baker II**’), both in J Baker, *Collected Papers on English Legal History* (Cambridge UP, 2013), vol 3, pp 1233-62 & 1263-84. Baker I was also published in (1979) Cambridge LJ, vol 38, pp 295-322 and Baker II in W Swadling & G Jones, *The Search for Principle: Essays for Lord Goff of Chieveley* (OUP, 2000), pp 79-96.

<sup>39</sup> LE Trakman, *Law Merchant and the Evolution of Commercial Law* (Hein, 1983).

<sup>40</sup> See n 13.

<sup>41</sup> V Piergiovanni (ed), *From Lex Mercatoria to Commercial Law* (Duncker & Humblot, 2005) (‘**Piergiovanni I**’). See also V Piergiovanni (ed), *The Courts and the Development of Commercial Law* (Duncker & Humblot, 1987) (‘**Piergiovanni II**’).

However, it may be noted that none of these authors analysed in any detail 3 areas of law which provide further insight into the early existence, and nature, of the law merchant, viz.

- **Anglo-Saxon law.** A review indicates that there is no evidence of the law merchant existing prior to the Norman Conquest of 1066. Indeed, there seems no evidence of it existing prior to 1189, at least - with the possible exception of piepowder courts (although it is likely these did not emerge in England until the 13<sup>th</sup> century);
- **London Customs.** These are contained in works such as: the *Liber Albus* (White Book) of the City of London (c. 1419),<sup>42</sup> the *Liber Custumarum* (Book of Customs) and the *Liber Horn*.<sup>43</sup> There are also the Calendar of Letterbooks of the City of London,<sup>44</sup> the Calendar of Pleas and Memoranda Rolls of the City of London<sup>45</sup> and the Calendar of Early Mayor's Court Rolls.<sup>46</sup>
  - These texts indicate that a number of 'customs of merchants' were London customs. Ones which applied to London citizens first and foremost - including citizens who bought and sold as a profession;<sup>47</sup>
  - Further, that many 'customs of merchants' extended to other groups. The effect of this lends support to the view that the law merchant never comprised a distinct body of law. And, that there was nothing particularly special about these customs of merchants. In medieval times, many groups of persons had their own privileges (customs) recognized by the law;<sup>48</sup>
- **Charters.** Many charters were granted to the City of London (the 'City'),<sup>49</sup> to the Cinque Ports<sup>50</sup> and to boroughs and towns.<sup>51</sup> They include various commercial privileges accorded to their freemen, usually, to benefit them to the exclusion of 'foreigners' - which term covered non-freemen as well as those who came from abroad.

### 3. TRADE: ANGLO-SAXON TIMES

#### (a) Anglo-Saxon Law - General<sup>52</sup>

<sup>42</sup> In 1419, John Carpenter made a repertory (that is, a book of remembrances) of existing laws, observances, rights and franchises of the City which is generally referred to as the *Liber Albus*. This was translated by HT Riley in 1861, see HT Riley, *Liber Albus: The White Book of the City of London* (Griffin & Co, 1861).

<sup>43</sup> The *Liber Custumarum* (compiled in the early part of the 14<sup>th</sup> century) and the *Liber Horn* (also called the *Liber Legum Regum Antiquorum*) belonged to Andrew Horn, lawyer and City Chamberlain who died in 1328. For these texts, see HT Riley, *Munimenta Gildhallae Londoniensis: Liber Albus, Liber Custumarum et Liber Horn* (Longmans, 1860), pts 1 & 2.

<sup>44</sup> The full title is: 'Calendar of Letter-Books preserved among the Archives of the Corporation of the City of London at the Guildhall' (printed by order of the Corporation under the Direction of the Library Committee). See Letterbooks A (1275-98), B (1275-1312), C (1291-1309), D (1309-14), E (1314-37), F (1337-52), G (1352-74), H (1375-99), I (1400-22), K (temp Henry VI (i.e. 1422-71)), L (Edward IV to Henry VII (i.e. 1461-1509)). See also British History online, www.british-history.ac.uk and GS McBain, *Liberties and Customs of the City of London - Are there any Left?* (2013) International Law Research, vol 2, no 1, pp 56-7. See also HT Riley, *Memorials of London and London Life...AD 1276-1419* (Longman, 1868). Riley, a Victorian researcher, extracted material from the Letterbooks for his book.

<sup>45</sup> *Calendar of Pleas and Memoranda Rolls preserved among the archives of the Corporation of the City of London at the Guildhall*, vol 1 (1323-64), vol 2 (1364-81), vol 3 (1381-1412), vol 4 (1413-37), vol 5 (1437-57), vol 6 (1458-82).

<sup>46</sup> AH Thomas, *Calendar of the Early Mayor's Court Rolls preserved among the archives of the Corporation of the City of London at the Guildhall, AD 1298-1307* (Cambridge UP, 1924). See also RR Sharpe (ed), *Calendar of Letters from the Mayor and Corporation of the City of London c. AD 1350-1370* enrolled and preserved among the archives of the Corporation at the Guildhall (London, 1885).

<sup>47</sup> As Bateson, n 31, p xv and xxxvii noted, some London customs were statutory. See *Judicia Civitatis Lundonie* (c. 930-40) and the *Libertas Londoniensis* (c. 1133-54).

<sup>48</sup> Coquillette, n 13, p 125 'the medieval mind thought in terms of special 'customary' laws for other special groups, such as clergy, women, aliens, Jews, and burghers. Merchants were just one more group.'

<sup>49</sup> See McBain, n 44.

<sup>50</sup> GS McBain, *The Charters of the Cinque Ports - Are they Still Needed?* (2013) Rev. of European Studies, vol 5, no 2, p 106.

<sup>51</sup> See Bateson, n 31. See also: (a) A Ballard, *British Borough Charters 1042-1216* (Cambridge UP, 1913) (especially ch 5, mercantile privileges) ('Ballard I'); (b) A Ballard, *British Borough Charters 1216-1307* (1923) ('Ballard II') and (c) M Weinbaum (ed), *British Borough Charters 1307-1660* (1943) ('Ballard III').

<sup>52</sup> See generally, (a) FL Attenborough, *The Laws of the Earliest English Kings* (NY, 1963); (b) AJ Robertson, *The Laws of the Kings of England from Edmund to Henry I* (Cambridge UP, 1925); (c) B Thorpe (ed), *Ancient Laws and Institutes of England* (printed by the Commissioners on the Public Records, 1840); (d) F Pollock & FW Maitland, *The History of English Law* (Cambridge UP, 1968) ('P & M'), vol 1, ch 2; (e) JH Baker, *An Introduction to English Legal History* (Reed, 4<sup>th</sup> ed, 2002), ch 1; (f) J Hudson, *The Oxford History of the Laws of England* (OUP, 2012); (g) FM Stenton, *Anglo-Saxon England* (OUP, 3<sup>rd</sup> ed, 1971); (h) F Palgrave, *History of the Anglo-Saxons* (W Tegg & Co, 1876). For the asserted laws of Edward the Confessor (AD 1042-66) see BR O'Brien, *God's Peace and King's Peace. The Laws of Edward the Confessor* (Univ. of Pennsylvania Press, 1999).

With the decline of the Roman empire in the 3<sup>rd</sup> to 5<sup>th</sup> centuries, the Romans left Britain to fend for itself as from c. AD 410.

- Thereafter, Germanic tribes from Saxony ('*Anglo-Saxons*', also called '*Saxons*' or '*Angles*') migrated - in increasingly large numbers - to Britain. They had subdued it (probably) during the years of Justinian's re-conquest of Italy (i.e. AD 534-54).<sup>53</sup> The result is that early Anglo-Saxon law is close to Germanic law in its pure form;<sup>54</sup>
- Few Anglo-Saxon laws have come down to us<sup>55</sup> and - as Pollock and Maitland pointed out - those which have, are likely to be mere '*superstructures on a much larger base of custom*'.<sup>56</sup>

In the commercial sphere, Anglo-Saxon law is scant. Pollock and Maitland state:

Except so far as it is involved in the law of theft, the law of property is almost entirely left in the region of unwritten custom and local usage. The law of contract is rudimentary, so rudimentary as to be barely distinguishable from the law of property. In fact people who have no system of credit and very little foreign trade, and who do nearly all their business in person and by word of mouth with neighbours whom they know, have not much occasion for a law of contract.<sup>57</sup>

This statement is explicable with regard to the situation that prevailed in Anglo-Saxon England:

- **Population.** When the Anglo-Saxons first arrived in the 5<sup>th</sup> century, there was (likely) a great decline in the population (as in Europe) due to war and plague.<sup>58</sup> This was exacerbated with the arrival of Danish armies (Vikings) from AD 866.<sup>59</sup> Indeed, much of the history of Anglo-Saxon England is characterized by war - both with external enemies and among the kingdoms.<sup>60</sup> Thus, even by the time of the Norman Conquest 1066, the population of England would (likely) have been 2-3 million persons and widely scattered at that;<sup>61</sup>
- **Items of Trade – Livestock.** It is clear from the many provisions on cattle stealing,<sup>62</sup> that the principal item of trade was livestock (including slaves). As Pollock and Maitland noted, other items of value (weapons, jewels *etc.*) would have been in constant personal custody and traded with care;<sup>63</sup>

<sup>53</sup> KF Drew, *The Lombard Laws*, (University of Pennsylvania Press, 1973), p vi. Also, p viii 'It took a century for the Anglo-Saxons to subdue the resistance in Roman Britain, but subdue it they did.' The first landing of the Jutes (Anglo-Saxons) appears to have been in AD 449.

<sup>54</sup> P & M, n 52, vol 1, p 44 'in its general features, Anglo-Saxon law is not only archaic, but offers an especially pure type of Germanic archaism.'

<sup>55</sup> **Attenborough**, n 52, cited: (a) the Kentish laws of Aethelberht (AD 558-616), Hlothhere and Eadric (AD 673-685/6), Eadric (AD 685-6) and Wihtred (AD 690/1-725); (b) the laws of Ine (AD 688-725) and of Alfred (AD 871-99); (c) a treaty of Alfred and the danish king Guthrum (AD c. 878-90) and the laws of Edward (the Elder, AD 899-924) and Guthrum (asserted, more recently, to have been written, c. AD 1000 by Wulfstan II, Archbishop of York (AD 1002-23); (d) the laws of Edward the Elder (AD 899-924) and of Aethelstan I (AD 924-39). **Robertson**, n 52, cited: (a) laws of Edmund (AD 939-46) and Edgar (AD 943-75); (b) *Promissio Regis* (a coronation oath composed for Edward the Martyr (AD 975-8) or Aethelred II (AD 978-1016)); (c) the laws of Aethelred II (AD 978-1016); (d) the laws of Canute (1016-35). Robertson also cited the '*laws*' of William I (1066-87)(*viz.* a charter to the City of London, Regulations concerning exculpation, Episcopal laws, Ten Articles and *Articuli Retractati*) as well as various laws of Henry I (1100-35) (*viz.* a Coronation charter, a Decree concerning Coinage and a Decree concerning the county and hundred courts. Also, a charter to the City of London, c.1132-3).

<sup>56</sup> P & M, n 52, vol 1, p 27.

<sup>57</sup> *Ibid*, pp 43-4.

<sup>58</sup> This could have been by as much as 50%, see GS McBain, *Modernising the Law: Breaches of the Peace and Justices of the Peace* (2015) *Journal of Politics and Law*, vol 8, no 3, p 166.

<sup>59</sup> As from AD 866, Danish armies (Vikings) began to winter in England - as opposed to raiding periodically. They brought with them their Danelaw. Eventually, the Danes put an end to all English kingdoms, save for that of Wessex. See also McBain, n 58, p 166.

<sup>60</sup> See generally, Stenton, n 52 and D Whitelock *et al*, *The Anglo-Saxon Chronicle* (Eyre & Spottiswoode, 2<sup>nd</sup> ed, 1965)(chronology).

<sup>61</sup> RH Britnell, *The Commercialisation of English Society 1000-1500* (Manchester UP, 1996), p 5 asserted that 'There were perhaps fewer than 3m people living in the 13,278 places recorded in Domesday Book.' Cf. CK Allen, *The Queen's Peace* (Hamlyn Lecture, 1953), p 4, who thought the population of England in 1087 was c. one and a half million people.

<sup>62</sup> P & M, n 52, vol 1, p 38 'The staple matter of judicial proceeding was of a rude and simple kind. In so far as we can trust the written laws, the only topics of general importance were manslaughter, wounding, and cattle stealing. So frequent was the last named practice that it was by no means easy for a man, who was minded to buy cattle honestly, to be sure that he was not buying stolen beasts, and the Anglo-Saxon dooms are full of elaborate precautions on this head....' *Ibid*, p 55 'Theft, especially of cattle and horses, appears to have been by far the commonest and most troublesome of offences.'

<sup>63</sup> *Ibid*, p 57 'Movable property, in Anglo-Saxon law, seems for all practical purposes to be synonymous with cattle. Not that there was no other valuable property; but arms, jewels, and the like, must with rare exceptions have been in the constant personal custody of the owners or their immediate attendants.'

- **Oral Trade and by Delivery.** In the rudimentary society that Anglo-Saxon England comprised, it is reasonable to suppose that transactions were oral rather than in writing.<sup>64</sup> And, that there was either immediate physical delivery of the item or a token (earnest) to evidence later payment and delivery;<sup>65</sup>
- **Oath & Vouching to Warranty.** Unlike Roman law which it supplanted, Germanic law was based on allegiance and the swearing of loyalty by means of an oath. Ensuring the legitimacy of sales was also by oath.<sup>66</sup> More importantly, in the case of sales - in order to forestall later claims of the goods being stolen - third party witnesses were required to vouch title to goods. Pollock and Maitland state:

there runs persistently through the Anglo-Saxon laws a series of ordinances impressing on buyers of cattle the need of buying before good witnesses. But this has nothing to do with the validity of the sale between the parties.<sup>67</sup> The sole purpose, judging by the terms and context of these enactments, is to protect the buyer against the subsequent claims of any person who might allege that the cattle had been stolen from him...

Also,

A buyer who neglected to take witness was liable to eviction, if the cattle were claimed as stolen, without even the chance of calling the seller to warrant him, and he might also incur a forfeiture to the lord of the place, and be called on to clear himself by oath of any complicity in the theft. If he had duly taken witness, he still had to produce the seller, or, if the seller could not be found, to establish his own good faith by oath. If the seller appeared he had in turn to justify his possession, and this process might be carried back to the fourth degree removed from the ultimate purchaser.<sup>68</sup>

- **Where Sales Permitted.** By the laws of Edward the Elder (AD 899-924) and of Aethelstan I (AD 924-39) it seems that sales of more valuable goods such as larger livestock (horses, oxen, cattle, slaves) were restricted, in this period, to: (a) towns; or (b) when in the presence of the portreeve (an official of the king) or other man of credit.<sup>69</sup> While this was likely to ensure accountability and prevent disputes, it also suggests the Crown was asserting its prerogative over the right to hold markets - a right later franchised, for its financial benefit.

In respect of these matters being reflected in Anglo-Saxon law, this is now considered.

### **(b) Early Anglo-Saxon Law**

The earliest extant Anglo-Saxon law appears to be that of Aethelbert, king of Kent (AD 558-616). It was likely issued between AD 597-616. This code contains some 90 provisions, mainly relating to what we would term criminal law.<sup>70</sup> On trade (commercial) matters, there was nothing. As to subsequent Anglo-Saxon laws:

<sup>64</sup> J Campbell, *Essays in Anglo-Saxon History* (Hambledon Continuum, 1986), p 31 thought that literacy in Anglo-Saxon times was rare.

<sup>65</sup> P & M, n 52, vol 1, p 57 'We may assume that actual delivery was the only known mode of transfer between living persons; that the acceptance of earnest money and giving of faith and pledges were customary means of binding a bargain; and that contracts in writing were not in use.'

<sup>66</sup> Ibid, pp 57-8 'There is no evidence of any regular process of enforcing contracts, but no doubt promises of any special importance were commonly made by oath, with the purpose and result of putting them under the sanction of the church.' Ibid, p 58 'We may guess, from what is known of the practice of local courts in the twelfth and thirteenth centuries, that before the Conquest the hundred courts did to some extent do justice in matters of bargain and promise in the ordinary affairs of life. But we have no direct information whatever.'

<sup>67</sup> That is, whether the goods were adequate, whether the agreed price had been paid *etc.*

<sup>68</sup> Attenborough, n 52, pp 58-9. He continued 'These elaborate provisions for vouching to warranty (A-S [Anglo-Saxon] *team*) or the custom on which they were founded, persisted for some time after the Norman Conquest [Pollock and Maitland cited Glanvill, see 4(c)], and are interesting by their analogy to the doctrine of warranty in the law of real property, which afterwards underwent a far more full and technical development, and remained long after it had been forgotten in practice, as the foundation of many parts of modern conveyancing.' See also Hudson, n 52, pp 155-60, which, p 156, contains the relevant oaths.

<sup>69</sup> P & M, n 52, vol 1, p 59 'Evidently great suspicion attached to sales made anywhere out of open market. Some ordinances require the presence of the portreeve or other credible men at sales without the gates; others attempt to prohibit selling altogether except in towns.'

<sup>70</sup> See generally, McBain, n 58, especially, p 166. The state of England prior to Aethelbert's reign is described in MJ Whittock, *The Origins of England 410-600* (Barnes & Noble, 1986). There is nothing to suggest that there were fairs operating in England or that there were other than a few markets in towns. Indeed, many of the larger towns may have had scant populations. Whittock, p 172, did not think London began to revive as a commercial centre until AD 640's.

- **Hlothhere & Eadric** (AD 673- 685/6). These made provision on the theft of goods.<sup>71</sup> Also, what seems to be, the first mention of vouching to warranty.<sup>72</sup> As to the latter:
  - The reference to the '*king's residence*' - while it might mean the actual residence of the king - one would suggest, more likely, referred to the king's courts or where the king's official (his reeve) <sup>73</sup> resided, in order for them to resolve the dispute;
  - This law may also be the origin of the later concept of '*market overt*' (a local custom which applied to London in respect of title to stolen goods) since it refers to a defence that the purchaser '*bought the property openly in London*';<sup>74</sup>
  - The above suggests there were public markets in London at the time - not an unreasonable supposition, when its population may have been c. 5,000 persons;<sup>75</sup>
- **Ine (AD 688-725)**. These laws appear to be the first to refer to a trader [*cipemann* or chapman]. It also seems likely that there was - by this period - trading outside the principal towns (including London) since the law refers to traders going into the '*interior of the country*'.<sup>76</sup> The laws of Ine also mention vouching to warranty <sup>77</sup> as well as the return of defective goods.<sup>78</sup> It also seems that - besides London - places such as York, Canterbury, Southampton and Rochester were resorted to, not just by local traders but by foreign ones;<sup>79</sup>
- **Alfred (AD 871-99)**. These laws mentioned traders and their retinue; <sup>80</sup>

<sup>71</sup> Attenborough, n 52, p 19 'If one man steals property from another, and the owner afterwards reclaims [attaches] it, he [who is in possession] shall bring it to the king's residence, if he can, and produce the man who sold it to him. If he cannot do that, he shall surrender it, and the owner shall take possession [of it].'

<sup>72</sup> Ibid, p 23 'If a man of Kent buys property in London [Attenborough, p 180 notes that 'No doubt the law, as usual, applies primarily to cattle stealing] he shall have two or three trustworthy men, or the reeve of the king's estate, as witness. If afterwards it is claimed from the man in Kent, he shall summon as witness, to the king's residence in London [Attenborough, p 180 states: 'Or perhaps 'the king's reeve in London.']; the man who sold it to him, if he knows him and can produce him as warrant for the transaction. If he cannot do so, he shall declare on the altar, with one of his witnesses or with the reeve of the king's estate, that he brought the *property openly in London*, and with goods known to be his, [Attenborough, p 180 states: 'Or rather, perhaps, 'in a public transaction.']] and the value [of the property] shall be returned to him. If, however, he cannot prove that [he bought the property openly *etc*] by lawful declaration, he shall give it up, and the owner shall take possession of it.' (*italics supplied*)

<sup>73</sup> The reeve (like the later sheriff) had considerable and varied powers. D Whitlock, *English Historical Documents c.500-1042* (Eyre & Spottiswoode, rep, 1968), p 67 'Town reeves' duties included much supervision of trade, collecting of tolls and witnessing of purchases, and supervision of the mint in boroughs that were allowed one.'

<sup>74</sup> The origin of market overt was likely Anglo-Saxon, brought over from Germany. CP Scott, *The Visigothic Code* (Boston Book Co, 1910), p 357 'Where any foreign merchant sells gold, silver, clothing, or ornaments of any description, for a fair price, to any of our subjects, and said property should afterwards prove to have been stolen, the purchaser shall incur no liability therefor.' See also Bateson, n 31, vol 2, pp lxxvii-ix 'The Visigothic law ([AD] 475) protected the honest buyer's possession wholly if he could prove that he bought from a merchant who came from overseas.' See also Bewes, n 34, pp 37-41.

<sup>75</sup> London had been an important place in Roman times. What its population was in the reigns of Hlothhere and Eadric (AD 673, 685-6) is unclear. Perhaps, 5,000 persons with some 20 markets. See also P & M, n 52, vol 2, p 158, fn 2. There must have also been a few foreign traders in this period since a letter of AD 796 from Charlemagne, king of the Franks (c. AD 742-814) to Offa, king of Mercia (AD 757-796) refers to the mutual protection of merchants, see Mitchell, n 30, p 23 and Thornley, n 32, p 4.

<sup>76</sup> Attenborough, n 52, p 45. 'If a trader [makes his way into] *the interior of the country* and [proceeds to] traffic, he shall do so before witnesses. If stolen property in the hands of a trader is attached, and he has not brought it in the presence of trustworthy witnesses, he shall declare with an oath equal to the penalty [involved] that he has been neither an accessory nor an accomplice [to the theft], or pay a fine of 36 shillings.' (*italics supplied*)

<sup>77</sup> Ibid, p 47 'If a man is vouched to warranty for livestock and he has previously disowned the transaction and wishes again to disown it, the oath required of him shall be equal to the amount of the fine involved and the value of the stock. If he does not wish to disown the transaction [a second time], he shall pay double compensation for his false oath.' Slaves could also be vouched to warranty. Ibid, pp 53-4.

<sup>78</sup> Ibid, p 55 'If anyone buys any sort of beast, and then finds any manner of blemish in it within thirty days, he shall send it back to [its former] owner... or [the former owner] shall swear that he knew of no blemish in it when he sold it him.' Ibid, p 61 'If a stolen chattel is attached, and the person in whose possession it is attached vouches it to another man, and if the man will not admit it, and says that he never sold him that, but that he sold him some other thing, he who vouched the man to warranty may declare that he [the witness] sold him none other but the same thing.'

<sup>79</sup> See generally, Stenton, n 52, p 526 *et seq.*

<sup>80</sup> Attenborough, n 52, p 79 'with regard to traders, it is decreed: they shall bring before the king's reeve, at a public meeting, [i.e. a public court] the men they are taking with them up into the country, and declare how many of them there are; and they shall take with them [only] such men as they can bring to justice again, at a public meeting. And when they need to have more men with them on their journey, a similar declaration shall always be made to the king's reeve, before the assembled company, as often as the need arises.'



- **Alfred & Guthrum (AD 878-90)**. A treaty between Alfred and the Danish king, Guthrum, referred to vouching to warranty to goods;<sup>81</sup>
- **Edward the Elder (AD 899-924)**. These laws provided that the selling of more valuable goods was to be restricted to market towns (it cannot be supposed that Anglo-Saxon laws sought to prohibit village sales of produce).<sup>82</sup>
  - This suggests that markets were likely regulated by the Crown by this time, if not before. Not least, since tolls imposed at them would have been a good source of revenue;
  - These laws contain more specific provisions on vouching to warranty<sup>83</sup> as well as provide for the reeve to hold his court (later, called the hundred court) every 4 weeks;<sup>84</sup>
- **Aethelstan (AD 924-39)**. These laws made reference to the exchange of cattle.<sup>85</sup> They also restricted the sale of goods worth more than 20 pence to towns<sup>86</sup> (although this was not confirmed in the later laws of this king).<sup>87</sup> Further, there seems to have been a ‘*professionalising*’ of witnesses in such matters.<sup>88</sup> As to what fell within this 20 pence category, an Ordinance of the City of London (*Judicia Civitatis Lundoniae*)<sup>89</sup> drawn up by the bishops and reeves who held jurisdiction in London and approved by Aethelstan and his council (*witan*) - which law was probably promulgated c. AD 930-40 - reckoned, with regard to compensation payable to a gild member who had been robbed, that a (an):
  - horse was worth half a pound (and, if less valuable, then according to its appearance);
  - ox was worth a *mancus* (30 pence);
  - cow was worth 20 pence;
  - pig was worth 10 pence;
  - sheep was worth a shilling (12 pence);

<sup>81</sup> Ibid, p 101 ‘Every man shall have knowledge of his warrantor when he buys slaves, or horses, or oxen.’ C Walford, *Fairs Past and Present* (1883, rep NY, 1968), p 19 stated that, in the time of king Alfred [AD 871-99], foreign merchants were only permitted to come to 4 fairs and to remain in England up to 40 days. He cited no source but it was likely *The Mirror of Justices* (c. 1290), SS, vol 7, p 14 ‘It was forbidden that any foreign merchant should frequent England save at the four fairs and that no [alien] should dwell in the land for more than 40 days.’ However, the Mirror is not generally held as a very good authority.

<sup>82</sup> Ibid, p 115 ‘my will is that every man shall have a warrantor [to his transactions] and that no one shall buy [and sell] except in a market town; but he shall have the witness of the ‘*port reeve*’ [i.e. the reeve in charge of a town or ‘*port*’] or other men of credit, who can be trusted. And if anyone buys outside a market town, he shall forfeit the sum due for insubordination to the king; but the production of warrantors shall nevertheless be continued, until the point is known at which they can no longer be found.’ See also FW Maitland, *Domesday Book and Beyond* (Fontana, 1965), p 238 and Stenton, n 52, p 528. Hudson, n 52, p 153 translated ‘*port*’ as a ‘*recognised trading place*.’ E Williams, *Staple Inn* (1906), p 18 ‘*Porte* is a Saxon word of latin origin, meaning both market and gate...’. Britnell, n 61, p 12 ‘The word *port*, derived from the latin *portus* meaning a harbour...designated an urban centre of trade, whether on the coast or island, rather than a market in any more narrow sense.’

<sup>83</sup> Ibid, p 115 ‘Further, we have declared that he who has to vouch [another man] to warranty, shall have trustworthy witness that he is doing so in accordance with the law; or shall produce an oath which he who brings the accusation may place confidence in. We have similarly declared, that in cases where a man wishes to substantiate his plea of ownership, he shall produce trustworthy witness to this effect, or he shall produce such an oath - an unselected oath if he can - as the plaintiff shall be bound to accept.’

<sup>84</sup> Ibid, p 121 ‘It is my will that every reeve shall hold a meeting every four weeks; and they shall see to it that every man obtains the benefit of the public law, and that every suit shall have a day assigned to it on which it shall be heard and decided.’

<sup>85</sup> Ibid, p 133 ‘no one shall exchange any cattle unless he has as witness the reeve or the mass-priest, or the landowner, or the treasurer, or some other trustworthy man. If anyone does so he shall pay a fine of 30 shillings, and the landowner shall take what has been exchanged.’ The ‘*treasurer*’, likely, referred to the financial official of the king in various districts. Ibid, p 207.

<sup>86</sup> Ibid, p 135 ‘we have declared that no one shall buy goods worth more than 20 pence, outside a town; but he shall buy within the town, in the presence of the port reeve or some other trustworthy man, or again, in the presence of the reeves at a public meeting [i.e. a public court]. And we declare...that all trading shall be carried on in a town.’ Also, p 141 ‘if anyone buys cattle in the presence of a witness, and afterwards has to vouch it to warranty, then he from whom he has bought it shall receive it back again, whether he be a slave or a freeman - whichever he may be.’ Hudson, n 52, p 153 n 23 ‘Insistence on certain locations clearly had advantages for the king not only in keeping track of transactions in order to prevent dealing in stolen goods, but also in ensuring that tolls could be taken.’ See also Whitelock, n 73, p 72.

<sup>87</sup> Hudson, n 52, p 153. See also Attenborough, n 52, p 147 and Bewes, n 34, p 105.

<sup>88</sup> Ibid, p 155 ‘in every reeve’s district, as many men as are known to be honest shall be nominated to be witnesses in all suits. And the number of honest men required to give oaths [in each case] shall be in proportion to the value of the [disputed] goods, and they shall be ‘unselected.’

<sup>89</sup> G Home, *Medieval London* (Bracken Books, 1994), p 253 ‘It is a code of regulations relating to London, which, in the preamble, distinctly states that it was drawn up by the municipality at various dates and was now codified.’

- slave was worth half a pound.<sup>90</sup>

This law, then, required the sale of horses, oxen, cattle and slaves to be conducted in market towns;

- **Edmund (AD 939-46).** These laws made provision on witnessing the purchase of strange (probably, it refers to non-local) cattle.<sup>91</sup> They also contained a general legal requirement that every man must provide surety for his lawful conduct;<sup>92</sup>
- **Edgar (AD 943-75).** These laws re-iterated the requirement that every man had to provide surety for his lawful conduct.<sup>93</sup> They also provided for witnesses in the case of the buying and selling of goods, and for neighbours to be informed of purchases.<sup>94</sup>
  - These laws of Edgar also provided there be one standard system of weights and measures, as used in London and Winchester<sup>95</sup> and for the minimum price of wool<sup>96</sup> - which indicate the increasing involvement of the Crown in the regulation of trade;

The laws of Edgar also refer to the prerogatives of the Crown and to his holding them as in the time of his father (Edmund, see above).<sup>97</sup>

- In respect of this, it seems likely that, about this time (that is, mid-10<sup>th</sup> century) kings were franchising certain Crown prerogatives to powerful nobles. In particular, the right to exercise private justice - including the holding of a court (termed '*sake and soke*' or '*sac and socn*');<sup>98</sup>
- It is also possible that - about this time - Anglo-Saxon kings were franchising to others (such as magnates and important clerics) '*toll and team*'.<sup>99</sup> That is, the right to impose a tax ('*toll*') on the sale of goods on their manorial estates as well as the right to arbitrate disputes

<sup>90</sup> Attenborough, n 52, p 161. '*Mancus*' was a West Saxon shilling (a gold coin weighing about 70 grains), worth 30 pence. Ibid, p 201. The Ordinance also provided that: 'every man should note, with the witness of his neighbours, when he has, and when he ceases to have, possession of his cattle. If he cannot find them, he shall point out the trail to us within 3 days; for we believe that many heedless men do not care where their cattle wander, owing to their excessive confidence in the public security [which now exists].' Cf. Whitelock, n 73, p 73.

<sup>91</sup> Robertson, n 52, p 15 'no one shall make a purchase or receive strange cattle unless he has as witness the high reeve or the priest or the treasurer or the town reeve.'

<sup>92</sup> Ibid, p 27 'every man shall see that he has a surety, and this surety shall bring and keep him to [the performance of] every lawful duty.'

<sup>93</sup> Ibid, p 15 'My will is, further, that every man be under surety, whether he live within a borough or in the country. And a body of standing witnesses shall be appointed for every borough and for every hundred. 36 persons shall be chosen as witnesses for every borough. 12 [shall be chosen] for small boroughs and for every hundred, unless you desire more.'

<sup>94</sup> Ibid, p 33 'And every man shall buy or sell in the presence of these witnesses all the goods which he buys or sells either in a borough or in a wapentake. And he who sets out to make any purchase shall inform his neighbours of the object of his journey; and when he comes home, he shall also declare who was present as witness when he bought the goods. If, however, he makes a purchase unexpectedly, when he is away on some journey or other, and he had not given notice of it when he set out, he shall do so when he comes home; and, if it is livestock, he shall bring it to the common pasture with the cognizance of the village to which he belongs. And every man shall act as surety for his men and for all those who are under his protection and on his estate.' A person who failed to do this forfeited the livestock. Ibid, p 35. A person who made it known that he had brought the cattle in the presence of witnesses - and this turned out to be false - was treated as a thief and he 'shall forfeit his head and all that he possesses.' Ibid, p 37. See also Hudson, n 52, p 154.

<sup>95</sup> Ibid, p 29 'there shall be one system of measurement, and one standard of weights, such as is in use in London and in Winchester.' At this time, Winchester (in Anglo-Saxon, *Wintanceastre*) was an important financial centre, noted for the sales of cloth and of wine. See also Hudson, n 52, p 153.

<sup>96</sup> Ibid, 'a wey of wool shall be sold for 120 pence, and no one shall sell it at a cheaper rate. And if anyone sells it at a cheaper rate, either openly or secretly [privately], both he who sells it and he who buys it shall pay 60 shillings to the king.'

<sup>97</sup> Ibid, p 33 'in every borough and in every county I possess my royal prerogatives as my father [i.e. king Edmund, AD 939-46; Ibid, p 307] did.'

<sup>98</sup> Stenton, n 52, p 492 stated 'The origin of private justice is one of the unsolved problems of Anglo-Saxon history. The research of many scholars has failed to find any text earlier than the middle of the tenth century which explicitly assigns the right of holding a court to any lord other than the king.' Whitelock, n 73, p 546 referred to a grant of *sac* and *soc* (sake and soke) in a charter as early as AD 1004. A Harding, *The Law Courts of Medieval England* (Allen & Unwin, 1973), p 18 "'*sake*' denoting the right to hear cases and '*soke*' the right to extract suit from the inhabitants of the hundred.' See also McBain, ns 44 & 50. Also, H Cam, *The 'Private' Hundred before the Norman Conquest*, pp 50-60 in JC Davies (ed), *Studies presented to Sir Hilary Jenkinson* (Oxford UP, 1957).

<sup>99</sup> Stenton, n 52, p 498 '*toll*...denoted the right to take a payment on the sale of cattle or other goods within an estate; *team* denoted the right to hold a court in which men accused of wrongful possession of cattle or goods could prove their honesty; and the best proof was the open testimony of witnesses who had seen the payment of toll when the disputed chattels were acquired.' O'Brien, n 52, p 181 '*Toll*: What we call *theloneum*, namely the liberty to sell and buy on one's own land. *Team*; That if something has been attached from someone and he himself cannot have his warrantor, [his] was the monetary penalty; and similarly the jurisdiction over the accuser if he fails [in his proof].' Whitelock, n 73, p 546 referred to a grant of toll and team in a charter as early as AD 1004. See also Ballard I, n 51, p liv.

(vouching to warranty) in respect of the same ('team'). This is important since this expression 'toll and team' may refer to the right to hold a market or fair;

- **Aethelred II (AD 978-1016)**. These laws re-iterated that every freeman must have a trustworthy surety<sup>100</sup> and that no one might buy or sell anything unless he had a surety and witnesses.<sup>101</sup> Also, that vouching to warranty was required to take place in a royal manor.<sup>102</sup> There was forfeiture of livestock where no surety had been provided;<sup>103</sup>
- **The Year 1000**. By this time there was a volume of trade with foreign traders from a number of countries<sup>104</sup> since a law of c. 1000 referred to foreigners, in the context of tolls for landing goods in London from their ships. Thus:
  - Men of *Rouen* who came with wine (or blubber fish) paid a toll of 6 shillings for a large ship. Also, a toll of 5% of the value of the fish;
  - Men from *Flanders, Ponthieu, Normandy* and the *Isle of France* were required to 'exhibit' their goods (possibly, 'exhibit' means an obligation to sell such goods in a public market and not privately) for which they were required to pay a toll (but no other duty);<sup>105</sup>
  - Men from *Huy, Liege and Nivelles* who were passing through London paid a sum for exhibition and toll;<sup>106</sup>
  - Subjects of the *Emperor* (i.e. Germanic merchants)<sup>107</sup> who came in their ships were entitled to the same privileges as the burgesses (citizens) of London.<sup>108</sup>

This law also specified that goods sold in the London markets had to pay a toll for eggs, cheese and butter.<sup>109</sup> Where a person asserted that he had paid the toll and there was dispute, vouching to warranty was required.<sup>110</sup>

While all these Anglo-Saxon laws in respect of trading - and its regulation - are scant, they reveal certain things:

- **Vouching to Warranty**. The means Anglo-Saxon law employed to prevent the theft of livestock or slaves (the main items of worth) was the requirement that any sale of the same had to be vouched for. That is, warranted or guaranteed by reliable third parties - whether the king's official, the reeve or other persons of credit;
- **Involvement of the Crown**. From, at least AD 673, the Crown (the king's reeve) was involved in evidencing sales and arbitrating disputes in relation to them;
- **Crown Prerogative to Operate a Market**. From, at least AD 899, the Crown restricted the sale of more valuable goods to designated market towns. This suggests not only that there were more public markets operating in England by this time - but that the Crown was, also, beginning to assert the prerogative to operate markets. One can see the benefit (and the need) for this. Markets resulted in the congregation of many people. Thus, there was the prospect of communal violence - especially where

<sup>100</sup> Robertson, n 52, p 53 'every freeman shall have a trustworthy surety.'

<sup>101</sup> Ibid, p 55 'no one shall buy or exchange anything, unless he have a surety and witnesses.'

<sup>102</sup> Ibid, pp 61-2.

<sup>103</sup> Ibid, p 67 'if anyone has livestock acquired without surety, and manorial lords attach it, he shall give up the livestock and pay 20 ores.' In Danish districts, money was reckoned by the 'ore' of 20 pence.

<sup>104</sup> See also Whitelock, n 73, pp 73-4.

<sup>105</sup> Stenton, n 52, p 540 'its language suggests that they were required to expose [publicly sell] their goods and pay toll on the wharf or on shipboard.'

<sup>106</sup> Ibid, p 541 '[they] were apparently allowed to enter the city before paying toll.'

<sup>107</sup> They had a trading post at the Steelyard, on the banks of the Thames (now Thames Street), from AD 900-1597. Henry III (1216-72) granted a charter to certain merchants of Flanders and of the Hanse towns (Lubeck, Hamburg, Bremen, Cologne) giving them possession of the Steelyard for services rendered. Elizabeth I (1558-1603) ordered the closure of the Steelyard in 1597. See also G Cawston & AH Keane, *The Early Chartered Companies (AD 1296-1858)*(Arnold, 1896), pp 4-9.

<sup>108</sup> Robertson, n 52, p 73. Stenton, n 52, p 541 "'men of the emperor', a phrase which covers all other Germanic merchants, are declared to be worthy of such good customs as the men of London themselves enjoyed.' Also, 'in the first half of the eleventh century London was a place of frequent resort for traders from every country between Norway and northern France.'

<sup>109</sup> Ibid. 'From hampers [these were carried on the back] with hens, one hen [is given] as toll, and from one hamper of eggs, five eggs as toll, if they come to the market. Women who deal in dairy produce (i.e. cheese and butter) pay 1 penny a fortnight before Christmas, and another penny a week before Christmas.'

<sup>110</sup> Ibid, pp 73-4.

theft was not suppressed. Markets also enabled the king to charge for his reeves becoming involved in witnessing the sale of goods and in arbitrating disputes.

Thus, the Crown could impose a 'toll' for the selling of goods at market. It could also franchise markets - a means of replenishing the Treasury as well as securing loyalty from the franchisees, since the franchise could be taken away. As for London, it must have remained - ever since Roman times - the location of a number of public markets. Further, it is difficult not to suppose that - at least - some of these markets survived wars and disasters, regardless of whether the Britons, the Anglo-Saxons or the Danes controlled them.

- Thus, specific customs in respect of the sales of goods (including slaves) must have developed. In particular, one would suggest that a large turnover of the sale of livestock in London<sup>111</sup> - as well as the dictates of having to do a brisk business (since it was dangerous to travel after dusk) - necessitated a rule of *market overt*, obviating the need for every sale in a public (open) market having to be vouched to warranty (up to the fourth degree of sale) each time;
- In towns other than London - which would have been much smaller and where traders likely knew each other on a daily basis - the need for a rule of market overt would have been less.

### (c) Later Anglo-Saxon Law - Canute & Edward the Confessor

The *Laws of Canute* (1016-35) made provision on vouching to warranty.<sup>112</sup> They also provided that:

no one shall buy anything over four pence in value, either livestock or other property,<sup>113</sup> unless he have four men as trustworthy witnesses, whether [the purchase be made] within a town or in the open country'.<sup>114</sup>

Four pence would have been a low sum and would covered sheep and pigs as well as cattle and horses but, probably, not chickens, although the, later, laws of Edward the Confessor (written c. 1140's) suggest otherwise in referring to a 'living animal' when they stated:

It was also prohibited in law that no one buy a *living* animal or a used garment without pledges and good witnesses.<sup>115</sup> ...if the seller cannot find pledges, he shall be detained with the money until either his lord or some other person who justly can warrant him shall come. But if someone buys in another way, he shall lose what he foolishly bought and [pay] a monetary penalty.<sup>116</sup>

Moreover, when it was said that they ought not to buy [living] animals without pledges, the butchers from the cities and boroughs, whom the English call *flesmangeres*, claimed they had to buy, kill, and sell animals every day. Likewise the citizens and burghers claimed as their own customs that around the feasts of St Martin [11<sup>th</sup> November] they used to purchase animals without pledges in order to do their butchering in preparation for Christmas. These just and wisely established customs we do not take away

<sup>111</sup> London may have had a population of 5,000 persons by AD 673 with perhaps, say, 20 markets or so (see n 75). Being a walled City and still containing many Roman buildings, one would imagine the old Roman markets would also have been the venue for the Anglo-Saxon ones, in many instances. Also, that Anglo-Saxon markets would have been situated close to the City walls - to enable livestock to be taken the minimum distance from outside the City and for the easy disposal of blood, entrails *etc.* It is also (likely) that large areas within the walls of London were still rural.

<sup>112</sup> Robertson, n 52, p 187 'no man shall be entitled to vouch to warranty, unless he has trustworthy witnesses [to declare] whence he acquired the stock which is attached in his possession.'

<sup>113</sup> A sheep was 4 pence, a pig eight (or ten) pence. Whitelock, n 73, p 73.

<sup>114</sup> Robertson, n 52, p 187. It continued 'If, however, any property is attached, and he [who is in possession of it] has no such witnesses, no vouching to warranty shall be allowed, but the property shall be given up to its rightful owner and also the supplementary payment, and the fine to the party who is entitled thereto. And if he has witnesses in accordance with what we have declared above, vouching to warranty shall take place three times. On the fourth occasion he shall prove his claim to it or give it back to its rightful owner. But we regard it as unjust that anyone should claim ownership in a case where there is evidence by which it can be recognized that fraud is involved; so that no one ought to claim ownership of it in less than six months at least from the time when it was stolen.' See also Hudson, n 52, p 154.

<sup>115</sup> O'Brien, n 52, p 201. It continued 'And if there is any gold or silver work whose seller ought to be doubted, it shall not be bought except by goldsmiths and moneyers [i.e. coiners]. And if these recognised that it came from a church or from treasures, it shall not be bought without pledges.'

<sup>116</sup> *Ibid.* It continued 'And the justice should later inquire through lawmen and the better men of the borough, hundred, or *vill* where the buyer himself lives, about what kind of life he led, and if prior to this they had heard him accused of illegal conduct. And if they shall testify to his law-worthiness, he shall clear himself by the judgment of the county that he had not known the seller was guilty of this sale nor about some other illegal conduct. And if he knows the seller, who he is or where he is, he shall say so, and the justice shall seek him in order to do justice; and if he cannot be found, he shall be outlawed.'

from them, as long as they shall buy in the markets with witnesses and from known sellers.<sup>117</sup> (*wording divided and italics supplied*)

The provision on animals is interesting since - like the London 'market overt' exception - it suggests that trade generally was now sufficiently widespread that selling animals was not subject to the full rigour of vouching to warranty in certain instances, such as near Christmas time.<sup>118</sup> However, it should be noted that the Laws of Edward the Confessor are, likely, *post* Conquest.

#### (d) **Fairs & Markets**

As will be discussed later (see **13**), from the time of Henry III (1216-72), fairs were very common. Unlike markets, fairs did not occur on a regular basis but - rather - often, once a year and on a day when there was a religious festival.<sup>119</sup> Although such festivals (Latin, *feria*) were common in Roman times (and earlier),<sup>120</sup> there is reason to believe that such fairs would not have been common in London or elsewhere in Anglo-Saxon England, for the following reasons:

- **Devastation in London.** London was often sacked in Anglo-Saxon times, as well as being devastated by fire and plague;<sup>121</sup>
  - Indeed, after AD 457 - when a Romano-British army was defeated by a Saxon army (commanded by Hengist) at the river Cray (some two miles west of Dartford) - London may not have been inhabited for some 50-80 years;<sup>122</sup>
  - Further, after the sack of London in AD 851, it is possible that it was barely inhabited until king Alfred retook it in AD 886 (another 35 years),<sup>123</sup>
  - And, in AD 961, London experienced an outbreak of plague.

What happened to London also happened to other major towns in Anglo-Saxon times;

- **Little Interest in Trade.** Anglo-Saxons - like their Germanic ancestors -<sup>124</sup> were warriors. Thus, they, (likely) had no interest in any thing but the most basic trade. Further, they preferred small encampments (villages) to cities or to large towns - limiting the need for larger markets,<sup>125</sup>
- **Violence.** Anglo-Saxon England was remarkably violent, with constant war and disturbance. This occurred right up to the mid-10<sup>th</sup> century. As a result, trade was (likely) local and strictly regulated, with such markets as there were, being held in walled towns (*burghs*, boroughs), in order to prevent

<sup>117</sup> Ibid, pp 202-3. Ibid, p 280 'OE [Old English] *flaesc* 'flesh, body' + *mangere* 'merchant, trader.' Hudson, n 52, p 380 stated that these provisions were 'probably added by the author to his original version in the second quarter of the twelfth century.'

<sup>118</sup> Ibid, p 280. O'Neill noted 'The requirement to have witnesses to sales was a chronic problem because most witnessing took place at the hundred court, which met only once a month, while the butchers purchased and slaughtered daily. Butchers were particularly busy during late autumn, when animals were butchered to avoid the expense and difficulty of feeding them during the winter months, and their meat was salted to last the season. The requirement to have witnesses to sales, then, was difficult to fulfil and this failure would lay the butchers open to penalties for being accomplices to theft if the animals were proved to be stolen.'

<sup>119</sup> JW Gilbert, *Lectures on the History and Principles of Ancient Commerce* (1853), p 34 'A fair is a large market, and a market is a small fair. The word fair is derived from the French word *foire*, which is derived from the Latin word *forum*, which signifies a market. The market is derived from the Latin word *mercatus*, and is of the same derivation as mercantile. Markets are held more frequently than fairs, and are established chiefly for the sale of the produce of their neighbourhood... In the early ages of the world, nearly all the traffic between nations, and even between districts of the same country, was carried on by periodical fairs.'

<sup>120</sup> See generally, GS McBain, *Abolishing some more Obsolete Crown Prerogatives: Part 2* (2011) Liverpool LR, vol 32, 277-90.

<sup>121</sup> London was sacked in AD 851 by the Vikings, see Anglo-Saxon Chronicle, n 60, p 34. It was burnt in AD 886 when king Alfred took it from the Vikings, Ibid, p 42. It was also devastated by fire in 1077 ('worse than ever it had been since it was founded.') and in 1087. Ibid, pp 159, 163. See also Whitelock, n 73, pp 242, 249, 250 (London was devastated by fire in AD 764, 798 & 801).

<sup>122</sup> JA Giles (trans), Roger of Wendover, *Flowers of History* (London, 1849), vol 1, p 13 states that the Saxons 'first took possession of London, and then successively of York, Lincoln, and Winchester, committing in the meanwhile great devastations. They fell on the natives in every quarter, like wolves on sheep forsaken by their shepherds...'

<sup>123</sup> Ibid, p 220 (after Alfred besieged London, the citizens opened the gates to him. 'He thereupon restored the city and repaired its walls.')

<sup>124</sup> *Tacitus on Britain and Germany* (Penguin, 1954), pp 112-3: 'The Germans have no taste for peace; renown is easier won among perils, and you cannot maintain a large body of companions except by violence and war... They love indolence but they hate peace.' Ibid, p 113 'You will find it harder to persuade a German to plough the land and await its annual produce with patience than to challenge a foe and earn the prize of wounds. He thinks it spiritless and slack to gain by sweat what he can buy with blood. When not engaged in warfare, they spend some little time in hunting, but more in idling, abandoned to sleep and gluttony.' Ibid, p 120 'Their food is plain - wild fruit, fresh game or curdled milk.' Ibid, p 122 'They plant no orchards, fence off no meadows, water no gardens; the only levy on the earth is the corn crop.'

<sup>125</sup> Ibid, p 114 'It is a well-known fact that the peoples of Germany never live in cities, and will not even have their houses set close together.'

outbreaks of disorder and to protect people coming to market.<sup>126</sup> Further, roads in Anglo-Saxon England would have been very poor, Roman roads having decayed over time. Thus, transporting goods long distances by land would have been difficult.

Given this, while *markets* for slaves, cattle and horses likely existed in London and some towns, it is dubious that *fairs* (irregularly held markets) existed until, at least, late Anglo-Saxon times. Further, when fairs did exist, this would (likely) have been where the Crown franchised the same to ecclesiastical institutions - or powerful magnates - who would be able to control the assembled crowd.

#### **(e) Conclusion**

Anglo-Saxon England was rudimentary with respect to commercial matters.<sup>127</sup> There was little mention of 'merchants' in its law.<sup>128</sup> And, both foreign and local trade was (likely) scant.<sup>129</sup>

- Such Anglo-Saxon law as there is extant, suggests that - from AD 673, at least - it was concerned with: (a) the selling of livestock (including slaves);<sup>130</sup> and (b) oaths, and vouching to warranty, being used as a means to thwart theft;
- The Crown was, from the 7<sup>th</sup> century at least, involved in markets, its reeves (later, shire reeves or sheriffs) witnessing such sales as well as arbitrating disputes. From this, the Crown moved to control the sales of goods in markets, by limiting such to designated market towns ('ports'), most of which would also have been fortified towns ('burghs' or boroughs). Later, the Crown (perhaps, from AD 899) imposed a toll on the sale of goods as well as asserted that the right to establish a market was a Crown prerogative;
- There is no evidence of Anglo-Saxon laws that applied *only* to merchants (unless London port tolls on foreign merchants can be treated as such, see (b)). That is, the 'law merchant' did not exist.
- Further, there was little demand for laws specifically governing 'merchants' since - even by the time of Edward the Confessor (1042-66) - the only towns with a population of more than 5,000 persons were (likely) London, York, Lincoln and Norwich. Further, such limited foreign trade as there was, was (also, likely) on English terms and restricted to a few locations.<sup>131</sup>

***In conclusion, in Anglo-Saxon times, there is no evidence the law merchant existed.***

#### **4. TRADE: WILLIAM I (1066-87) - HENRY I (1100-35)**

##### **(a) Laws of William I**

When William I (1066-87) became king he encountered English law in three aspects - Mercian law, West Saxon law and the Danelaw (Viking law). However, all three reflected the Anglo-Saxon concepts previously discussed. The extent William I maintained Anglo-Saxon law or imposed the ducal law of Normandy (which was scant)<sup>132</sup> on his new subjects is uncertain. However, in the case of the sale of goods, there is no indication that much changed

<sup>126</sup> Travel by merchants even from one part of the country to another could be hazardous. Wendover, n 122, p 263 records that, in AD 974, 'there landed in the isle of Thanet some merchants from York, who were immediately taken prisoners by the islanders, and spoiled of all their property; on which king Edgar [AD 943-75], moved with exceeding rage against the spoilers, deprived them of all their goods, and put some of them to death.'

<sup>127</sup> P & M, n 52, vol 2, p 184 'Anglo-Saxon society barely knew what credit was, and had no occasion for much regulation of contracts. We find the same state of things throughout northern and western Europe.' Ibid, p 185 'Sale and exchange, it may be, are as yet only known to the law as completed transactions, which leave no outstanding duty to be enforced; no credit has been given on either side; the money was paid when the ox was delivered and the parties have never been bound to deliver or to pay.' Whitelock, n 73, pp 70-1 'the greatest part of the population was occupied in agricultural pursuits...Town-dwellers were a small minority, even at the end of the [Anglo-Saxon] period.'

<sup>128</sup> Gross I, n 24, p 3, n 2 'In these [Anglo-Saxon] laws the merchant is very rarely mentioned...'

<sup>129</sup> Ibid. 'It is plain...that internal trade and industry did not flourish.' Also, up to the 11<sup>th</sup> century agriculture pre-dominated.

<sup>130</sup> Hudson, n 52, p 154 'The transfer of cattle, which constituted a major element of many owners' capital, was thus highly regulated, a crucial aim being the prevention of disposal of stolen animals, of other fraudulent transactions, and of future disputes.' Ibid, p 147 'The prime concern of these laws was probably theft of a significant number of livestock, and their removal and possibly their disposal in a quite distant place.'

<sup>131</sup> DC Douglas (ed), *English Historical Documents 1042-1189* (Eyre & Spottiswoode, rep 1961), p 78. Ibid, pp 78-9 where he asserted that traders from Normandy, northern France, the Low countries and the Rhineland probably used London. Also, that Swedish trade was with 'York, Lincoln and Winchester, and perhaps to a lesser degree from Stamford, Thetford, Canterbury, Leicester and Norwich.'

<sup>132</sup> For commentary on the difference between the ducal law of Normandy and the law of England, see O'Brien, n 52, pp 12, 20-1. Also, Baker, n 52, ch 2 *re* the Norman Conquest.

<sup>133</sup> for what would have been a population of less than 3 million<sup>134</sup> (with London having a population of c. 10-20,000 persons).<sup>135</sup> In respect of the little we have of the laws of William I, the following may be noted:

- **Ten Articles of William I** (written, perhaps, c. 1080-7). They stated, *inter alia*:
 

we forbid the buying or selling of any livestock except within towns and before three trustworthy witnesses, likewise that of any second hand goods without a surety and warrantor. If anyone does otherwise, he shall pay the value of the goods twice over and in addition the fine for insubordination;<sup>136</sup>
- **Laws of William I (c. 1090-1135)**.<sup>137</sup> These laws dealt with vouching to warranty.<sup>138</sup> They also stated:
 

No one shall buy anything 4 pence in value, either livestock or other property, unless he has 4 men as witnesses either from a town or a village. And if anyone claims it and he has no witnesses and no warrantor, the goods shall be given up to the claimant, and the fine shall be paid to the party who is entitled thereto. And if he has witnesses in accordance with what we have declared above, vouching to warranty shall take place there three times; and on the fourth occasion he shall prove his ownership of it or deliver it up. We regard it as unjust that a man should claim ownership against the witness of those who recognize the thing vouched to warranty. No one shall claim ownership in less than six months from the time that the livestock was stolen.<sup>139</sup>
- **Willelmi Articuli Retractati** (which may actually have been written as late as 1210). They stated, *inter alia*:
 

no market or fair shall be held or permitted to take place except in the cities of our realm, and in boroughs which are enclosed and walled, and in castles, and in well-guarded places, where the customs of our realm and our common law and dignities of our crown, which were established by our worthy predecessors, cannot lapse or be defrauded or violated, but where all things must be done duly, openly and in accordance with law and justice.<sup>140</sup>

As in Anglo-Saxon times, this latter restriction was likely to prevent violence as well as to secure tolls. These laws of William (if, indeed, they are of that period) suggest that, in the area of commercial law, Anglo-Saxon continued, with little amendment - not least, since the 4 pence requirement reflected the laws of Canute (see 3(c)).

#### **(b) Laws of Henry I (c. 1113)**

It seems there was little change in Anglo-Saxon laws relating to commerce up to (and including) the time of the legal text, the *Laws of Henry I* (written c. 1113).<sup>141</sup> Although this text made reference to matters of jurisdiction

<sup>133</sup> Hudson, n 52, p 383 'The impact of the Conquest was not nearly so dramatic on the law regarding movables as on that regarding land. We have noted considerable continuities, for example with regard to...warranty of sales. Transactions concerning movables seem largely to have taken place in the local courts that also survived the Conquest, and which, especially in hundreds and boroughs, felt considerable continuing influence from members of English origin. In addition, the impact of Norman forms of lordship was less significant on movables than on land.'

<sup>134</sup> See n 61.

<sup>135</sup> Ibid, p 8.

<sup>136</sup> Robertson, n 52, pp 239-41. Hudson, n 52, p 380 'This sounds like a continuation of pre-1066 practice, although perhaps in some circumstances with fewer witnesses.'

<sup>137</sup> Whitelock, n 73, p 330 (these laws were contained in a private document).

<sup>138</sup> Robertson, n 52, p 265 'The attachment of livestock: if anyone desires to claim it as stolen, and is willing to give pledge and find surety for prosecuting his claim, he who has possession of it must name his warrantor, if he has one. If, however, he does not have one, he shall name his surety and his witnesses, and produce them at the appointed day and the appointed time, if he has them, and the claimant shall give a pledge with five compurgators, and the other shall give the livestock into the hands of his warrantor or surety, whichever of these he has. And if he has neither warrantor nor surety but has witnesses that he bought it in the public market and that he does not know whether his warrantor or his pledge is alive or dead, he shall swear to this along with his witnesses with a simple oath. In this way he shall lose his goods (but escape punishment), if they bear witness that he obtained a surety for them. And if he can produce neither warrantor nor witness, he shall lose [the goods] and pay in addition [compensation to the claimant] and forfeit his *wergeld* to his lord. This holds good in the province of Mercia and in the Danelaw.' See also Hudson, n 52, p 380 'The *Leges*...indicate that sales were to take place in appropriate locations and before witnesses, as they had before 1066.' Also, 'The *Leges Henrici* are notably silent on matters concerning the witnessing and warranty of sales.'

<sup>139</sup> Ibid, p 273.

<sup>140</sup> Ibid, p 249. See also E Lipson, *The Economic History of England* (1947), p 225.

<sup>141</sup> Although this text does not comprise a statement of the 'laws' as such (being a legal text), it probably reflects the legal position of that time. See P & M, n 52, vol 2, p 457.

concerning, for example, stolen goods,<sup>142</sup> it contained nothing else on commercial matters. However, in this, the more stable reign of Henry I (1100-35), trade in England increased greatly. This was especially so in London and it resulted in the citizens of London commencing to secure legal privileges in respect of commercial matters, in return for helping to finance the king. Thus, a charter of Henry I to the City of London (the 'City'), which was probably issued c. 1132- 3,<sup>143</sup> provided that:

- **Pleading.** Citizens of London shall not plead without the walls of the City for any plea.<sup>144</sup> That is, any legal claims against a citizen of London had to be brought before the courts in London;<sup>145</sup>
- **Freedom from Tolls.** Citizens (and their goods) were to be free of all tolls and customs throughout England and the sea ports;<sup>146</sup>
- **Jurisdiction.** Citizens were to have their lands, promises, bonds, and debts in the City and without;<sup>147</sup>
- **Payment of Debts.** Those who owed London citizens debts, should pay them in the City or discharge them there.<sup>148</sup>

These privileges were confirmed in a charter of 1155 as well as in subsequent charters granted to the City.<sup>149</sup> However, they cannot be treated as examples of any 'law merchant' since they applied to all the citizens of the City and not just to merchants.

### (c) Glanvill (1189)

The first legal text - Glanvill, *Treatise on the Laws and Customs of the Realm of England* (c. 1189)<sup>150</sup> - contained a surprising amount on commercial matters. It was also more sophisticated than Anglo-Saxon law. Glanvill discussed in detail:

- debts;<sup>151</sup>

<sup>142</sup> LJ Downer, *Leges Henrici Primi* (Oxford, 1972), p 177 'If any stolen article, in respect of which a person has been accused, is found in his possession, the matter must be dealt with judicially at the place of discovery, and there he shall be either cleared of the charge or found guilty.' Ibid, p 201 'If a person is seized anywhere having stolen property in his possession, he shall at that place be either cleared of the charge or found guilty.' Ibid, p 205 'If any persons wish to establish for themselves ownership of a thing disputed between them and oathhelpers are to hand on each side, and the property is claimed to be stolen, then the party who produces the better evidence in the form of his oathhelpers shall be the more entitled to offer proof of his case and he shall prove that the thing is his by himself with an oath in strict form, while his oathhelpers shall support him with simple oaths. If this is not the case, then the person in possession will always be more entitled than the accuser to ownership, and he shall have it; or if he is able he may defend his claim to title by vouching to warranty, which is not permitted to be unsuccessful beyond the third occasion of vouching.' See also Hudson, n 52, p 380.

<sup>143</sup> By this time, London (likely) had developed specialist markets, if not before. Britnell, n 61, p 8 'The city had a dispersed pattern of markets, some of them specialised in particular commodities. The Pantry was the centre of the bakers' craft by 1140. The shambles inside Newgate were the centre of the retail meat trade, and the fish market was nearby to the east. Cheapside was a major market for the London crafts, though some had their separate centres elsewhere.'

<sup>144</sup> McBain, n 44, p 13 'the citizens of London shall not plead without the walls of London for any plea...' A charter of Henry II (1154-89) of c. 1155 confirmed this, stating: 'I have granted to my citizens of London, that none of them shall plead without the walls of the city of London, upon any pleas, except only pleas of foreign tenures (my moneyers [i.e. coiners] and officers excepted)...'. See also, pp 13-14 (charters of 1268 & 1327). Also, Robertson, n 52, p 289. This privilege later spread to other towns, by charter. See Ballard II, n 51, p lxi.

<sup>145</sup> For the London courts, see McBain, n 44, pp 10-2.

<sup>146</sup> Ibid, p 35 'all the men of London shall be quit and free, and all their goods, throughout England, and the ports of the sea, of and from all toll and passage and lstage [lastage], and all other customs. 'Lastage' was a toll on traders at fairs, to carry goods. This freedom from tolls would have included all market tolls such as stallage, piccage, tronage, scavage and lastage. For later charters confirming this, see Ibid, pp 35-6. Also, Robertson, n 52, p 291.

<sup>147</sup> Ibid, p 42 'I will cause my citizens to have their lands, promises, bonds and debts, within the city and without; and I will do them right by the law of the city, of the lands of which they shall complain to me.' See also Robertson, n 52, p 291. For the purport of this see McBain, n 44, pp 43-4.

<sup>148</sup> Ibid. 'all debtors, who do owe debts to the citizens of London, shall pay them in London, or else discharge themselves in London, that they owe none; but if they will not pay the same, neither come to clear themselves that they owe none, the citizens of London, to whom the debts shall be due, may take their goods in the city of London, of the borough or town, or of the county wherein he remains who shall owe the debt.' See also Robertson, n 52, p 291.

<sup>149</sup> See McBain, n 44.

<sup>150</sup> R Glanvill, *The Treatise on the Laws and Customs of the Realm of England* (c.1189)(Nelson, 1965). See also P & M, n 52, vol 2, ch 5. Fitzstephen in his *Description of London* (c.1170) (contained in Stow, *The Survey of London* (1598, rep JM Dent, 1965)), p 501, described London as 'possessing above all others abundant wealth, extensive commerce, great grandeur and magnificence.'

<sup>151</sup> Ibid, p 117 'The cause of the debt may be loan for consumption, or sale, or loan for use, or letting, or deposit or any other just cause of indebtedness...'



- sureties (warrantors),<sup>152</sup>
- mortgages.<sup>153</sup>

Glanvill also considered purchase and sale, stating, *inter alia*:

The cause of a debt may also be purchase or sale, as when anyone sells something of his to another; for then the price is owed to the seller and thing purchased is owed to the buyer. A purchase and sale is effectively complete when the contracting parties have agreed on the price, provided that this is followed by delivery of the thing purchased and sold, or by payment of the whole or part of the price, or at least by the giving and receipt of [an] earnest (*arre*).<sup>154</sup>

Although Glanvill also referred to vouching to warranty,<sup>155</sup> unlike Anglo-Saxon law, as Hudson noted,<sup>156</sup> he made no mention in respect of the need for transaction witnesses in a specific location such as a market.<sup>157</sup> This suggests that - by his time - the formal rigours of the law had given way to a more relaxed, commercially oriented, environment. It also suggests that trade had increased greatly since c.1113 (when the *Laws of Henry I* was likely written), such that prior legal restrictions had become too cumbersome to retain. Finally, it may be noted that, in Glanvill's time, sale was a matter of private contract since the Crown was not involved. As a result, the kings' courts did not exercise jurisdiction over disputes relating to them.<sup>158</sup>

#### **(d) Conclusion**

For the purposes of this article, up to - and including - the first legal text on English law (Glanvill) there is no evidence of any '*law merchant*'. That is, any law specifically applying to merchants. Such, scant, commercial law as there was, applied generally. It also comprised (rather simple) provisions on: sale, debt, surety, pledge and vouching to warranty. All this was to be expected from a rural, agrarian, community where the majority of persons had few assets beyond livestock.<sup>159</sup> There is one possible exception to this conclusion:

- The Crown may have franchised some markets by 1189. It may also have allowed fairs (i.e. markets which did not happen on a regular basis and which were usually outside towns) to operate by 1194;
- If so, such markets or fairs *may* have had courts (courts of piepowder) operating, ones which dispensed law based on mercantile custom, the '*law merchant*'. This is considered in **13**.

<sup>152</sup> Ibid, p 118. 'Now, when the loan is accompanied by the giving of sureties only, if the principal debtor defaults and is not able to pay, recourse is to be had to the sureties, and they shall be summoned by the following writ. . . When the sureties appear in court they will either admit or deny their suretyship. If they admit it, then they must make satisfaction to the creditor at suitable times assigned to him in court for this purpose, or else they must prove in due form that they have discharged themselves from that suretyship by payment or in some other lawful manner. . . Ibid, p 119 'When the sureties have paid the debt they may have recourse on the principal debtor, if subsequently he has assets from which to satisfy them, by means of the principal plea of debt. . .'

<sup>153</sup> Ibid, p 121 'sometimes movables such as chattels are deposited as gage, sometimes immovables such as lands and tenements and rents (which may consist of money or of other things). When creditor and debtor agree to the deposit of a gage, whatever the nature of the gage, then the debtor, after he has received the loan, either immediately gives the creditor seisin of his gage or does not. Moreover, the gage may be for a fixed term, or with no term fixed. Furthermore, sometimes the gage is a dead gage (mortgage) and sometimes not; it is called mortgage when the fruits and rents accruing during its continuance do not count towards repayment of the loan.'

<sup>154</sup> Ibid, p 129. Once an earnest had been given the buyer could withdraw (forfeiting the earnest) but Glanvill left uncertain what penalty he had to pay. Ibid, p 130. See also P & M, n 52, vol 2, p 208 and ns 179 & 249.

<sup>155</sup> Ibid, p 130 'If the thing is sold as an immovable and the buyer or his heirs are impleaded about it, the seller and his heirs are bound to warrant it to the buyer and his heirs in the same way as was explained above in the treatise on warranties [which Glanvill had previously discussed]. Similarly, if a movable thing is claimed from the buyer by one who alleges that it was previously sold or given to him, or acquired by him through some just cause, and the words of felony are not added, the same rule applies as was stated above for an immovable. But if a thing is claimed from the buyer as stolen, he must either clear himself completely of the theft imputed to him, or vouch a warrantor. . .'. Ibid, p 132 'The customary method of proving what is owed on a purchase or loan for use is the general method of proof in court, namely writing or battle.'

<sup>156</sup> Hudson, n 52, p 687 'Glanvill makes no mention of the requirement that sales or grants of goods should take place before witnesses in an assembly, a requirement insisted upon by the Anglo-Saxon laws and the Anglo-Norman *Leges* [i.e. the laws of Henry I, see **4(b)**].'

<sup>157</sup> P & M, n 52, vol 2, p 207 'The specially appointed witnesses, the 'transaction witnesses' of the Anglo-Saxon laws, have by this time disappeared or are fast disappearing, and we must think of them as having provided, not an alternative form or evidence of the contract, but a collateral precaution: - the man who bought cattle without the testimony was exposed to criminal charges.' The rules which set a limit to the voucher of warrantors still seem to have been maintained. Ibid, p 209.

<sup>158</sup> Ibid, p 132 'We deal briefly with the foregoing contracts which are based on the consent of private persons because, as was said above, is not the custom of the court of the lord king to protect private agreements, nor does it even concern itself with such contracts as can be considered to be like private agreements.' Glanvill had previously stated, p 124 'it is not the custom for the court of the lord king to protect or warrant private agreements of this kind concerning the giving or receiving of things as a gage, or other such agreements, whether made out of court or in courts other than that of the lord king; it follows that, if such agreements are not kept, the court of the lord king will not concern itself with them. . .'

<sup>159</sup> Douglas, n 131, p 72 'Between 1042 and 1189 it was exceptional for any Englishman not to be a villager; and it was equally exceptional for him not to find his life conditioned at every turn by the arrangements of the village in which he lived.'

***In conclusion, there is no evidence of the ‘law merchant’ as a distinct body of law up to 1189 - with the possible exception of courts of piepowder.***

### **5. EXCHEQUER OF THE JEWS: 1194-1290** <sup>160</sup>

The Jews came to England (it is thought) about the same time as the Norman Conquest in 1066. Since the usury laws (taking interest on money lent) did not apply to them,<sup>161</sup> they became important in finance and moneylending. Especially, with regard to English kings who were ever desirous of borrowing (and less desirous of paying back).

- By 1190, the Crown had established the Exchequer of the Jews (*Scaccarium Judaeorum*), a division of the Court of Exchequer. It, mainly, dealt with suits relating to moneylending by Jewish merchants;
- Further, in 1194, in respect of debts owed to Jewish merchants and pledges given in favour of them – which were treated as debts and pledges owed to the king<sup>162</sup> - the *Ordinance of the Jews* (1194) required enrollment of the same, in order to obviate fraud.

Thus, this Ordinance of 1194 provided that:

All debts and pledges of Jews are to be enrolled as also their lands, houses, rents, and possessions<sup>163</sup> ...

Also, let six or seven places be appointed at which they shall make their loans,<sup>164</sup> and let two lawful Christians and two lawful Jews [*these were the four chirographers*] and two lawful scribes [*these were the writers*] be appointed, and in their presence, and in that of the clerks of William of the Church of St Mary and of William de Chimelli, [*William of Sainte-Mere-Eglise and William of Chimille, the king’s commissioners*] let such loans be made, and let a deed describing the loan be made, after the manner of an indenture.

One part is to remain in the hands of the of the Jew, sealed with his seal to whom the money is paid, while the other is to remain in the common chest [ark]; on which there are to be three locks; whereof the two Christians are to keep one key, the two Jews the other, and the clerks of William of the Church of St Mary and of Master William of Chimelli, the third, as also three seals, those who have the keys setting thereon their seals. The clerks also of the two Williams aforesaid are to have a register containing copies of all the deeds, and as the deeds are altered so shall the register be altered *etc.*<sup>165</sup>

This Ordinance may, accurately, be described as a body of law which applied to merchants - albeit only to Jewish merchants and, thus, to a limited group.<sup>166</sup> However, even if this body of law might be described as comprising part of the ‘*law merchant*’, it did not last very long, since the Jews were expelled from England in 1290 and they did not return until c.1656, in the time of Cromwell. When they did, this Ordinance no longer applied.

***In conclusion, the Ordinance of the Jews (1194) dealt with the enrollment of debts and pledges in favour of Jewish merchants. It may be said to be part of the law merchant. It ended by 1290.***

### **6. MAGNA CARTA (1215)**

Mention should be made of Magna Carta (1215) since - while it did not make any provision on the law merchant

<sup>160</sup> See generally: (a) C Gross, *The Exchequer of the Jews of England in the Middle Ages* (a lecture delivered at the Anglo-Jewish Historical Exhibition, Royal Albert Hall, 9 June 1887); (b) P Brand, *The Earliest English Reports*, SS, vol 123 (contains Exchequer of the Jews Reports 1272-90); (c) H Hall (ed), SS, vol 49, introduction; and (d) JM Rigg, *Select Pleas, Starrs and other Records from the Rolls of the Exchequer of the Jews AD 1220-1284*, vol 15 (Jewish Historical Society of England, 1902). See also the *Calendar of the Plea Rolls of the Exchequer of the Jews*, vol 1 (ed JM Riggs), Henry III, 1218-72; vol 2 (ibid), Edward I, 1273-72; vol 3 (ed. H Jenkinson), Edward I 1275-77; vol 4 (ed. HG Richardson), Henry II 1272 and Edward I 1275-77; vol 5 (ed. S Cohen), Edward I, 1277-79 and vol 6 (ed. P Brand), Edward I, 1279-81.

<sup>161</sup> This changed with the Statutes of Jewry (*Les Estatuz de la Jeuerie*) (rep 1846) which forbade usury. This legislation was, probably, issued 18 Edw I (i.e.1290, when the Jews were expelled), although it has been asserted that it belongs to 4 Edw I (1276).

<sup>162</sup> See P & M, n 52, vol 1, pp 468-75. Likely, even prior to this statutory requirement, bonds and recognizances of debts in favour of Jewish lenders were stored in chests (arks) in secure places. See Gross, n 160, p 14.

<sup>163</sup> It continued ‘Any Jew who shall make concealment of any one of these things, shall forfeit to our lord the king his body, as also the thing concealed; and all his possessions, and all his chattels; and no Jew shall be allowed to recover what he has so concealed.’

<sup>164</sup> Gross, n 160, p 20 asserted that there were some 26 local exchequer places (where chests were kept).

<sup>165</sup> HT Riley (trans), *The Annals of Roger of Hoveden 1192-1201* (Llanerch Press, rep of 1853 ed), p 338. See also P & M, n 52, vol 1, pp 469-75. Ibid, pp 469-70, ‘All loans and payments of loans were to be made under the eye of certain officers, some of them Christians, some of them Jews, and a copy or ‘*part*’ of every deed was to be deposited in an ‘*ark*’ or chest under official custody.’ See also Gross, n 160, pp 15-6.

<sup>166</sup> One would surmise that Jewish merchants helped considerably the development of legal principles in English law relating to sale, pledges (gages), mortgages (dead pledges) and surety. P & M, n 52, vol 1, p 469 ‘it is highly probable that the Jewish ‘*gage*’ was among Englishmen a novel and an alien institution, since it broke through the old law by giving rights in land to a creditor who did not take possession.’

- it evidenced that there were an increasing number of foreign (alien) merchants (especially Lombards and Provençals)<sup>167</sup> in England, likely bringing with them their own trade practices. It also evidenced the fact that the Crown sought to protect such merchants (as they had done with the Jews) being cognizant of their money making - and money lending - ability, especially to the Crown. Thus, *Magna Carta*, chapter (section) 41 provided that:

All merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the *ancient and right customs*, quit from all evil tolls, except (in time of war) such merchants as are of the land at war with us...<sup>168</sup> (*italics supplied*)

This provision probably resulted from the fact that, later in his reign,<sup>169</sup> king John (1199-1216) had exploited foreign merchants as much as he could<sup>170</sup> - something which had, also likely occurred under his father Henry II (1154-89) and his brother, Richard (1189-99).<sup>171</sup> Thus, *Magna Carta*, in effect, granted foreign merchants certain privileges: *viz*:

- safe conduct (i.e. protection of their persons and goods from violence);
- liberty to buy and sell in time of peace;
- a confirmation of ‘*ancient tolls and customs*’.<sup>172</sup>

However, despite this statutory protection, foreign merchants were, generally, much resented by local traders. Especially those in cities such as London.<sup>173</sup> It may have been to assuage this animosity that *Magna Carta*, chapter 13 also provided that:

the city of London shall have all its *ancient liberties and free customs*, as well by land as by water; furthermore, we decree and grant that all other cities, boroughs, towns, and ports shall have all their *liberties* [i.e. franchises] and *free customs*.<sup>174</sup> (*italics supplied*)

As to these:

- **Liberties.** What these ‘*liberties*’ (another word for franchises) were, may be seen in the many charters granted by sovereigns to the City from c. 1132-3<sup>175</sup> - both before, and after, London had (likely)

<sup>167</sup> WS McKechnie, *Magna Carta* (2<sup>nd</sup> ed, 1914), p 405 ‘Under the fostering protection of Henry III [1216-72], Lombards and Provençals settled in considerable numbers in the capital...’. See also Street, n 16, vol 2, pp 325-6. Lombards were merchants from the republics of Genoa, Lucca, Florence and Venice.

<sup>168</sup> *Magna Carta* (1215), c. 41. McKechnie, n 167, p 399: ‘Merchants and merchandise had suffered from John’s greed. The control of commerce was reserved for the king’s personal supervision: no binding rule of law or traditional usage trammelled him in his dealings with foreign merchants, who were dependent on royal favour, not on the law of the land, for the privilege of trading and even for personal safety. No alien could enter England or leave it, nor take up his abode in any town, nor move from place to place, nor buy and sell, without paying heavy tolls to the king. This royal prerogative proved a profitable one.’ See also JC Holt, *Magna Carta* (Cambridge UP, 1965) and Coke, n 16, vol 2, pp 57-63 (citing *Magna Carta* 1297, ch 30).

<sup>169</sup> Initially, king John had given merchants protection similar to that in *Magna Carta*. McKechnie, n 167, p 401 ‘At the commencement of John’s reign, traders resident in England collectively obtained confirmation of their privileges. The king issued letters patent to the mayor of London, to the magistrates of many smaller towns, and to the sheriffs of the southern counties of England, directing them, in terms closely resembling those of *Magna Carta* [chapter 41], to allow to all merchants, of whatsoever land, safe coming and going, with their wares.’

<sup>170</sup> McKechnie, n 167, p 399 ‘[King] John increased the frequency and amount of such exactions, to the detriment alike of foreign traders and their customers. *Magna Carta*, therefore, sought to restrain this branch of the prerogative, forbidding him to exact excessive tolls for removing obstacles of his own creating.’ See also Sanborn, n 35, p 371.

<sup>171</sup> *Ibid*, p 401 ‘The policy of Henry II [1154-89] and his sons was to favour merchant strangers [i.e. foreign merchants], but to exact in return the highest dues possible, restrained only by an enlightened self-interest which stopped short at the point where trade would languish by becoming unprofitable.’

<sup>172</sup> *Ibid*, pp 399-400.

<sup>173</sup> By 1215, London would likely have been a substantial town of some 20,000 or more people with many more merchants, both local and foreign. For the sovereign, it was more difficult to control than in the past - especially when both king Richard I (1189-99) and king John (1199-1216) were so impecunious and thus, needed to keep both the citizens of London and foreign merchants ‘*onside*’, despite their mutual animosity. As to xenophobia, Letter Book D, n 44, introduction (by Sharpe) ‘Another link with ancient Rome may, perhaps, be found in the antipathy which the freemen of the City of London entertained...to the foreigner and stranger...’.

<sup>174</sup> McKechnie, n 167, p 241. One would suggest that ‘*free customs*’ was a reference to such local customs as were recognised as legally effective by the courts or in any charters and that ‘*free*’ was a short-form reference to the free burgesses (citizens) of those cities *etc.* *City of London’s Case* (1610) 8 Co Rep 127 (77 ER 658) *per* Coke CJ ‘There are divers customs in London which are against common right, and the rule of the common law, and yet they are allowed in our books...because they have not only the force of a custom, but are also supported and fortified by authority of Parliament.’

<sup>175</sup> McBain, n 44. It analyses some 45 charters from William I (1066-87) until 1741.

achieved its own municipal constitution in 1191. While many of the privileges granted were not in respect of commercial matters, a few were of commercial import (see **4(b)**). These franchises were soon acquired by the Cinque Ports and other towns,<sup>176</sup> establishing a rigid system of protectionism which favoured local tradesman as against outsiders ('*foreigners*', who included overseas merchants);

- **Customs.** Magna Carta did not indicate what '*customs*' of the freemen in the City (and elsewhere) it confirmed, especially in the commercial field. However, '*market overt*' would likely have been one. One also would surmise that customs as to evidencing a sale (in the case of a tally or a token), which are discussed in **8**, may also have been included by this time.

***In conclusion, while Magna Carta (1215) confirmed certain customs of London and elsewhere - including, possibly, commercial ones - it did not create (or add to) any 'law merchant'.***<sup>177</sup>

### **7. BRACTON (c. 1240)**

Bracton, following Glanvill (there was probably only some 50 years between the two texts), considered commercial matters in his *On the Laws and Customs of England* (c.1240)<sup>178</sup> - albeit this did not take up much space in his massive tome. Bracton discussed sale, stating, *inter alia*:

When one sells his property to another, whether it is movable or immovable, the purchaser is liable to the seller for the price and conversely the seller is bound to deliver the thing to the purchaser, because...without delivery dominion over things is not transferred. It is requisite that the thing sold be certain [and the price fixed for it certain, for there can be no purchase without a fixed price][for] an unspecified thing may not be claimed...A purchase and sale is contracted when the contracting parties agree on the price, providing 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.

If a writing is to be made, the purchase and sale will not be complete until that has been delivered to the parties and executed. So long as there is neither earnest nor writing, nor any delivery made, there will be room for re-consideration and the contracting parties may withdraw from the agreement without penalty. But if the price has been paid, or part of it, or delivery made, the purchase and sale will be complete and neither of the parties may afterwards withdraw from the contract, on the ground that the price was not paid, in part or in full, but the seller may proceed by a suitable action to recover what is owed of the price, not to regain the thing itself.<sup>179</sup>

Bracton also considered letting and hiring<sup>180</sup> and (mainly in the context of land) vouching to warranty.<sup>181</sup> In respect of sale, if Bracton had been asked '*Are you stating the common law or the custom of merchants in these matters?*' 'one would assert he would have replied '*the former*'<sup>182</sup> since these statements of law - albeit they

<sup>176</sup> Ibid, n 50. For borough and towns charters, see also Ballard I-III, n 51.

<sup>177</sup> Nor did any subsequent versions of Magna Carta, including Magna Carta (1297) which is still extant. See also Coke, n 16, vol 2, p 20 (Magna Carta, ch 9).

<sup>178</sup> H Bracton (trans Thorne), *On the Law and Customs of England* c.1240 (Cambridge UP, 1968-76). Bracton is now online, see [bracton.law.harvard.edu](http://bracton.law.harvard.edu).

<sup>179</sup> Ibid, n 178, vol 2, pp 181-3. A seller who defaulted after earnest was paid, had to pay double. See P & M, n 52, vol 2, p 208 and n 249. Also, Fleta, see n 249.

<sup>180</sup> Ibid, pp 183-4 'Letting and hiring very much resembles purchase and sale, for as a contract of purchase and sale is concluded after the price is agreed upon, so it is with letting and hiring. By a letting and hiring a thing is usually given either for use or occupation, as where one lets his movable or immovable property to another for a specified time in return for a certain payment; he who lets is bound to give up the thing let for use and the hirer obliged to pay the hire...One who gives or promises money for the use of clothes, gold or silver or other ornaments, or of a beast of burden, is required to show the standard of care that a most conscientious householder shows in his own affairs. If he has shown this and yet by some mischance has lost the thing, he will be under no obligation to restore it. It is not enough to show [merely] such diligence as one would show in his own affairs unless he shows the standard of care described above.'

<sup>181</sup> Ibid, vol 3, pp 260 (writ for summoning a warrantor), p 359 (tenant vouches a warrantor) *etc.* Also, vol 4, pp 191-2.

<sup>182</sup> Bracton, n 178, vol 2, p 19 'Though in almost all lands use is made of the *leges* and the *ius scriptum*, England alone uses unwritten law and custom [*consuetudine*]. There law derives from nothing written [but] from what usage has approved. Nevertheless, it will not be absurd to call English laws *leges*, though they are unwritten, since whatever has been rightly decided and approved with the counsel and consent of the magnates and the general agreement of the *res publica*, the authority of the king or prince having first been added thereto, has the force of law. England has as well many local customs, varying from place to place, for the English have many things by custom which they do not have by law, as in the various counties, cities, boroughs and vills, where it will always be necessary to learn what the custom of the place is and how those who allege it use it.'

were customs or unwritten law<sup>183</sup> - were intended to be of universal application. They were not specific to merchants (*mercatores*) as such. Similarly, in the case of London customs - which Bracton referred to in the context of dower, mort ancestor and pleas,<sup>184</sup> for example - these were also treated by him as part of the common law since they applied to all citizens of London. As to customs specific to *merchants*,<sup>185</sup> it seems that Bracton referred only to two:

- **Summons.** In the case of a summons pursuant to a writ of right, he stated :  
because of persons who ought to have swift justice, as merchants, to whom justice is done piepowder,<sup>186</sup> [*iusticia pepoudrus*] and thus, for good reason, the time of summons is shortened and sometimes provides a period of less than fifteen days;<sup>187</sup>
- **Attachment.** Bracton stated:  
the formal order of attachments need not always be observed in personal actions, sometimes because of the privilege and favour of crusaders, whose affairs call for thorough and immediate consideration. Similarly because of the privilege and favour of merchants [*mercatorum*].<sup>188</sup>

However, there is no suggestion that Bracton treated these two customs as a *distinct* body of law; nor were they exclusive to merchants. Thus,

- **Summons.** The 15 day period as long ago as the time of Henry (c.1113) was only 7 days when a person summoned was in the same county.<sup>189</sup> And, in Bracton's time, the 15 day period was reduced, not only with respect to merchants, but also, for example: (a) when a church was vacant; or (b) when the parties were in the county where the *eyre* was; (c) in the case of crusaders;<sup>190</sup>
- **Attachment.** A shortening of the process of attachment not only applied to merchants and crusaders but also, for example, where the: (a) lapse of a benefice was apprehended; (b) injury was 'very atrocious'; (c) the plaintiff deserved a particular respect, such as a nobleman. Further, by the reign of Edward I

<sup>183</sup> Ibid, p 22, 'though law (*lex*) may in the broadest sense be said to be everything that is read (*legitur*) its special meaning is a just sanction, ordering virtue and prohibiting its opposite. Custom in truth, in regions where it is approved by the practice of those who use it, is sometimes observed as and takes the place of *lex*. For the authority of custom and long use is not slight.'

<sup>184</sup> See Bracton, n 178, vol 2, p 180 & vol 3, pp 388 & 400 (*re* dower); vol 3, p 295 (*re* mort ancestor) and vol 4, p 280 (plea outside London).

<sup>185</sup> In general, in his text, Bracton referred little to merchants. Such references may be traced by a word search of Bracton online, see n 178.

<sup>186</sup> How courts of the fair got the name '*piepowder*' is unclear. It may have been as a result of the dusty feet (*pieds poudres*) of the merchants who arrived there. Coke, n 16, vol 4, p 271 'This court is incident to every fair and market, as a court baron to a manor, and is derived of two latin words, as is apparent, and so called, because that for contracts and injuries done concerning the fair or market, there shall be as speedy justice done for advancement of trade, and traffic, as the dust can fall from the foot.' Cf. W Blackstone, *Commentaries on the Laws of England* (Oxford, Clarendon Press, 1<sup>st</sup> ed, 1765-9, Univ. of Chicago Press, rep 1979), vol 3, p 32 'the etymology given us by a learned modern writer is much more ingenious and satisfactory; it being derived according to him, from *ped puldreux* a pedlar, in old French, and therefore signifying the court of such petty chapmen as resort to fairs or markets.' The citation was to J Barrington, *Observations on the Statutes* (2nd ed, 1766), p 257 'Now *ped puldreux* in old French, signifies a pedlar, who gets his livelihood by vending his goods where he can, without any certain and fixed residence.' H Spelman, *Glossarium Archaiologicum* (London, 1664), p 455 '*Pedis pulverisati curia. Ea est quae in nundinis constituitur, ad nundinalium rixas litesque celerrime componendas....*' ('Court of Dusty Feet. It was established in fairs for resolving as speedily as possible contentions and disputes arising during the course of the fair.') See also, Gross II, n 24, pp 231-2; GW Kitchin, *A Charter of Edward the Third confirming and enlarging the privileges of St Giles Fair, Winchester AD 1349* (London, 1886), p 64 and Holdsworth, n 26, vol 1, p 536.

<sup>187</sup> Bracton, n 178, vol 4, p 63. See also borough privileges accorded to citizens, see Bateson, n 31, p xxiii 'the burgess could not be expected to summon three times the stranger whose house was not in the town. The stranger was attached without summons. The boroughs were willing to give further privilege to burgesses absent from home when the summons was delivered, and absence from home on long journeys, presumably for trade purposes, seems to be expected in the case of the burgess. He might neglect the summons...if his foot were in the stirrup, and a similar rule applied also in the old common law.'

<sup>188</sup> Ibid, p 377. TE Scrutton, *The Influence of the Roman Law on the Law of England* (Cambridge UP, 1885), p 177 quoted these passages from Bracton and stated 'From the earliest times a summary mode of procedure appears to have existed, in which a kind of rough and ready justice was exercised in mercantile disputes according to the usages of commerce.'

<sup>189</sup> Downer, n 142, p 147 'If he is in the same county he shall receive notice of the hearing amounting to seven days; if he is in an adjoining county, a period of fifteen days shall be appointed...'

<sup>190</sup> See also *Fleta* (c. 1290), SS, vol 99, p 117 'cases of merchants, of crusaders and the like which require urgency and speed.' J Reeves, *History of the English Law* (2<sup>nd</sup> ed, 1787), vol 1, p 404 'A summons ought always to be served fifteen days before the day on which the party summoned was to appear: and if there were fewer days, the summons was illegal, unless in some particular cases where dispatch was required; as when a church was vacant; when the parties were in the country where the *eyre* was; or in cases where merchants were concerned, who were entitled to what Bracton calls *justitia pepoudrous*.'

(1272-1307), Reeves thought that merchants enjoyed no distinction in respect of attachment from ‘common plaintiffs’.<sup>191</sup>

***In conclusion, Bracton (writing c. 1240) referred to an expedited legal process in only two instances in the case of merchants. However, these applied in other cases as well and there is no suggestion that he treated them as evidence of a distinct law merchant.***

## **8. TREATISE - LEX MERCATORIA (c. 1280)**

### **(a) Definition of Law Merchant: Market Law**

The nature of the law merchant was analysed in a legal treatise called *Lex Mercatoria* (c. 1280). By an unknown author, it has been described as a text on the process of mercantile courts<sup>192</sup> and it complements what is known of the law merchant from extant contemporary records.<sup>193</sup> The author stated, as to the meaning of law merchant:

Mercantile law is thought to come from the market, and thus we first need to know where markets are held from which such laws derive. So it should be observed that such markets take place in only five [types of] place, specifically in cities, seaports, market towns, and boroughs, and this by reason of the market.

From this it should further be seen that just as markets are held in five [types] of place, so mercantile law or the law of the market always follows, namely: in [i] cities and [ii] fairs (whether *nundine* or *ferie*, for they are the same thing),<sup>194</sup> where purchases and sales of merchandise, specifically of clothes, foodstuffs, and almost every type of movable good, are continually made, the law follows after itself continuously in these two [places] like the market.<sup>195</sup>

This description is interesting in that:

- **Definition.** The author treated the law merchant (mercantile law)<sup>196</sup> as one and the same as ‘market law’. Thus, the author did not consider prior legislation relating to mercantile activity - such as the Exchequer of the Jews 1194 (see 5) or the Statute of Acton Burnell 1283 or the Statute of Merchants 1285 (which are discussed in 9) - as part of the law merchant.<sup>197</sup> The reason, however, may be that his treatise was written prior to the Acts of 1283 and 1285. Also, the Jews were expelled from England in 1290 and the Ordinance of 1194 (likely) was of little avail prior to such date.<sup>198</sup>
- **Markets & Fairs.** The author drew no distinction between fairs and markets. Market law applied, whatever type of market and wherever held, if there were ‘purchases and sales of merchandise’.
  - The author also stated that markets only took place in 5 types of location (cities, fairs, ports, market towns, boroughs). This limitation suggests that the author was intending to discuss only public (open) markets and fairs. That is, those franchised (or operating by prescription) with a piepowder court and the ability to impose tolls. As a result, he was excluding private (non public) sales, *ad hoc* markets (*wakes*) and village sales. Such seems consonant with Anglo-Saxon law as well as common sense.<sup>199</sup>

<sup>191</sup> Ibid, (Reeves), p 481 ‘Personal actions differed...in their process, according to circumstances: in some causes which from their nature would not bear delay; as where the subject was the fruits of the earth or other things, which were perishable; the *solemnitas attachiamentorum*, as it was called, was dispensed with: so again, where the lapse of a benefice was apprehended, or where the injury was very atrocious, or the plaintiff deserved a particular respect or privilege; as noble persons, or merchants, who were continually leaving the kingdom.’ For other instances, see Ibid, p 487. Ibid, vol 2, p 158 ‘The shortening of the process of attachment in favour of merchants, as was usual in the last reign [of Henry III (1216-72)], was a partial redress, and since the *solemnitas attachiamentorum* had been corrected by several statutes, they seem to have enjoyed no distinction in point of process from common plaintiffs.’

<sup>192</sup> Basile, n 6, p 13, ‘*Lex Mercatoria*, we argue...is both an instructional manual on how to conduct a mercantile court and a series of recommendations on how to improve the process in such courts.’ Ibid, p 20 ‘a treatise on the process of mercantile courts.’

<sup>193</sup> Ibid, ‘extant contemporary records, which are fragmentary and, insofar as they are published, consist primarily in the rolls of the fair court of St Ives.’

<sup>194</sup> The reference is to the Roman markets/fairs which met every 9 days as well as to those fairs operating on festival days. See also n 321.

<sup>195</sup> Ibid, n 6, ch 1, p 1.

<sup>196</sup> The editors chose ‘mercantile law’ to translate ‘*lex mercatoria*’, Basile, n 6, p 7.

<sup>197</sup> Basile, n 6, p 23 & sec 3A, p 107.

<sup>198</sup> Cf. the argument of the editors at sec 3A, p 108 (the author may not have discussed these Acts because their importance was not yet clear). One is dubious about this.

<sup>199</sup> When Anglo-Saxon law referred to a ‘market’ one would suggest it referred to those where goods worth more than 20 pence were sold (see n 86). It was not intended to cover village markets, ‘fruit and veg’ or *ad hoc* markets, nor items traded for household use. Thus, one would assert

- Further, the author recognized that - even in these 5 locations - mercantile law was often absent since merchants were litigating pursuant to the common law,<sup>200</sup> something the author accepted often happened.<sup>201</sup>

Thus, one would assert that the author, in his treatise, was doing little more than seeking to deal with - and assert that - the law merchant (market law) was when a summary legal process, one also called piepowder justice (*iusticia pepoudrus*), applied.<sup>202</sup> Unfortunately, later legal writers tended to link the word '*piepowder*' specifically with fair courts. However, the author of this text, clearly, did not - since his market law also covered trading in cities, ports *etc.*

### **(b) Law of the Market & Common Law**

The author asserted there were 3 ways in which market law (piepowder law) differed from the common law:

The law of the market differs from the common law of the kingdom in three general ways.

*First*, it generally delivers itself [of a judgment] more quickly.

*Second*, whoever pledges [i.e. guarantees] someone to answer for a trespass, covenant, debt, or detinue of chattels pledges the whole debt, damages, and costs of the plaintiff, if the one pledged is convicted and does not have enough [to pay the judgment] within the bounds of the market. And if one pledged happens to be first attached by gage or by chattels and afterwards he takes the gage away, [and] the market reeve lets him take it outside the bounds of the market on account of such a pledging, the pledge should answer [to] the court or the plaintiff for a gage of this sort or its value.<sup>203</sup>

And [the law of the market] differs in a *third* way because 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 deed or both, and not to the defendant.<sup>204</sup> (*italics supplied*)

Even though the author may have been keen to argue that there was a distinction between market law (law merchant) and the common law,<sup>205</sup> his 3-fold distinction did not add up to much since - in two of these cases, at least - such benefits also applied to others and *not just* to merchants:<sup>206</sup> Thus:

- **Speedy Justice.** Justice could be very speedy. From Anglo-Saxon times if a thief was caught with stolen goods in his hand (hand having) or on his back (back bearing), he could be executed there and

that the author of the *Lex Mercatoria* was only analysing the law with respect to larger public markets and fairs, held on a regular basis in the 5 locations he mentioned. See also Basile, n 6, p 38.

<sup>200</sup> Basile, n 6, ch 2, p 3. 'whoever buys or exchanges anything with a merchant, whether or not the buyer or exchanger is a merchant, so long as the thing is of his [the merchant's] merchandise or belongs to his merchandise, and the buyer does not keep his [appointed] day against the merchant about it, he is held to answer the same merchant according to mercantile law wherever he can be arrested or attached within the boundaries of the said five places. And the same law applies if the merchant does not keep his [appointed] day against the other, whoever the other is, whether or not he is a merchant, *unless the parties happen to agree and prefer to plead at common law* in the same cities and the same [places] where they have courts after the fair, tide and market in which [courts] the common law is observed.' (*italics supplied*). Also, ch 9, p 18.

<sup>201</sup> Ibid, p 2 'To these laws [i.e. the law of the market] naturally pertain all pleas excepting only those of land. But if the lords and pleading parties would rather withdraw and prosecute pleas of appeals begun before them in the aforesaid places in other courts at common law, and refuse mercantile law, they certainly can, *and they do so more often than not throughout the whole kingdom.*' (*italics supplied*). Also, p 14 'By the 1260's, the common law courts were granting remedies *secundum legem mercatoriam* and overseeing the justice supplied by mercantile courts. At the same time, burgesses, who comprised the majority of merchants, claimed the right to be tried in their own borough courts.'

<sup>202</sup> See also Basile, n 6, p 43, n 48.

<sup>203</sup> These customs, that the pledge: (a) covered the whole debt; (b) was unaffected if any gage (or chattels) of the debtor were removed from the market, seem to be truly '*fair*' specific.

<sup>204</sup> Ibid, Ch 1, p 3. The author noted 'with respect to other matters, such as prosecutions, defences, essoins, defaults, delays, judgments, and execution of judgments, the same process should be used in both laws [i.e. the common law and mercantile law].' See also Basile, n 6, p 24. Baker I, n 38, p 1238 'It was the third rule which most often occasioned discussion in the common law courts, because it enabled plaintiffs to prove informal contracts by tally or suit. The difference was vital in practice, but it was a difference as to evidence and proof; there is no suggestion that the law merchant had its own substantive law of contract.'

<sup>205</sup> One would agree with the editors that the book seems to be instructional. Also, arguing for market law being an area of specialist knowledge. Basile, n 6, p 22 describes it as a text designed to 'give practical instruction in what mercantile is and to argue for what it ought to be.'

<sup>206</sup> Street, n 16, vol 2, p 329 summarised the position in early English times: 'How large a body of doctrine there was bearing the name '*law merchant*' is hard for us to say. Probably in some respects it took a more liberal and modern view of contractual obligations than that which was taken by the common law.' Ibid, p 330 '[The] differences were largely of a formal and procedural character. Thus, the production of the tally was sufficient proof of a merchant's debt, and the defendant could not wage his law. Again, the payment of the earnest was sufficient to make a mercantile bargain binding.'

then.<sup>207</sup> And, in the commercial sphere (as Bracton noted, see 7), while a merchant had the benefit of speedier summons and attachment, this also applied to others;

- **London Speedy Courts.** The fair court was not the only one that was speedy. Cam asserted that London had a court in 1221 which held daily sittings in the case of persons ‘*passing through the City*’.<sup>208</sup> This court was not a fair court; nor does it seem that it was restricted to merchants.
  - Mention is also made of a daily court in London for the ‘*foreign merchant*’ in 1285 - which court was not just for the benefit of foreign merchants but for those dealing with them.<sup>209</sup> These courts seem to be distinct from City fair courts since a charter of 1327 provided for City fair courts;<sup>210</sup>
  - Also, by 1364, it seems that speedy justice in the Mayor’s Court was open to any citizen in respect of debt claims.<sup>211</sup> Certain groups of merchants were also granted speedy justice;
  - Finally, certain groups of merchants - such as the merchants of Almaine - had a right to have one of their aldermen to act as a judge, to determine pleas among them.<sup>212</sup>
- **Simpler Burden of Proof.** Although the common law required a person, usually, to deny a debt by his oath and that of 11 compurgators (‘*wager of law*’) <sup>213</sup> - and although a debt between *merchants* could be proved, instead, by a tally <sup>214</sup> and two witnesses <sup>215</sup> - there were exceptions to *wager of law*

<sup>207</sup> Bateson, n 31, pp xxi-ii.

<sup>208</sup> H Cam, *Law-Finders and Law-Makers* (1962), p 88. She referred to the *Liber Albus*, n 42, p 59 (*Iter* before Hubert de Burgh, in 1221) ‘*Question IX* ‘May the bailiffs of the City determine the complaints of persons passing through the City who cannot make any stay there, such persons, that is to say, as are called ‘*piepoudrous*’ as to debts due or injuries done to them? Or must they await the sitting of the Hustings? *Answer*. It is answered, that of usage such pleas are not holden out of the Court of Hustings. But it is further provided and agreed, that in future the mayor and sheriffs, assisted by two or three aldermen, shall hear such complaints, and that immediately, from day to day, if the court shall not be sitting on such day: and justice shall be done therein without delay, irrespective of the Hustings.’ See also Bateson, n 31, vol 2, p 183; Carter, n 27, p 166; AKR Kiralfy, *Potter’s Outlines of English Legal History* (1958), p 102 and HG Richardson, *Law Merchant in London in 1292*, HER, vol 37 (1922), pp 242-9.

<sup>209</sup> *Liber Albus*, n 42, p 257 ‘whereas the king [Edward I, 1272-1309] doth will that no foreign merchant shall be delayed by a long series of pleadings, the king doth command that the warden or sheriffs shall hear daily the pleas of such foreigners as shall wish to make complaint, or cases in which others shall wish to make complaint against foreigners; and that speedy redress be given to them. And if the warden or sheriff upon any day shall be unable [to act], then let there be some one in their stead to do the same, for whom they shall be ready to answer: that so the foreign merchants be in no manner delayed.’ (*italics supplied*) The reference to ‘*warden*’ and not to ‘*mayor*’ was when Edward I took the City into his hand in 1285 (this ended in 1298). See also, *Ibid*, pp 14-7 and Basile, n 6, p 112.

<sup>210</sup> A charter of Edward III [1327-77] in 1327 provided that citizens of London had a power to hold courts of *pie poudre* (piepowder) at fairs within the City, see McBain, n 44, p 40 ‘And forasmuch as the citizens, in all good fairs of England, were wont to have among themselves keepers to hold pleas touching the citizens of the said city assembling at such fairs; we will and grant, as much as is in us, that the same citizens may have such like keepers, to hold such pleas of their covenants, as of ancient time they had, except the pleas of land and of the Crown.’ The words in italics would seem to refer to a charter of Henry III [1216-72] of 1268 which granted London citizens the right to appoint 4 of 5 of their number to try ‘*pleas of merchandise*’ in which they were concerned in any fair in England. In 1274, three men were so assigned at Boston fair. See Gross II, n 24, p 239; Thornley, n 32, p 10 and EW Moore, *The Fairs of Medieval England* (Pontifical Institute of Medieval Studies, 1985), p 103.

<sup>211</sup> See, e.g. Letter Book G, n 44, p 198 ‘it is ordained [an ordinance of the mayor and aldermen of the City of 12 November, 1364] that all those who wish to complain before the mayor and aldermen by bill shall find pledges to prosecute their bill, and the mayor shall do them speedy justice from day to day without delay, according to the law merchant etc.’ See also *Liber Albus*, n 42, p 337. In London, the mayor’s court - and the sheriff’s court - dealt with matters concerning the law merchant. See Thomas, n 46, vol 1, *1298-1307*, p xxvi (Darcy’s Book, 1337-8) ‘mayor and aldermen use there [in the Mayor’s Court] to hold, and determine pleas of debt and other actions personal whatsoever, by bill as well among merchants, and merchants for merchandise, as also between others that will plead by process made against the parties.’

<sup>212</sup> See Letterbook K, n 44, p 401 (1460) and Letterbook L, n 44, p 65 (1465-6). It seems that the terms on which foreign merchants traded with London merchants were, sometimes, agreed in writing. See e.g. *Liber Albus*, n 42, p 360 (agreement between London merchants and those of Amiens, Corby and Neel), p 367 (indenture between the same). Corby and Nesle were towns in Picardy, France.

<sup>213</sup> Rogers, n 12, p 23 ‘Wager of law, or compurgation, was a standard means of defence in actions in debt on informal contracts. The defendant offered to ‘*wage his law*’ that the debt was not due. The court set a time for the defendant to appear, along with his oath helpers, usually eleven, and swear a formal oath denying the debt. If all the compurgators swore the oath without slipping, the defendant won the lawsuit. Rogers also pointed out that *wager of law* did occur in the fair courts, for example, if a transaction was wholly oral. However, this was also the London custom, see n 219.

<sup>214</sup> The tally (tally stick, from the latin, *talea*, a slip used for grafting) was a piece of wood, notched, to reflect a debt, and the *quantum*. Split in two, one piece was held by the debtor, the other by the creditor. When placed together, they ‘*tallied*’. Tallies were age old, see E Fletcher, *Tokens and Tallies through the Ages* (Greenlight Publishing, 2003). See generally, LF Salzman, *English Trade in the Middle Ages* (Oxford, Clarendon Press, 1931), pp 25-8. The tally was evidence of debt as well as of a receipt of a payment. They were also negotiable. *Ibid*, p 28. Also, Letter Book A, n 44, p 61 (X acknowledged himself bound to pay £6 to the bearer of a tally). G Davies, *A History of Money* (University of Wales Press, 2002), pp 147-53, 253, who also asserted that tallies were discounted (also, that they were extensively used in the 17<sup>th</sup> century). The Treasury tally was abolished in 1826, pursuant to an Act of 1783. *Ibid*, p 365. However, since tallies took time to cut, at smaller markets (or



generally <sup>216</sup> and, in the area of debt, these also did not just apply to merchants. Thus, in the case of London citizens:

- **Sealed Tally treated as Bond.** The *Liber Albus* provided that: ‘a sealed tally of debt, by usage of the City, is as binding as an obligation [i.e. bond]; and in cases where plaint of debt is made, and such sealed tally is proffered in proof of the debt, the defendant shall not wage his law in proof that he owes nothing, or in fact any other matter, any more than against an obligation.’<sup>217</sup> [i.e. no wager of law, if a sealed tally was produced]
- **Non Sealed Tally.** The *Liber Albus* provided that: ‘if it happen that between merchant and merchant, or citizen and citizen, there is a dispute as to a debt, and a tally is produced by one party, and such tally is disowned; then shall the party bringing such tally have his proof according to law merchant: provided that such proof is made by citizens and merchants, or other good and lawful men, and not by ribald persons.’<sup>218</sup> [i.e. no wager of law, for citizens of London, or merchants in London, if a tally was produced]
- **Oral.** Where a debt arose from an oral agreement, the *Liber Albus* provided for a citizen of London to wage his law in a debt plea with just 6 people - and a non-resident foreigner, with just two;<sup>219</sup> [i.e. reduced requirement of wager of law].

These simpler forms of proof in London spread out to other towns <sup>220</sup> Finally, the author of *Lex Mercatoria* noted the following:

- While market law (the law merchant) covered where a ‘merchant’ was involved <sup>221</sup> - it did not apply if the parties selected the common law, something that often happened,<sup>222</sup>
- ‘The common law...is the mother of mercantile law.’<sup>223</sup> It was not a distinct law.

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for smaller transactions) it is likely that exchange or tokens (private coinage) was used or the transaction was oral (which would likely occur where the parties trading knew each other well).

<sup>215</sup> Kiralfy, n 208, p 105 ‘In the fourteenth century the common law aimed to supercede all local customs, but merchants preserved the character of their law. Thus, in the reign of Edward I [1272-1307] a merchant who demanded a debt in a common law court was required to give only ‘slight proof’ in support of a tally against which by the custom of merchants wager of law was not allowed.’ Kiralfy cited YB 21 & 22 Edw I (RS), p 456 (1294) and 20 Edw I (RS), p 68 (1292). In a 1294 case, Methingham CJ stated that ‘He who demands this debt is a merchant, and therefore if he can give slight proof to support his tally, we will incline to that side...Every merchant cannot always have a clerk with him.’ For the 1292 case, see Horwood (ed), *Yearbooks of the Reign of King Edward the First, Years XX and XXI* (Longmans, 1866), p 68 (note that, by the law merchant, one cannot wage his law against a tally; but if he deny the tally, the plaintiff must prove the tally). See also CHS Fifoot, *History and Sources of the Common Law* (Stevens & Sons, 1949), p 224. For the testing (comparison) of tallies by the judges in a piepowder court at St Giles Fair (see n 347), see Kitchin, n 186, pp 48 & 71.

<sup>216</sup> See Simpson, *History of the Common Law of Contract* (OUP, 1975), pp 138-44.

<sup>217</sup> *Liber Albus*, n 42, pp 189-90.

<sup>218</sup> *Ibid*, pp 255-6. A common law court would uphold this, see *Bandon’s Case* (1312-3) YB 6 & 7 Edw II, Eyre of Kent, 27 SS 48 cited by Rogers, n 12, pp 30-1 (a case between merchants in the king’s court where a tally produced as evidence of debt). See also Basile, n 6, p 112; MJ Pritchard & DEC Yale, *Hale and Fleetwood on Admiralty Jurisdiction*, SS, vol 108, p 55 (Hale, *Treatise on Admiralty* c. 1676) and P & M, n 52, vol 2, p 215.

<sup>219</sup> *Liber Albus*, n 42, p 180 ‘in plea of debt, the defendant may wage his law, by usage of the City, [in proof] that he owes nothing to the plaintiff; that is to say, if he is a man enfranchised in the City or residing within such City, [he may wage his law] with the seventh hand himself named as one...if the defendant is a foreigner, a stranger, and non-resident in the City, he may wage and make his law with the third hand forthwith, himself named as one, [to the effect that] he owes nothing to the plaintiff, and so shall he be acquitted.’ If the latter could not find 2 witnesses (oath helpers) the same was attained if he swore an oath at the 6 churches nearest to the Guildhall. *Ibid*, p 256 ‘In plea of contract and of debt, when the plaintiff has neither writing nor tally, the defendant may defend himself by waging his law’ (himself and 6 others). See also Bateson, n 31, vol 1, pp 177-8 and Reeves, n 190, vol 2, p 260-1.

<sup>220</sup> e.g. Ipswich customal c. 1291, Bateson, n 31, vol 2, p 188 ‘if a merchant sells his merchandise to another merchant to pay on a near day or directly on the nail [probably, it refers to payment at the merchant’s counting table in the market] in which case it is not usual for merchants to make writing or tally for the speedy payment, if a plea arises afterwards between those persons in the said court of Ipswich for the non-payment of such merchandise, the merchant to whom the merchandise was thus sold shall not be allowed in pleading to defend by his law, saying that he does not withhold from the said merchant plaintiff the money for the merchandise sold to him as foresaid, provided that the sale or the delivery of the said merchandise can be proved or averred by good inquest according to merchant law in the form below written.’ This referred to 2 witnesses, the same as the London custom where the defendant was a foreigner or stranger who was non-resident, see n 219.

<sup>221</sup> Exactly what the author meant by a ‘merchant’ is unclear. However, it is suggested he was referring to those who traded as a profession, and not *ad hoc*. See also n 200; Basile, n 6, p 36 and P & M, n 52, vol 1, pp 466-7 (as to the indefinite nature of ‘merchant’).

<sup>222</sup> See ns 200 & 201.

<sup>223</sup> Basile, n 6, ch 9, p 18. The editors commented, p 29: ‘The imagery further suggests that our author regarded the privileges accorded mercantile law as fundamental to the law of the realm and thus as capable of being reified as an endowment of the maternal common law. In other words, he seems to have viewed the privileges of mercantile law as being of the order of the grants of rights and liberties in Magna Carta,

*In conclusion, the text Lex Mercatoria (c. 1280), referred to 3 benefits given to merchants by way of a relaxation in the common law, viz. (a) speedy justice; (b) pledgee to answer for the whole debt; (c) no wager of law on the negative side. The author viewed these as market (mercantile) customs and treated them as a part of the common law.*

## 9. CITY OF LONDON CUSTOMS

As previously noted (see 4(b)), as long ago as the time of Henry I (c.1113), the Crown granted privileges to freeman of the City of London - privileges which were re-iterated in subsequent charters. It also upheld their 'free customs'. What exactly these customs were in the commercial field is not clear. However, the *Liber Albus* (although dated 1419)<sup>224</sup> referred to earlier London customs, including commercial ones. For example, the City was accorded *jurisdiction* over the following:

- **City Merchants: Contracts outside London.** Pleas between merchants within the City in respect of contracts made outside the City - with the Inquest being held before merchants who travelled between the City and the market town where the contract was made;<sup>225</sup>
- **Contracts Abroad: Payment or Account in London.** Contracts made beyond sea at any: (a) market town; or (b) place of merchandise, where the contract provided for payment (or delivery of the merchandise) or an account - in the City.<sup>226</sup>

These customs probably derived from an Ordinance of Edward I (1272-1307) of 1285, who re-took control of the City, in terms of administration, in the period 1285-98, appointing his own warden in place of the mayor.<sup>227</sup> Thus, these customs had the sanction of legislation.<sup>228</sup> Further, they were *London* customs.

- This point was overlooked by civilian writers and non-lawyers in the 17<sup>th</sup> century (and, indeed, by some writers on the law merchant in the early 19<sup>th</sup>-20<sup>th</sup> century) who thought that early merchant customs comprised a *distinct* body of law. Also, some of these writers thought their origin might have been *foreign* mercantile practices;
- They did this because they failed to consider the charters and customs of London, which show that the source of the customs referred to by Bracton and the author of the *Lex Mercatoria* were, primarily, *London* customs, first and foremost.<sup>229</sup> That is, domestic, not foreign. Also, customs, not principally for the benefit of merchants, but for *London citizens* - which customs were later extended to various towns and boroughs as well as to merchants generally;<sup>230</sup>
- Finally, such writers failed to note that London customs were especially privileged. A charter of 1341 provided that London customs could be amended (or changed) by the Common Council of the City of London; reference to a court was not necessary.<sup>231</sup> And, a charter of 1462 provided that the recorder of London could certify that a custom existed,<sup>232</sup> reference to a court was not necessary.

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which was re-issued and confirmed many times throughout the thirteenth century, and became identified as a fundamental part of the 'common laws' or 'law and custom of the kingdom' referred to throughout [the text] *Lex mercatoria*.'

<sup>224</sup> See n 42.

<sup>225</sup> *Liber Albus*, n 42, p 190 'in plaints of debt and account, and other personal contracts made between merchant and merchant, if the plaintiff declares that the defendant at any market town or at any place of merchandise within the realm, bargained for or bought of the said plaintiff any merchandise, or received his money for the purpose of paying him, delivering, or rendering to him an account thereof, in any place within the City of London; in such case, the defendant, according to usage, shall be put to his answer, notwithstanding that such contract was made out of the City; and if the parties are at traverse and plead for issue thereon by Inquisition, then shall the Inquest be taken from people of the said City, that is to say, from merchants passing between the said city and the market-town where the contract is alleged [to have been made]; for the reason that such merchants who are so passing may have notice of the said contract.' (*italics supplied*)

<sup>226</sup> *Ibid*, p 191. See also Letterbook K, n 44, p 208 (BOE between a London merchant and the factor of another made in Bruges, 1436).

<sup>227</sup> The City was owned by the sovereign and leased to its citizens by Henry I (1100-35) in a charter of c.1131-2 'I have granted to my citizens of London, to hold Middlesex to farm for [£300], upon accmpt to them and their heirs'. See McBain, n 44, p 6.

<sup>228</sup> See text to n 174.

<sup>229</sup> The same applies to charters and local customs at ports, which Magna Carta also upheld, see n 174.

<sup>230</sup> One point easily overlooked was that - in medieval times - the 'prize' was not to be a merchant *per se*, but to be a *citizen* of a town and a merchant of that town's gild. Then, one secured the benefit of all the restrictive trade practices and simplified procedures. Otherwise, one was a 'foreigner' (whether from abroad or not) and everything tended to be against one - save at fairs. However, even the simplified procedures at piepowder courts were (likely) designed to principally benefit the citizen dealing with the foreigner, rather than the foreigner *per se*. 'Foreigners' in England medieval society were, generally, treated with suspicion and disliked, see n 173.

<sup>231</sup> A charter of 3 June 1341 of Edward III [1327-77] provided 'where any customs theretofore used and obtained proved hard or defective, or any matters newly arising within the city needed amendment and no remedy had been previously provided: to apply and ordain a convenient remedy as often as it should seem expedient; so that the same were agreeable to *good faith, and reason*, for the common advantage of the

***In conclusion, many mercantile customs, pre-1290, were London customs or derived from the same. There is no evidence they comprised a distinct body of law. Nor, that they derived from any foreign law(s).***

## **10. BRITTON (c. 1280) & FLETA (c. 1290)**

### **(a) Britton (c. 1290)**

The text Britton (c. 1290)<sup>233</sup> - which was (probably) written some 50 years after Bracton – analysed debts,<sup>234</sup> obligations,<sup>235</sup> surety<sup>236</sup> and sale (principally, with respect to land).<sup>237</sup> There is no suggestion that Britton treated these - which would have applied to citizens generally (and not just to merchants) - as part of the law merchant. They were part of the common law (the general or ‘*common*’ customs of the realm).<sup>238</sup> Britton also referred to:

- weights and measures;<sup>239</sup>
- the Assize of Bread and Ale (it regulated the price and weight (volume) of bread and ale);<sup>240</sup>
- the crime of selling unwholesome (that is, putrid) food;<sup>241</sup>
- the crime of forestalling which was committed by those who bought up goods before they came into the open market.<sup>242</sup>

All these matters were contained in legislation or were matters of the common law. Thus, they would not have been treated as part of the ‘*law merchant*’, save where merchants had a distinct custom, to which Britton only appears to have made one reference - one which (likely) covered the weight of certain dry goods where legislation did not otherwise provide.<sup>243</sup> However, this exception ended early on: in London, there was a

citizens, and other liege subjects sojourning with them, and useful to king and people.’ See McBain, n 44, p 50. This power of the Common Council seems to have been extensive, see Ordinance of the Common Council in 1487 prohibiting London citizens carrying goods for sale to fairs and markets outside London. This was annulled by 3 Hen VII c 9 (1487, rep 1863). See also Walford, n 81, pp 34-5. For other Common Council ordinances see *Laws concerning Trade and Tradesmen* (printed by J Nutt, 1712).

<sup>232</sup> A charter of 9 November 1462 of Edward IV [1461-83] stated: ‘the...mayor and aldermen...shall record, testify and declare, whether such be a custom or not, by the recorder of the same city...by word of mouth; and that there may be speedy process by that record, certificate, and declaration, such custom so alleged shall be allowed for a custom, or accounted not for a custom, without any jury therefore to be taken, or further process thereon to be made.’ This was confirmed in a charter of 18 October 1638 of Charles I [1625-49]. See McBain, n 44, p 45 (which referred to Edward III but should have referred to Edward IV).

<sup>233</sup> FM Nichols (trans), *Britton* (John Byrne & Co, 1901).

<sup>234</sup> *Ibid*, p 128 *et seq.*

<sup>235</sup> *Ibid*, p 129 ‘An obligation is a legal bond, whereby a person is bound to give or do anything, and thus it is the parent of an action, and takes its origin from some precedent trespass or contract.’

<sup>236</sup> *Ibid*, pp 138-9.

<sup>237</sup> *Ibid*, book 2.

<sup>238</sup> Local customs were not legal if not according to the common law. Britton, n 233, p 70 ‘Let inquiry...be made of customs used in the county differing from the common law, and what they are, and if there be any repugnant to the common law, let them be prohibited, *unless they have been confirmed by us or our predecessors.*’ The last reference was, likely to confirmation of customs in Magna Carta (see text to n 174) or confirmation by way of an ordinance, such as in 1285 in respect of the City, see n 209.

<sup>239</sup> Britton, n 233, pp 153-9. *Ibid*. p 153 ‘We will that no one have measures in our realm except ourselves, but that everyone shall take his measures and his weights from our standards, as of bushels, gallons, pounds, ells, and other such measures.’ See also pp 68-9 (inquiry as to false weights and measures).

<sup>240</sup> *Ibid*, pp 153-5. The Assize of Bread and Ale was printed as an Act in 51st year of Henry III (i.e. 1266). There were a number of variants. See Statutes of the Realm (1814), vol 1, p 199 (Tanner Ritchie has a searchable edition on CD Rom). On the Assize of Ale generally, see LF Salzman, *English Industries of the Middle Ages* (Oxford, Clarendon Press, 1923), ch 12. *Ibid*. p 286 ‘The Assize of Ale...fixed the maximum price of ale throughout the kingdom on the basis of the price of malt, or rather of the corn from which malt was made.’

<sup>241</sup> *Ibid*, p 158 ‘salesmen and cooks, who make a practice of selling to passers-by bad meat, tainted or diseased, or otherwise dangerous to the health of man. Likewise forestallers, who raise the market price of victuals by their dealings outside the market.’

<sup>242</sup> *Ibid*. For the subsequent history of this crime, as well as those of ingrossing and that of regrating see Coke, n 16, vol 3, pp 194-6. Also, Blackstone, n 186, vol 4, p 158 ‘The offence of forestalling the market is also an offence against public trade... which (as well as the two following)[he refers to regrating and to engrossing] is ...an offence at common law...’.

<sup>243</sup> *Ibid*, p 156 ‘Merchants nevertheless shall have their weights as far as regards *avoirdupois* according to their customs.’ Coke, n 16, vol 4, p 273 ‘There is another kind of weight called *aver de pois*... It is called *aver de pois*, because thereby they have full measure.’ Kitchin, n 186, p 80 ‘*Avoir de pois* is a term of French commerce, afterwards applied in English trade to the ‘*pound avoir de pois*’ or pound of sixteen ounces, used for weighing dry goods... There is also a medieval form of it, ‘*averium ponderis*’, interpreted by Du Cange [*Glossarium ad Scriptores Mediae et Infimae Latinitatis*, 1638] as meaning all wares which are sold by the ‘*pondus*’ or pound or by the scale weight; thence it came to mean, as in our charter, spices, etc, as distinguished from mercery, etc.’

standard system of weighing dry goods by weight by 1305<sup>244</sup> and the Statute of the Staple 1353 provided for there to be standard measures throughout the realm.<sup>245</sup>

**(b) Fleta (c.1290)**

The text, *Fleta* (c. 1290),<sup>246</sup> analysed buying and selling, closely following Bracton.<sup>247</sup> As to customs in the case of the ‘law merchant’ (*consuetudine mercatorum*), Fleta appears to have referred to two only. The first referred to the tally (already discussed in *Lex Mercatoria*, see 8).<sup>248</sup> The second related to earnest money and a seller rescinding from a sale prior to delivery of the goods but after earnest money had been paid. Fleta stated:

‘if ...the seller...regrets what he has done, he shall give the buyer double what he has received by way of earnest, *unless this conflicts with the custom of merchants, [consuetudine mercatorum]* which lays it down, in accordance with the law merchant [*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.<sup>249</sup> (*italics supplied*)

Fleta also considered: letting and hiring,<sup>250</sup> obligations,<sup>251</sup> debtors and creditors,<sup>252</sup> vouching to warranty<sup>253</sup> and the purchase of stolen goods.<sup>254</sup> It may be noted that the latter did not reflect the concept of *market overt* (since the buyer lost out) - which confirms that *market overt* was a specific provision that only applied to London and, possibly, one or two other places.<sup>255</sup> Finally, Fleta referred to:

<sup>244</sup> A charter of 26 March 1268 provided that no merchant stranger (or other) might buy or sell any wares which ought to be weighed or troned, unless by the king’s beam, on forfeiture of the said wares. See McBain, n 44, p 38. An Ordinance of c 1285 of Edward I, see *Liber Albus*, n 42, pp 238-9, provided ‘no person shall have a measure or balance, or other weight, except it be good and lawful, and that according to the weight of his lordship the king.’ *Carta Mercatoria* (1303), see 12, provided, p 214 ‘that throughout our whole realm and power there be one weight and one measure.’ See also Letterbook F, n 44 p xxxiv (1305 and 1309, agreement with foreign merchants *re* weighing of *aver du pois*). Also, Letterbook G, n 44, p 138 (Ordinance of c. 1362), ‘no one may sell or buy any manner of goods of weight (*avoir de pois*)... unless weighed by a weight agreeing with the Standard of the Exchequer...’. Also, Letterbook K, n 44, p 394 (proclamation of 1458, all *avoir de pois* to be weighed by the king’s beam).

<sup>245</sup> Statute of the Staple 1353, s 10 ‘one weight, one measure, and one yard, be through all the land, as well out of the staple as within.’

<sup>246</sup> Fleta, n 190, vol 72. The work, *The Mirror of Justices* (c. 1290), see n 31, mentions contract and bailment, SS, vol 7, pp 73-6.

<sup>247</sup> *Ibid*, pp 194-6.

<sup>248</sup> *Ibid*, 203 ‘if the plaintiff produces suit, the defendant must defend himself against the plaintiff and against the suit he produces, and this he does by [wager of] law. The same procedure will be followed when the plaintiff proffers tallies, *unless he be a merchant*, for, by the grace of the prince [see n 227], merchants are allowed to prove, by the oath of two men at least who are found after careful examination to be in agreement about the day, place, amount and the rest of the circumstances, tallies that are repudiated by trustworthy witnesses.’ (*italics supplied*). See also *Ibid*, pp 211-2 and Basile, n 6, p 64.

<sup>249</sup> *Ibid*, pp 195-6. FW Maitland, *Select Pleas in Manorial and other Seigniorial Courts, Reigns of Henry III and Edward I*, SS, vol 2, p 131 thought the payment of such a high penalty was an ‘improbable contingency.’ Cf. Bracton, see n 179 (penalty was double). The position for foreign merchants was different when *Carta Mercatoria* (1303) provided that ‘every contract entered upon by those merchants with any persons soever, whencesoever they be, touching any sort of merchandise, shall be valid and stable, so 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...’. (*italics supplied*). P & M, n 52, vol 2, p 209 noted that this principle later became part of the common law, citing W Noy, *The Principal Grounds and Maxims* (1641, rep Law Book Exchange) ‘If the bargain be that you shall give me ten pounds for my horse, and you give me one penny in earnest, which I accept, this is a perfect bargain’. Also ‘after earnest given, the vendor cannot sell the goods to another...’. See also *Langfort v Tiler* (1703) 1 Salk 113 (91 ER 104) *per* Holt CJ. This later became statutory, see Statute of Frauds 1677, s 17 ‘No contract for the sale of any goods, wares or merchandise, for the price of £10 or upwards, shall be good, except the buyer...give something in earnest to bind the bargain, or in part payment.’

<sup>250</sup> *Ibid*, p 197.

<sup>251</sup> *Ibid*, pp 198 *et seq*.

<sup>252</sup> *Ibid*.

<sup>253</sup> *Ibid*, p 91 ‘The accused [i.e. the person accused of theft] may plead exceptions of many kinds...and he can say that the goods were sold or given to him by someone and then he can vouch him to warranty. If the warrantor be present or if the accused can produce him by a certain day, let him do so, and the action shall then proceed between them regarding the warranty.’ See also *Fleta*, n 190, vol 99, p 151 ‘All can vouch to warranty who are not forbidden, that is to say, he who has any corporeal thing by some lawful title, by reason of a gift, a promise or a purchase or the like with a charter or homage, unless warranting and exchange are specially excepted, in which case an agreement overrides the law.’

<sup>254</sup> *Ibid*. ‘Should anyone buy stolen goods that he believes to be lawfully acquired and should he be sued by someone who claims the goods, if the buyer bought the goods openly in a market or at a fair before the bailiffs and reputable folk, who bear lawful witness thereof on his behalf and that he has paid toll and custom, it should be adjudged that the buyer departs quit and that he restore the goods to the true owner who claims them and that he lose what he has paid for them: and if there is no testimony as aforesaid or if he has no warrantor, he will be in danger of losing his life [i.e. for theft].’

<sup>255</sup> On the subsequent history of market overt see *The Case of Market Overt* (1596) 5 Co Rep 83b (77 ER 180) ‘every shop in London is an open market for such things only which by the trade of the owner are put there to sale.’ See also Holdsworth, n 26, vol 5, pp 105 & 110-1 and Sanborn, n 35, p 352. See also *Clayton v Le Roy* [1911] 2 KB, pp 1038-45 where Scrutton J analysed the law but did not refer to Anglo-Saxon law, see n 72. See also JG Pease, *Market Overt in the City of London* (1916) 31 LQR 270-88. Market Overt was abolished by

- the Assize of Bread and Ale,<sup>256</sup>
- the Assize of Cloth,<sup>257</sup>
- selling unwholesome food,<sup>258</sup>
- forestalling;<sup>259</sup>
- weights and measures.<sup>260</sup>

However, all of the above applied to everyone; not just to merchants. These are now considered in greater detail.

### (c) Assizes & Measures

Both Britton and Fleta referred to the Assize of Bread and of Ale (*Assisa Panis et Cervisie*)(rep 1863) as well as to the Assize of Weights and Measures (*Assisa de Ponderibus et Mensuris*)(rep 1863), both likely enacted c.1266.<sup>261</sup> These pieces of legislation (they were treated as such) were preceded by Magna Carta (1215), chapter 25 of which dealt with the measurement of goods, stating:

Let there be one measure of wine throughout our whole realm; and one measure of ale; and one measure of corn, to wit, 'the London quarter', and one width of cloth (whether dyed, or russet, or 'halberget'),<sup>262</sup> to wit, two ells within the selvedges,<sup>263</sup> of weight also let it be as of measures.<sup>264</sup>

This regulation of goods was not new since, in Anglo-Saxon times, currency and measures were regulated.<sup>265</sup> More recently:

- In 1197, king Richard I (1189-99) had imposed an Assize of Measures<sup>266</sup> with inspectors supervising it.<sup>267</sup> However, its terms were too stringent and they had to be relaxed in practice;<sup>268</sup>
- In 1199, king John (1199-1216) had imposed an Assize of Wine which sought to regulate the price of various types of Continental wine (an attempt which Magna Carta (1215) did not repeat).<sup>269</sup>

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the Sale of Goods (Amendment) Act 1994. In any case, market overt could not be asserted against the Crown, nor after 1529 (see 21 Hen VIII c 11 (1529), against a prosecutor to conviction. See also Carter, n 27, p 171. In *Crane v London Dock Co* (1864) 5 B & S 313 (122 ER 847), p 318, per Cockburn CJ 'Shops were very few in London, and persons, whose goods were taken feloniously, would know to what place to resort in order to find them. I can, therefore, quite understand that the law in question was established for the protection of buyers, that, if a man did not pursue his goods to market where such goods were openly sold, he ought not to interfere with the right of the honest and *bona fide* purchaser.'

<sup>256</sup> Fleta, n 190, pp 117-9.

<sup>257</sup> Ibid, p 120 'The assize of cloth is contained in the Great Charter [Magna Carta, chapter 25], namely, every cloth for sale which has not been made in England ought to be 25 ells [*ulnae*] long and 2 ells wide.' Magna Carta was subsequent to the Assize of Cloth 1197 which fixed the dimensions of cloth and assigned 4 or 6 men in each borough to compel obedience. See also Lipson, n 140, p 446 and Moore, n 210, pp 132-41.

<sup>258</sup> Ibid, p 122 'butchers and cooks who sell measled and diseased meat or who heat up food that is half-cooked or has gone bad and who pass off unsound for sound food to the peril of men's lives'.

<sup>259</sup> Ibid, 'forestallers who divert foodstuffs from the market and thereby raise prices.' See also Britnell, n 61, p 93.

<sup>260</sup> Ibid, pp 118-20.

<sup>261</sup> See Statutes of the Realm (1814), vol 1, pp 204-5. See generally, Salzman, n 214, ch 3 (weights and measures).

<sup>262</sup> McKechnie, n 167, p 356 (fn) thought this might refer to the thick cloth worn under a coat of mail.

<sup>263</sup> The meaning of this word is unclear. An *ell* was 45 inches, see Lipson, n 140, p 446 and OED, n 6 (*ell*). There were differences in meaning of the word *ell* in different countries. For example, the Flemish *ell* was 27 inches.

<sup>264</sup> See also Coke, n 16, vol 2, p 41.

<sup>265</sup> See n 95 (*Laws of Edgar (AD 943-75)*) which also provided 'one coinage shall be current throughout all the king's realm, and no one shall refuse it.' For Anglo-Saxon coinage, see Davies, n 214, ch 4.

<sup>266</sup> Roger of Hoveden, n 165, pp 410-1 (20 November 1197) 'It is enacted, that all measures, throughout the whole of England, shall be of the same capacity, both for corn and for pulse, as also for other things of a like nature, that is to say, one good and reasonable horseload; and this is to be the measure established, both within cities and boroughs, and without. The measure also of wine, ale, and all liquors, is to be of the same size, according to the various natures of the liquors. Weights also, and scales, and other measures of dimension, are to be of the same quantity throughout all the kingdom, according to the different nature of the commodities. Also, in the measures of corn, and of liquors, such as wine and ale, let pegs of iron be driven into them, that false measure may not fraudulently be given.' It then discussed cloth. See also McKechnie, n 167, p 356 and Britnell, n 61, pp 90-7 (measures and assizes). See also AE Bland *et al*, *English Economic History Select Documents* (Bell & Sons, 1914), p 154.

<sup>267</sup> Ibid, p 411 'in each city or borough, four or six lawful men of the said place, according to the size thereof, together with the sheriff... shall be appointed to keep this assize, in the following manner; they are to see and be assured that all things are sold and bought by the same measure, and that all measures are of the same quantity, according to the different nature of the wares. And if they shall find any person who shall make confession, or be convicted of selling otherwise than by statute measure, let his body be seized, and let him be committed to prison, and let all his chattels be seized to the king's use; and such persons are not to be set at liberty, except by our lord the king, or his chief justice.'

<sup>268</sup> McKechnie, n 167, p 357.

By 1290, Fleta set out the law on all these ‘*market regulations*’ in considerable detail <sup>270</sup> as well as the person charged by the Crown with upholding the same - the clerk of the marshalcy.<sup>271</sup>

- Along with these Assizes, there was also an Assize of the Pillory (*Judicium Pillorie*) c. 1266 (rep 1844).<sup>272</sup> It was designed to punish infractions of all these market regulations as well as the selling of unwholesome food <sup>273</sup> and forestalling;<sup>274</sup>
- Pursuant to it, a jury was assembled to determine whether traders (bakers, butchers *etc.*) had committed offences against the various Assizes.

Thus, Fleta stated:

when the jurors have given their answers and handed back their articles, those who are indicted shall be asked how they wish to clear themselves of the charge that they have broken or infringed the assize of bread, wine and ale, cloth, linen and such like goods sold by count, weight or measure.

And if a baker or ale-wife is found guilty thereof, then the jurors are to be asked if they have ever offended before, and, if the jury say that they have not, then they are to be leniently treated and lightly amerced [fined]. If, however, they are old offenders, then for a third offence a triple amercement [fine] shall be inflicted, while for the fourth, fifth, sixth and succeeding offences they are to suffer corporal punishment with infamy, though without danger to life and limb. And thus every offender shall be punished as the gravity of his offence demands.<sup>275</sup>

The usual punishment for ‘*repeat*’ offenders, was the pillory or cucking stool (tumbrel) <sup>276</sup> - although it seems clear that other, more unusual, offences were sometimes imposed - such as forcing a person who sold bad wine to drink it.<sup>277</sup> Defective weights and measures were destroyed. In the case of London:

- **Examples.** The Calendar of Letterbooks and the Plea and Memoranda Rolls of the City <sup>278</sup> are replete with examples of bakers, butchers and sellers of a huge range of goods, being punished for infractions of these Assizes as well as for the common law crimes of selling unwholesome food and forestalling. All these crimes were punished as a form of ‘*common (public) nuisance*’ and the usual punishment was a fine for a first offence and the pillory (or tumbrel) for repeat offences;<sup>279</sup>
- **Clerk of the Market.** Although the royal clerk of the marshalcy<sup>280</sup> was responsible for the regulation of the Assizes and weights and measures, London - pursuant to a charter granted by Edward III

<sup>269</sup> Ibid. Roger of Hoveden, n 165, pp 466-7 [King] John...enacted that no wine of Poitou should be sold at a higher rate than twenty shillings the tun, and that no wine of Anjou should be sold at a higher rate than twenty-four shillings the tun, and that no French wine should be sold at a higher rate than twenty-five shillings a tun; unless the said wine was so good that any one would be willing to give for it as much as two marks at the highest. He also enacted, that no wine of Poitou should be sold at a higher rate than four pence the gallon; and no white wine should be sold at a higher rate than sixpence the gallon. He also enacted, that all the tuns which should in the future come into England from Rech [Rochelle], after the present vintage should be changed...this first ordinance of the king had hardly been enacted, when it was immediately done away with; as the merchants could not bear up against this assize. Accordingly, leave was given them to sell a gallon of white wine for eight pence and a gallon of red wine for sixpence; and so the land was filled with drink and drinkers.’

<sup>270</sup> Fleta, n 190, pp 117-22.

<sup>271</sup> Ibid, p 117 ‘There is committed to the charge and custody of a clerk or layman the king’s measures, which are taken as the standard and pattern measures of the realm, that is to say, of ells, gallons, weights, bushels and the like, and he should be experienced in [the administration] of the assizes of bread, wine, measures and ale, so that he may fully understand them.’ Britton, n 233, p 155 ‘whereas we have entrusted one of our officers with the custody of the standards and samples of our weights and measures, we will that this officer shall have jurisdiction and cognizance of false weights and measures throughout our verge, wheresoever we be in our territory, within franchise and without, and to burn such as he shall find false, and to amerce and otherwise punish those who have made use of such weights or measures.’

<sup>272</sup> See Statutes of the Realm (1814), vol 1, p 201. Also, *Liber Albus*, n 42, pp 517-26 (offences punished by the pillory).

<sup>273</sup> Ibid, the Assize of the Pillory ‘if any butcher do sell contagious flesh, or that dies of the murrein [i.e. the plague]. Also, they shall inquire of cooks that seethe [boil] the flesh or fish with bread or water, or any otherwise, that is not wholesome for man’s body or after they have kept it so long that it loses its natural wholesomeness, and then seethe it again, and sell it [or if any do buy flesh of Jews, and then sell it to Christians].’

<sup>274</sup> Ibid. ‘forestallers, that buy anything afore the [due and accustomed hour] against [the good state and weal] of the town and market, or that pass out of the town to meet such things as come to the market, [being] out of the town, to the intent that they may sell the same to the town more dear to regrators [that utter [sell] it more dear] than they would that bought it, in case they had come to the [town or] market.’

<sup>275</sup> Fleta, n 190, p 122. See also Britton, n 233, pp 157-9.

<sup>276</sup> The tumbrel was a dung cart, used for carting people about to their shame. However, it seems, to have later become associated with a cucking stool (also called a thewe, trebuchet or castigory) in which people were thrown into a pool of water. See McBain, n 50, pp 117-8.

<sup>277</sup> GS McBain, *Modernising the Common Law Offence of Cheating the Public Revenue* (2015) Journal of Politics and Law, vol 8, no 1, p 58.

<sup>278</sup> See ns 44 & 45.

<sup>279</sup> It seems that, in London at least, that really bad offenders were forbidden to practice their trade again in London.

<sup>280</sup> The Clerk of the Marshals, originally, was the clerk (regulator) of the market that was kept outside the king’s palace, to feed the court.

(1327-77) to the City in 1327 - secured the privilege (franchise) of being able to appoint their own clerk of the market.<sup>281</sup> This, later, occurred with respect to other towns which secured the franchise of this office. Thus, borough markets had clerks of the market who checked weights and measures as well as punished infractions of the Assizes and other trade misdemeanours,<sup>282</sup>

- **Other Officials.** As well as clerks of the market - with the rise of guilds and craft guilds - other officials inspected particular trades. For example, each tavern brewed its own beer (the brewers were usually women). When brewed, an alestake<sup>283</sup> was placed outside the tavern and town officials (ale conners or ale tasters) came to test it. If the ale was unfit for consumption it was forfeit and the tavern could be closed.

A previous article has considered a number of these offences in more detail.<sup>284</sup> However, it is important to note that - while these market regulations affected merchants - they covered *anyone* who sold goods. Further, the basis of this regulation was always legislation (in most cases, the Assizes) or the common law (for example, forestalling was a common law crime, as was selling unwholesome food). All these regulations were *not* part of the '*law merchant*' and the punishment for not obeying them was a criminal sanction as opposed to a civil one. The only part of these regulations that could be said to comprise part of the '*law merchant*' was where:

- the measurement was that employed by merchants (see Britton, **10(a)**, *re* dry goods) or;
- there was a custom in respect of purchase and sale (see Fleta, **10(b)**) *re* the amount of penalty imposed on a merchant, if he pulled out of a purchase after earnest money had been paid by the buyer.

There seems to be no evidence that Britton or Fleta (as well as Bracton, in respect of piepowder courts) treated such mercantile customs as other than part of the common law. Finally, it is useful to conclude what happened to all these regulations on measurement:

- **Standardisation of Measures.** Over the centuries, legislation provided for progressive standardization throughout the country. A consolidating Act, the Weights and Measures Acts 1878-1897 provided for the use of the same weights and measures throughout the UK and for county (and borough) councils to appoint inspectors, to supervise the same;<sup>285</sup>
- **Assizes.** The Assize of Weights and Measures was (finally) repealed in 1863, although it was long obsolete before then.<sup>286</sup> The Assize of Bread and Ale c. 1266 (abolished in London in 1815) was repealed in 1863 and the Assize of the Pillory in 1844. Further, the means of punishing offences against the Assizes - the pillory - was abolished in 1837 (the tumbrel and trebuchet had long been in disuse before then).<sup>287</sup> Forestalling was abolished as a crime in 1844;<sup>288</sup>
- **Clerk of the Market.** Clerks of the market were almost obsolete by the time Coke wrote (c. 1641). By Victorian times they no longer existed,<sup>289</sup> although (interestingly) the actual office of '*clerk of the market*' does not seem to have been abolished. Courts of clerks of the market, in any case, ended by 1977.<sup>290</sup>

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As Coke noted, n 16, vol 3, p 272 'of ancient time there was a continual market kept at the court gate, where the king was better served with viands [food] for his household than by purveyors...'

<sup>281</sup> See McBain, n 44, pp 22-3.

<sup>282</sup> See n 51, for examples.

<sup>283</sup> LF Salzman, *English Life in the Middle Ages* (OUP, 1926), pp 76-7 'These alestakes were sometimes so long and heavy that they injured the fronts of the houses to which they were attached and were dangerous to persons riding through the narrow streets, so that in London they were not allowed to be more than seven feet in length.'

<sup>284</sup> See McBain, n 277, pp 57-9.

<sup>285</sup> See also McBain, n 44, p 23.

<sup>286</sup> Magna Carta, relating to measures, see text to n 264, was not repealed until 1948, though it was long obsolete by then.

<sup>287</sup> See n 276.

<sup>288</sup> 7 & 8 Vict c 24 (1844). See also McBain, n 44, p 23. As for selling unwholesome provisions in a market, this was, later, categorized by legal writers as an aspect of the (wider) crime of '*cheating*.' Thus, it was probably repealed by the Theft Act 1968, s 32(1). However, the position is not wholly clear.

<sup>289</sup> The Markets and Fairs Clauses Act 1847 required the owners of markets to provide proper weights and measures for commodities sold at fairs, obviating the job of the clerk of the market. However, it seems that this was otiose since the last time the office was exercised, in practice, by a clerk of the market (as a king's officer) was in 1738. See GS McBain, *Abolishing Obsolete Offices* (2012), Coventry LJ, vol 17, issue 2 p 58.

<sup>290</sup> Coke, n 16, vol 3, p 272 'at this day there is no great need of him, for the justices of assize, the justices of *oier and terminer*, justices of the peace, and the sheriffs in their tourns, and the lords in their leets, may and do inquire of false weights and measures.' Courts of clerks of the

*In conclusion, the legal texts Bracton, Britton and Fleta referred to commercial law in the context of legislation or the common law and - although there were a few mentions to the customs of merchants (in respect of courts of piepowder, the measurement of certain dry goods and a penalty for backing out of a sale after earnest had been paid) - there is no suggestion this was a distinct law.*

## 11. STATUTE OF ACTON BURNELL 1283 & STATUTE OF MERCHANTS 1285 <sup>291</sup>

In medieval times, as Fifoot noted, loans of money, when unpaid, provoked many actions for debt. There were two preferential means of recovering it:

- The first was the recognizance where a person recognized his debt in court and that, on non-payment, a sheriff might levy execution against him,<sup>292</sup>
- The second ‘was accorded to merchants, and especially foreign merchants, as a matter of state policy.’<sup>293</sup> The Statute of Acton Burnell 1283 <sup>294</sup>- and the subsequent Statute of Merchants 1285<sup>295</sup> which replaced it in part - dealt with the registration of debts to them.<sup>296</sup>

The registration of these debts was an extension of the Exchequer of the Jews 1194 (see 5).<sup>297</sup> It also seems that, even prior to Statute of Acton Burnell 1283, in London there was a system of debt registration, from 1268.<sup>298</sup>

- These Acts of 1283 and 1285 (they are construed together) were for the benefit and convenience of merchants (both local and foreign).<sup>299</sup> Thus, they could be treated as part of the law merchant;
- However, these Acts were later used by non-merchants <sup>300</sup> with Beardwood concluding that this happened by the 14<sup>th</sup> century.<sup>301</sup>

### (a) Statute of Acton Burnell 1283

The Preamble to this Act set out the problem and the means of resolution:

Forasmuch as merchants, which heretofore have lent their goods to divers persons, be greatly impoverished, because there is no speedy law provided for them to have recovery of their debts at the day of payment assigned; and by reason hereof many merchants [have withdrawn] to come into this realm with their merchandises, to the damage as well of the merchants, as of the whole realm; the king by himself and by his council has ordained and established, that the merchant which will be sure of his

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market can no longer operate after 1977, see Administration of Justice Act 1977, s 23 & sch 4, pt. See also, McBain, n 44, p 23 and McBain, n 289, p 58.

<sup>291</sup> See generally: (a) TFT Plucknett, *A Concise History of the Common Law* (5<sup>th</sup> ed, 1956) (**‘Plucknett I’**); (b) TFT Plucknett, *Legislation of Edward I* (1949) (**‘Plucknett II’**), pp 138-9; (c) A Beardwood, *The Statute Merchant Roll of Coventry 1392-1416* (published for the Dugdale Society, 1939); (d) Sanborn, n 35, pp 376-8; (e) Fleta, n 190, vol 72, pp 212-6; (f) H Hall (ed), SS, vol 49, introduction.

<sup>292</sup> The recognizance was entered on the court rolls and became a ‘contract of record.’ For the problems in recovering debts see Beardwood, n 291, pp vii-iii.

<sup>293</sup> Fifoot, n 215, p 222.

<sup>294</sup> 11 Edw I (1283) (rep 1863).

<sup>295</sup> 13 Edw I (1285) (rep 1863). Plucknett II, n 291, p 140, fn ‘The two statutes were read together and referred to indifferently as the statute of Acton Burnell or as the Statute of Merchants.’ For commentary on them see also Reeves, n 190, pp 158-62.

<sup>296</sup> Fifoot, n 215, p 222 ‘By two complementary Statutes of 1283 and 1285 a merchant might bring his debtor before the mayor of a town or the chief officer of a fair and require him to acknowledge the debt. The clerk then drafted a *lettre de obligation* to which were attached the seals both of the debtor and the king, and, if the debtor made default, he was arrested and, if necessary, his goods and his land were sold.’

<sup>297</sup> Beardwood, n 291, p ix.

<sup>298</sup> A charter of 26 March 1268 provided for the enrolment of debts owed to London citizens in the Exchequer ‘those debts which of their contracts or loans shall be due unto them, they may cause to be enrolled in our exchequer, for the more surety of them, upon the recognizance of those who shall stand bound unto them in the said debts.’ See McBain, n 44, pp 43-4. Also Hall (ed), SS, vol 49, p xxiii.

<sup>299</sup> Holdsworth, n 26, vol 9, p 97 ‘the purpose of both the statute merchant and staple was to encourage trade, by providing, both for subjects and aliens, a sure way of recovering their debts.’ Moore, n 210, p 120 ‘Edward I [1272-1307]...introduced [by the Acts of 1283 and 1285] another principle, applicable to all merchants denizen and alien, designed to counteract the disadvantages of itinerant trade.’ Reeves, n 190, vol 2, p 261 ‘because these methods of proof [of waging law and proving tallies even when no wager of law possible] left too much room for debtors to avail themselves of their hardiness in swearing, that another method of recovering debts was contrived by the statute-merchant.’

<sup>300</sup> Plucknett I, n 291, p 393 ‘Similar machinery [to the Acts of 1283 and 1285] was set up in every staple town by Edward III in 1353 for the special convenience of the members of those particular communities of merchants. The law and the forms were the same as for statutes merchant, the only difference being that the officials who took the recognisances were the staple officers, and that (at first) the recognisances were practically confined to operations in the ‘staple’ commodities of wool, leather, etc. In later times both statutes merchant and statutes staple were used by non-merchants.’

<sup>301</sup> Beardwood, n 291, p x concluded this by reference to the Coventry roll of 1392-1416 ‘by the fourteenth century, the statute had ceased to apply solely to merchants...It can, therefore, be understood that where the statute says ‘merchant’, we may understand debtor or creditor.’



debt, shall cause his debtor to come before the mayor of London, or of York, or Bristol, [or]<sup>302</sup> before the mayor and a clerk, which the king shall appoint for the same, for to [ac]knowledge the debt and the day of payment; and the recognizance shall be entered into a roll with the hand of the said clerk, which shall be known... This ordinance and act the king wills to be holden from henceforth throughout all his realm of England, among all persons whosoever they may be, who shall freely choose to make such a recognizance; except Jews, to whom this statute extends not [as to Jews, see 5].

Plucknett summarized the nature of this legislation:

In 1283 the Statute of Acton Burnell made special provision for the enrolment of mercantile debts in the principal towns, where the mayor was to keep a roll, and a clerk appointed by the Crown was to enter upon it the details of recognizances; the clerk was also to draw a deed and give it to the creditor, sealed with the debtor's seal and his own official seal. Upon default, the mayor was to order the sale of the debtor's chattels and devisable burgage lands; if there were none within the jurisdiction, the Lord Chancellor was to make suitable process. If the debtor had no such property he was to be imprisoned, the creditor providing him bread and water only.<sup>303</sup>

### **(b) Statute of Merchants 1285**

However, the Statute of Acton Burnell was defective.<sup>304</sup> Thus, the Statute of Merchants (*Statutum Mercatorum*) 1285 was enacted. Plucknett noted this:

The details of enrolment and sealing were changed so as to leave less room for fraud by the local officials, but the greatest change was in the execution allowed. The process was to begin with the imprisonment of the debtor, instead of using imprisonment as a last resort. There was to be no escaping this; if the goaler did not accept the prisoner he (or failing him, the owner of the goal) became liable for the debt.<sup>305</sup>

Recognizances entered into according to the Act were termed '*statutes*' and a creditor under the Act was termed a '*tenant by statute merchant*'.

### **(c) Conclusion**

This Act of 1285 remained the '*principal form of security during the Middle Ages, and even for centuries afterwards it was in very general use.*'<sup>306</sup> However - while these Acts of 1283 and 1285 might have been said to be part of the '*law merchant*' since they applied only to merchants - this soon ended, since, by the 14<sup>th</sup> century (probably the earlier part of the same),<sup>307</sup> they had become available to every person. As to their eventual demise - while the Acts of 1283 and 1285 were not repealed until 1863 - they were becoming redundant by the 18<sup>th</sup> century,<sup>308</sup> through the use by merchants (and others) of simpler forms of debt, such as bills of exchange and promissory notes.<sup>309</sup> A similar thing happened to the Statute of the Staple 1353 (see 16).

<sup>302</sup> Probably, this should read '*and*'.

<sup>303</sup> Plucknett I, n 291, p 392. G Crabb, *A History of English Law* (London, 1829), p 186 'the statute of Acton Burnell [1283] provided that a merchant who wished to secure his debtor before the mayor of London, York, or Bristol, there to acknowledge the debt and day of payment, the recognizance was to be entered on the roll by the clerk, who was to make a writing obligatory, to which the seal of the debtor was to be affixed. If the debtor did not keep his day of payment, then the mayor should immediately cause his chattels and devisable burgages to be sold to the amount of the debt. If the debtor had no moveables, then his body was to be taken and kept in prison, until he or his friends had made agreement with the creditor.'

<sup>304</sup> The Statute of Merchants 1285 stated 'Merchants after[wards] complained unto the king that sheriffs misinterpreted his statutes, and sometimes by malice and false interpretation delayed the execution of the statute [of 1283], to the great damage of merchants.' See also Plucknett II, n 291, p 139 and Beardwood, n 291, p ix.

<sup>305</sup> Plucknett I, n 291, p 393 'The object was clearly to circumvent the prejudice against compulsorily stripping a debtor of his land by selling it. The statute did not venture to do this, but the drastic means of close imprisonment was evidently meant to compel the debtor to sell. A clause was necessary to declare that such sales should be valid, no doubt because at common law a deed made in prison could generally be avoided.' For the best analysis of this Act see Plucknett II, n 291, pp 140-56.

<sup>306</sup> *Ibid*.

<sup>307</sup> See n 301. Letter Book E, n 44, p 53 referred to a writ to the mayor and sheriffs of London in 1315 'that they inquire whether [X] was a clerk (as he declares) and not a merchant when he entered into a recognizance of debt due to [Y], according to the Statute of Action Burnell which prescribed that recognizance should be made only between '*merchant and merchant*.' The Ordinances of 1311 (5 Edw II) art 33, restricted the Acts of 1283 and 1285 to merchants. However, these Ordinances were abolished in 1322. Thereafter, it seems that non merchants would have been able to register, see Letter Book E, n 44, p 213. See also Sanborn, n 35, p 378.

<sup>308</sup> Baker, n 52, p 312 'Statutes and recognizances were still used in the eighteenth century, but had become obsolete before they were abolished in 1863.'

<sup>309</sup> A similar thing happened to the Statute Staple of 1353 (see 16).

*In conclusion, the Statute of Acton Burnell 1283 and the Statute of Merchants 1285 enabled merchants to register debts owed to them. By the 14<sup>th</sup> century this debt registration system was being used by non-merchants as well. Thus, while it might have been treated as part of the ‘law merchant’ at first, this was soon no longer so. These statutes were repealed in 1863.*

## 12. CARTA MERCATORIA (1303)

In 1303, Edward I (1272-1307) granted a charter - the *Carta Mercatoria* (1303) which was also called the *Statute of New Custom*. This charter - while it conferred various privileges on foreign traders<sup>310</sup> - increased customs duty, which was likely its primary intent. Echoing Magna Carta 1215, it also provided that merchants might come safely into England<sup>311</sup> and that they could conduct trade.<sup>312</sup> In the case of disputes in respect of contracts<sup>313</sup> it ordered the courts (whether fair courts, borough courts *etc.*) to provide swift resolution, stating:

we will that all bailiffs and ministers of fairs, cities, boroughs and market towns do speedy justice to the merchants...who complain before them from day to day without delay *according to the law merchant* touching all and singular plaints which can be determined by the same law;

and if by chance default be found in any of the bailiffs or ministers aforesaid whereby the same merchants or any of them shall sustain the inconveniences of delay, although the merchant recover his damages in principal against the party, nevertheless the bailiff or other minister shall be punished in respect of us as the guilt demands, and that punishment we have granted by way of favour to the merchants aforesaid to hasten justice for them.<sup>314</sup> (*italics supplied*)

*Carta Mercatoria* - while it might be said to be part of the ‘law merchant’ - did not provide anything new. It simply emphasised that speedy justice be done in fairs, markets *etc.* Thus, it endorsed, as it were, the law as contained in the text, *Lex Mercatoria* of 1280. Further, this charter did not last long:

- **Abrogated & Re-vivified: 1311-22.** It was abrogated in the New Ordinances 1311 on the basis that it was contrary to Magna Carta and the franchises of the City of London (with a saving in respect of a couple of the duties).<sup>315</sup> However, these Ordinances of 1311 were, themselves, revoked by the Revocation of the New Ordinances 1322 when Edward II wrested power back from the Lord Ordainers.<sup>316</sup> Thus, *Carta Mercatoria* was re-vivified. Yet, this may only have been until the end of the reign of Edward II in 1327 since this charter may have been temporary (it is not clear).<sup>317</sup>

<sup>310</sup> The latin version of the *Carta Mercatoria* (1303) is contained in Riley, n 43 (*Liber Custumarum*), pp 205-11. For a translation see Bland, n 266, pp 211-6. The Preamble to the text refers to: ‘all merchants of the underwritten realms, lands and provinces, to wit, Almain [Germany], France, Spain, Portugal, Navarre, Lombardy, Tuscany, Provence, Catalonia, our duchy of Aquitaine, Toulouse, Quercy, Flanders, Brabant, and all other foreign lands and places, by whatsoever name they be known, coming to our realm of England and staying there, an especial anxiety weighs upon us, in what wise under our lordship a means of tranquillity and full security may be devised for the same merchants for times to come...’. See also Basile, n 6, pp 114-5; P & M, n 52, vol 1, pp 464-5; N Gras, *The Early English Customs System* (Harvard UP, 1918), pp 66-9; Holdsworth, n 26, vol 1, p 541 and Sanborn, n 35, pp 364-5 and 378-9.

<sup>311</sup> Ibid ‘all merchants of the said realms and lands, safely and securely, under our defence and protection, may come into our said realm of England and everywhere else within our power with their merchandise...’

<sup>312</sup> Ibid ‘within the same our realm and power in cities, boroughs, and market towns they may traffic in gross only as well with denizens or inhabitants of the same our realm and power aforesaid as with aliens, strangers or friends (*privatis*), so nevertheless that the wares which are commonly called mercery and spices may be sold at retail as before was wont to be done, and that all the aforesaid merchants may cause their merchandise, which they chance to bring to our aforesaid realm and power or to buy or otherwise acquire within the same our realm and power, to be taken or carried wither they will as well within our realm and power aforesaid as without...’ See also OED, n 6 (*mercery* and *spicery*).

<sup>313</sup> Ibid. n 206, ‘every contract entered upon by those merchants with any persons soever, whencesoever they be, touching any sort of merchandise, shall be valid and stable, so 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; and if by chance a dispute arise on such a contract, proof or inquisition shall be made thereof according to the uses and customs of fairs and towns where the said contract shall happen to be made and entered upon.’ See also Carter, n 27, p 159.

<sup>314</sup> Ibid. It continued ‘We will and grant that a certain loyal and discreet man resident in London be assigned as justice for the said merchants, before whom they may specially plead and speedily recover their debts, if the sheriffs and mayors do not full and speedy justice for them from day to day, and that a commission be made thereon granted out of the present charter to the merchants to wit, of the things which shall be tried between merchants and merchants according to the law merchant. See also Rogers, n 12, pp 21-2.

<sup>315</sup> 5 Edw II.

<sup>316</sup> 15 Edw 2. See also GSMcBain, *Abolishing some Obsolete Constitutional Legislation*, (2011) Coventry LJ, vol 16, issue 1, pp 1-9.

<sup>317</sup> The Ordinances of 1311 and 1322 were probably temporary, not being engrossed on the Statute roll. See McBain, n 316, p 8. M Hale, *A Treatise relative to the Maritime Law of England* (London, 1787, ed Hargrave), p 161 thought that *Carta Mercatoria* was given legal sanction by the Statute of the Staple 1353, s 26. Cf. Gras, n 310, p 9 ‘This statement is based upon the misreading of [s 26] and upon the failure to

- **Speedy Justice for Merchants.** Even if *Carta Mercatoria* survived after 1327, to the extent it confirmed ‘*speedy justice*’ for merchants in piepowder courts, borough courts *etc.*, by the 17<sup>th</sup> century, this applied to ordinary people as well. In any case it is clear that this charter recognised that the law merchant was part of the common law and not distinct from it.<sup>318</sup>

*In conclusion, Carta Mercatoria required ‘speedy justice’ for merchants. It was obsolete by 1809 at the latest.*  
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### 13. FAIRS & PIEPOWDER COURTS<sup>320</sup>

The classic example cited of the ‘*law merchant*’ in early times was in relation to fairs. Here, the merchants’ court - also called the court of piepowder or pedlars’ court - dispensed justice with speed in accordance with the trade customs prevailing among merchants. This is now discussed.

#### (a) Anglo-Saxon Law

As previously noted (see 3), in Anglo-Saxon times, there were markets.<sup>321</sup> However, they were likely restricted to fortified towns (*burghs*, boroughs) - to prevent any disturbance arising from a large assembly of people as well as to bring in money to the king (or franchisee) from the tolls. Given the levels of violence in Anglo-Saxon times - as well as the rural nature of trade - one would suggest there would have been few (if any) *fairs*. Not, at least, until the 10<sup>th</sup> century when things were a little more stable.<sup>322</sup> After that time, there may have been a few fairs operating, for the following reasons:<sup>323</sup>

- **Right to hold a Market.** It seems clear the right to hold a market was a Crown prerogative in Anglo-Saxon times. At least, by the time of king Athelstan, AD 734-75 (see 3);
- **Franchising Courts – Sac & Soc.** It is also likely the earliest Crown prerogative to be franchised in Anglo-Saxon times, was that of being able to hold a court and collect the fines (*sac* and *soc*). The earliest date for such a franchise would appear to be AD 956;<sup>324</sup>
- **Franchising Markets – Toll and Team.** The Anglo-Saxon expression ‘*toll and team*’ in writs and charters likely referred to the right to collect tolls (‘*toll*’) as well as to hold a court for persons vouching to warranty (‘*team*’). If so, since both were a feature of a market,<sup>325</sup> this expression, probably, was a short-form way of referring to a franchise of the Crown’s monopoly in respect of markets. The earliest

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distinguish an ordinance from an Act of Parliament.’ As to the customs provisions in *Carta Mercatoria*, Gras, p 71, asserted that they ended with the abolition of butlerage (a custom on wine) in 1809.

<sup>318</sup> Kiralfy, n 208, p 102 ‘the law merchant was recognised as part of the system of national law in the *Carta Mercatoria* (1303)...and in the Statute of the Staple.’

<sup>319</sup> See n 317.

<sup>320</sup> See generally: (a) McBain, n 120, pp 277-90 (and texts cited therein); (b) Gross II, n 24; (c) Gross III, n 24; (d) Hall, n 24, vols 46 & 49; (e) Whitelock, n 73; (f) Moore, n 210, pp 165-86; (g) Salzman, n 214, ch 8; (g) JR Green, *Town Life in the Fifteenth Century* (Macmillan, 1894), vol 2, ch 2; (h) J Masschaele, *Peasants, Merchants and Markets. Inland Trade in Medieval England 1150-1350* (Macmillan, 1997); (i) Holdsworth, n 26, vol 1, pp 535-44; (j) Piergiovanni I, n 41, pp 143-64, article by M Fortunati, *The Fairs between Lex Mercatoria and Ius Mercatorum*; (k) texts listed in Sweet & Maxwell, *A Legal Bibliography of the British Commonwealth of Nations* (1955), vol 1, pp 537-8.

<sup>321</sup> The word ‘*market*’ derives from the latin *mercatus* (meaning trade or traffic, buying or selling), the word ‘*fair*’ from the latin ‘*feria*’ meaning a holiday, such holidays being celebrated on religious festival days. The latin word ‘*nundina*’ was also used in Roman times to refer to a market held every ninth day (in later times, however, this word was often used indiscriminately to refer to markets or fairs). See generally, McBain, n 120, pp 277 and Walford, n 81, p 5. The word fair (French, *foire*) may also have come from the latin ‘*forum*’, a market place. The Spanish word ‘*feria*’ was the same for a church festival and a fair, indicating the close connection. Bewes, n 34, pp 98-9. See also Britnell, n 61, pp 14-5.

<sup>322</sup> There would, also, have (likely) been little need of them. Most people in Anglo-Saxon England would only have had animals to trade with as well as a few personal possessions (jewellery, tools, weapons). This could have been achieved in the few (organised) markets, situated in fortified towns (boroughs). Further, the relatively few foreign traders who visited England would (likely) not have wished to venture beyond the principal towns - given the state of the roads, the general violence and danger prevailing in those times and the prospect of their securing higher prices in the main towns. Certainly, in Anglo-Saxon literature, one cannot find evidence of fairs on any scale, see texts cited in Whitelock, n 73

<sup>323</sup> Britnell, n 61, pp 16-7 did not consider the nature of *toll* and *team* and, thus, seems to have considered there were no franchised markets or fairs in Anglo-Saxon times. If so, this would seem incorrect.

<sup>324</sup> FE Harmer, *Anglo-Saxon Writs* (Cambridge UP, 1952), p 75 (charter in which *sacu* and *soen* were given to Archbishop Osketil of York by king Eadwig, king AD 955-9). See also n 98 (charter of AD 1004).

<sup>325</sup> See also the legislative definition of ‘*toll*’ in the Laws of Edward the Confessor, see n 99.

reference to ‘*toll and team*’ appears to be in a charter of AD 1004.<sup>326</sup> It is also mentioned in the following Anglo-Saxon writs:

- **St Paul’s Cathedral, London.** A writ of king Cnut (AD 1020-35) to the priests of St Paul’s minister in London (i.e. St Paul’s Cathedral), issued c. AD 1033-35, granted toll and team;<sup>327</sup>
- **Abbingdon Abbey.** A writ of king Edward the Confessor (AD 1042-66) to Abbot Ordric of Abbingdon Abbey, for St Mary’s monastery, issued c. AD 1052-66, granted toll and team;<sup>328</sup>
- **Christ Church, Canterbury.** A writ of king Edward the Confessor, issued prior to AD 1052, granted toll and team;<sup>329</sup>
- **Chertsey Abbey.** A writ of king Edward the Confessor, issued c. AD 1053-66, to St Peter’s Abbey, Chertsey granted to the same the villages (vills) of Chertsey, Egham, Thorpe and Chobham with toll and team, both in festival time and outside it;<sup>330</sup>
- **Regenbald, Cirencester.** A writ of king Edward the Confessor, likely issued AD 1042-66, to a priest named Regenbald (who appears to have been a wealthy landowner) granted toll and team where Regenbald had lands and men;<sup>331</sup>
- **Coventry Abbey.** A writ of king Edward the Confessor (which may be spurious), issued c. AD 1043, confirmed a prior grant to Coventry Abbey of toll and team;<sup>332</sup>
- **Ely Abbey.** A writ of king Edward the Confessor, issued c. AD 1045-66 (or, possibly, later, AD 1057/8-1066), appointed Wulfric abbot of Ely with full privileges, including toll and team;<sup>333</sup>
- **Ramsey Abbey.** A writ (possibly spurious) of king Edward the Confessor, issued c. AD 1045-53 (or, possibly, later AD 1057/8-66), granted to Ramsey Abbey toll and team as well as the market at Downham;<sup>334</sup>

<sup>326</sup> See n 99. Cf. Harmer, n 324, p 77 ‘The earliest authentic instance of the combination of *toll* with *team* as a source of profits appears in a lease of a small estate, dating from the time of Cnut [AD 1020-35], and granted between 1017 and 1023.’ Gross III, n 24, p xvi indicated that royal grants of markets were first mentioned on the Continent in the 9<sup>th</sup> century. Thus, the practice of franchising the same in England may have come from the Continent. Ballard I, n 51, pp lxvi-ii maintained that king Edgar granted the right of holding a market to Peterborough Abbey as early as AD 963.

<sup>327</sup> Harmer, n 324, p 78 ‘The formula toll and team appears...in a writ of Cnut for St Paul’s...which if it is authentic (as is not certain) must have been issued 1033-35. Ibid, p 242 ‘I King Cnut, send friendly greeting to my bishops and my earls and all my thegns in the shires in which my priests in St Paul’s minister have lands. And I inform you that it is my will that they be entitled to...toll and to team, in festival season and outside it - and - as fully and as completely as ever they had in the days of any king, in all things, within borough and without...’ Repeated in a writ of AD 1042-66. Ibid, p 243.

<sup>328</sup> Ibid, p 132 ‘King Edward [the Confessor] sends friendly greetings to his bishops and his abbots and his earls and thegns who are in the shires in which abbot Ordric has land. And I inform you that I have granted to him for St Mary’s monastery...toll and team...within boroughs and without...over his own land.’

<sup>329</sup> Ibid, p 186 ‘King Edward [the Confessor] sends friendly greetings to all my bishops and my earls and my reeves and all my thegns in the shires in which Archbishop Stigand and the community at Christ Church have land. And I inform you that I have granted them that they be legally entitled to...toll and to team...over their own men within boroughs and without as fully and as completely as my own officers would exercise it, and over as many thegns as I have granted them to have. And I forbid that anyone take anything therefrom except themselves and their officers to whom they wish to commit it, because I have given these rights for the eternal redemption of my soul...’ The authenticity of this writ is dubious (however, it may have been re-created when the original was destroyed in a fire at Christ Church in AD 1067). Ibid, p 167. This grant was repeated in another writ of AD 1052-66, Ibid, pp 187-8.

<sup>330</sup> Ibid, pp 209-10 ‘I have granted to Chertsey, to Christ and to St Peter, the vill [village] itself and Egham and Thorpe and Chobham with the hundred of Godley... toll and team...in festival time and outside it, and with all the things that belong to me.’ This writ may have been a fabrication. See also later writs of king Edward the Confessor in AD 1053-66 and AD 1058-66, Ibid, pp 209-11.

<sup>331</sup> Ibid, p 214 ‘King Edward sends friendly greetings to my bishops and my earls and my sheriffs and all my thegns in the shires in which Regenbald my priest has lands and men. And I inform you that my will is that he be entitled to...toll and team...both within borough and without, as fully and as completely as ever any of his predecessors before him were in the days of king Cnut.’

<sup>332</sup> Ibid, p 221 ‘I likewise grant...toll and team.’

<sup>333</sup> Ibid, p 225 ‘King Edward sends friendly greetings to all my bishops and my earls and my sheriffs and all my thegns in the shires in which the lands belonging to Ely are situated. And I inform you that I have granted to Wulfric the abbacy at Ely with the everything within boroughs and without, toll and team...wherever his man may dwell, whatever he may do.’

<sup>334</sup> Ibid, p 261 ‘I inform you that I have given to Ramsay, to Christ and St Mary and St Benedict, and abbot Aelfwine...toll and team...and the market at Downham by water and by land, with [toll on] what is carried in and carried out, and with all the rights that belong thereto as well and as freely as ever I myself possessed it...And in every shire where St Benedict has land, his...toll and team...within borough and without, and in every place, by land and by strand, in woodland and in open country, whosoever may own the soke, St Benedict is to have his freedom in all

- **Westminster Abbey.** A writ of king Edward the Confessor, likely issued c. AD 1042-4, granted land at Westminster together with toll and team;<sup>335</sup>
- **Winchester.** A writ of king Edward the Confessor, issued c. AD 1042-7, granted to bishop Aelfwine the bishopric as fully as king Cnut (AD 1020-35) had granted it, including toll and team;<sup>336</sup>
- **Worcester Cathedral.** A writ of king Edward the Confessor, issued c. AD 1062, granting to the monk Wulfstan the bishopric of Worcester with toll and team.<sup>337</sup>

There may have been more of these writs franchising markets but they are lost in the mists of time.<sup>338</sup> Probably, the earliest franchises were to St Paul's (c. AD 1033) and to Westminster in London (c. AD 1042-4) with other powerful ecclesiastical establishments later '*cashing in on the act*'. Some of the writs refer to '*within borough and without*' - suggesting that these ecclesiastical establishments acquired the right to establish markets both within the fortified town (the burgh) as well as outside the same where they owned land. The latter may refer to a fair.

- The fact that few grants of '*toll and team*' were made in Anglo-Saxon times - and not until the 10<sup>th</sup> century - suggests that such *markets* as there were in Anglo-Saxon times were located in fortified market towns and that there were no or very few *fairs* (i.e. irregular markets outside these market towns). Probably, because it was too dangerous;
- It also suggests that Anglo-Saxon kings were not desirous of granting the '*money making*' right to hold a market or fair and that they only did so to ecclesiastical establishments, for the good of their souls.

Finally, it may have been that some markets and fairs in Anglo-Saxon times existed by long established custom (prescription)<sup>339</sup> and that subsequent kings let them continue - without requiring a grant, whether by charter or writ. This, however, is conjecture.

***In conclusion, it may be that - in Anglo-Saxon times - the Crown franchised to various ecclesiastical establishments the right to hold a market or fair as well as the right to charge tolls and to hold a court, to settle disputes. Thus, piepowder courts may have existed prior to 1066. Possibly, from 1033. However, this is unlikely. They seem to belong more to the 13<sup>th</sup> century.***

#### **(b) Fairs after 1066**

After the Norman Conquest, it took William I (and his sons) time to subdue England and there was much destruction. This, likely, have covered a number of markets. That said:

- Domesday Book (1087) mentioned 42 markets - 11 situated in boroughs;<sup>340</sup>
- Gross refers to a grant by William I (1066-87) to the church of St Mary of Thorney of a market at the manor of Yaxley with '*sac and soc and toll*'.<sup>341</sup> He may also have franchised fairs at Battle (in 1070-1) and Malmesbury, in Wiltshire;<sup>342</sup>

things as well and as freely as I myself have it to the fullest extent anywhere in England...And toll free throughout all England within borough and without, at the annual market (or fair) and in every place by water and by land.'

<sup>335</sup> Ibid, p 340 'I inform you that my will is that the (defensible) house at Wennington and four hides of land [belonging] thereto, with the church and with the church-soke, and with everything pertaining thereto, and with the land at the lea, shall belong to Westminster for the sustenance of the monks as fully and completely as ever Aetsere Swearte and his wife Aelfgyth possessed them, and gave them to that foundation...And I grant that St Peter have thereover...toll and team.' For later writs, Ibid, pp 341, 343, 246-72, 398-9.

<sup>336</sup> Ibid, p 398 'I inform you that I have granted to bishop Aelfwine the bishopric as fully and completely as ever king Cnut granted it to him; that is to say, I have granted to the holy place and to him, to Christ and St Peter and St Paul, that they be entitled to...toll and team.'

<sup>337</sup> Ibid, p 411 'I inform you that I have granted to the monk Wulfstan the bishopric of Worcester with...toll and team, within borough and without, as fully and as completely in all things as ever any of his predecessors possessed it.' Ibid, p 411, a writ of c. AD 1062 ('I have granted to the monk Aelfstan that he be entitled to...toll and to team, over his land and over his men, within town and without.'). See also a writ of c. 1062 which granted to bishop Wulstan for St Mary's minster (Worcester Cathedral) the third part of the '*seamtoll*' and of '*ceaptoll*' as fully and as completely as he has (? had) the other thing.' Ibid, p 410 'one third of the toll paid on every horse load of produce and goods brought into Worcester market [*seamtoll*], and one third of the toll paid by those buying and selling in the town [*ceaptoll*].'

<sup>338</sup> e.g. Lipson, n 140, p 222 mentions a likely fair 'Before the Norman Conquest there was an annual gathering at the feast of St Cuthbert in the palatinate of Durham...'

<sup>339</sup> A fair at York was claimed by the Archbishop on the ground of prescription, see Lipson, n 140, p 226. Fairs were transmissible by hereditary right and could be sold to another. Ibid, p 228. The Statute of Northampton, 2 Edw III (1328) c 15 (rep 1969), recognised that lords could have acquired a right to hold a fair by: (a) grant; or (b) prescription.

<sup>340</sup> A Ballard, *The Domesday Inquest* (2<sup>nd</sup> ed, 1923), p 181. See also Ballard I, n 51, p lxxvii-iii.

However, it is suggested that - after the Norman Conquest - in these markets, the common law on the buying and selling of goods likely prevailed without reference to particular merchants' customs - since there would have been an insufficiently large number of merchants to create the same. Further, it was probably only in the late 12<sup>th</sup> - early 13<sup>th</sup> century that there developed 'fairs' and courts of piepowder.<sup>343</sup> Most of these would have been in the hands of the church (as franchisees) and connected with religious festivals.<sup>344</sup> If one considers the registries of statutory recognizances in fairs in 1285,<sup>345</sup> mention is made, *inter alia*, of the following famous fairs - with St Giles usually being cited as the earliest fair created by way of a *post*-Norman charter, in 1094:<sup>346</sup>

- **St Giles' Fair (near Winchester).**<sup>347</sup> A charter is said to have been granted by William II (1087-1100) in 1094 to bishop Walkelin (Walchel), to aid him in building Winchester Cathedral.<sup>348</sup> This fair normally lasted 16 days. There was a court of piepowder (the pavilion court (*pavilonis aula*), so-called because it was located in the bishop's tent in the centre of the fair)<sup>349</sup> which recognized the law merchant - including debts evidenced by way of tally. When the City of Winchester was granted its own (separate) fairs in 1449 and in 1518, this fair became redundant;<sup>350</sup>
- **St Botolph's Fair (Boston, Lincolnshire).** When this fair was granted is unclear. However, it is said to be c. 1125. Muncey cited a later charter of king John (1199-1216) where he granted it to Roger de Thorne.<sup>351</sup> The fair declined from 1680;<sup>352</sup>
- **St Ives' Fair (near Huntingdon).** In 1100, Henry I (1100-35) granted by charter to the abbot of Ramsay Abbey, the right to hold a fair at St Ives (formerly called Slepe).<sup>353</sup> That said, the right to hold this fair may be even older, deriving from a writ of c. 1045 of Edward the Confessor (see (a)).
  - This fair lasted for 8 days and it was one of the largest in the country. St Ives began to decline as an international market at the time of the 100 Years War (1377-1453);<sup>354</sup>

<sup>341</sup> Gross III, n 24, p xvi. Ballard, n 340, p 181 mentioned a market at Tewkesbury, granted *pre*-1083 by the wife of William I (Queen Matilda). This was, probably, when William I (1066-87) was in Normandy and she acted as his deputy. See also Lipson, n 140, p 223. Douglas, n 131, p 450 referred to a trial at Pinnenden Heath (near Maidstone) c. AD 1072 (or 1075-6) in which Lanfranc, Archbishop of Canterbury asserted he was entitled to exercise 'toll and team'. Also, p 453, to a charter of William I c. 1080 in which the customary liberties of the Abbey of Ely, including 'toll and team', were to be maintained. Ely may have secured these from Edward the Confessor, see n 333.

<sup>342</sup> Britnell, n 61, p 15. Britnell also cited fairs franchised at Winchester (in 1096), Bath (1102), Canterbury (1103), St Albans (1105), Romsey (1100-6), Hoxne and Lynn (1106) and Rochester (1100-7). See also *Ibid*, p 23 (Norwich, c. 1106).

<sup>343</sup> Lipson, n 140, p 221 'In the Middle Ages the greater part of the internal trade of the country was carried on at fairs and markets... The period during which their activity was at its height was that of the twelfth, thirteenth and fourteenth centuries, when England became covered with a network of markets and fairs, of which some rivalled in fame even the great French fairs of Champagne and Lyons.' *Ibid*, p 228. Mitchell stated, n 30, p 67 that the earliest evidence of courts at the great fairs of Champagne ('*custodes nundinarum*') was from 1174. For them, see Piergiorganni I, n 41, pp 143-64, article by M Forunati, *The Fairs between Lex Mercatoria and Ius Mercatorum*. For charters in the time of Henry II (1154-89) granting 'toll and team', see Douglas, n 131, p 949 (to Holy Trinity, Aldgate) and p 973 (to the town of Oxford). See also S Moshenskiy, *History of the Weksel* (2008), p 99 *et seq*.

<sup>344</sup> Lipson, n 140, p 222 quoting P Huvelin, *Essai Historique sur le Droit des Marches et des Foires* (1897), p 40 'There is no great festival without a fair, no fair without a festival.' *Ibid*, p 227 'the most frequent recipient of the grants was the church...'

<sup>345</sup> SS, vol 49, p lxxxii.

<sup>346</sup> See generally, Moore, n 210. As to what happened to Anglo-Saxon markets (see 3(a)), one would suggest that, at least, some of them continued after the Conquest and that - by the time of Henry I (1100-35) - their charters were confirmed or new charters were obtained, where there was doubt. From the time of Henry I as well as, more particularly, king John (1199-1216), the Crown became assertive as to the need to secure a charter to evidence the franchise of a market - not least because this brought in money to the Crown.

<sup>347</sup> W Prynne, *Animadversions on... the Fourth Part of the Laws of England concerning the Jurisdiction of Courts* (1669), p 191 'the longest fair and strangest power to make justices and coroners equal to the kings and mayor and all officers in the City and to hold such an exorbitant court of pie-powder I ever met with is that of the Bishop of Winchester's fair kept for 24 days together on St Giles Hill near that City.' See also Lipson, n 140, p 229; JJ Jusserand, *English Wayfaring Life in the Middle Ages* (1897), p 247 and Kitchin, n 186.

<sup>348</sup> See Gross III, n 24, p xvii. Also, RW Muncey, *Our Old English Fairs* (1935), pp 79-85 and Moore, n 210, pp 17-20. For the Anglo-Saxon grant, see (a).

<sup>349</sup> See for a detailed discussion, W Page (ed), *A History of the County of Hampshire* (Victorian County History, 1912), vol 5, pp 36-44. *Ibid*. 'From an early period they [the merchants] were allowed to elect attorneys or judicial assessors to hear apparently in association with the judge of the Pavilian court of the fair, cases in which their fellow citizens were involved.' See also Moore, n 210, p 186.

<sup>350</sup> McBain, n 120, p 282. See also Lipson, n 140, p 261.

<sup>351</sup> Muncey, n 348, p 119 who also cited, p 118, a reference to the fair in c. 1150. See also Lipson, n 140, p 231 and Moore, n 210, pp 15-7. For various commissions to this fair, see *Liber Albus*, n 42, pp 473-4.

<sup>352</sup> See also Lipson, n 140, p 260.

<sup>353</sup> Gross, n 79, p xvii. Also, pp xxviii-xxxv. See also Maitland, n 249, p 130 *et seq*; Muncey, n 348, pp 111-6; Lipson, n 140, p 230 and Moore, n 210, pp 13-5 and *passim*.

<sup>354</sup> *Ibid*, p xxxiv. See also Lipson, n 140, pp 223-4.

- Today, a St Ives Easter fair is held on Bank Holiday Monday. The town of St Ives (incorporated in 1834) acquired the right to hold this fair from the Earl of Manchester (who had been granted the manor of St Ives in 1628) in 1886. Whether it is the same as the old St Ives' Fair is uncertain;<sup>355</sup>
- **Stourbridge Fair (near Cambridge)**. This fair was granted by a charter of king John (1199-1216) to the Lepers' Hospital of St Mary Magdalen in Stourbridge (Sturbridge) in 1211. The fair lasted 3 weeks. It ceased, legally, in 1855, although it had ended, in practical effect, in 1839, when the Corporation of Cambridge refused to let sites for the booths since the fair had become disorderly;<sup>356</sup>
- **Yarmouth Herring Fair (Cinque Ports)**. A charter of 1278 provided that the portsmen of the Cinque Ports were to have toll and team (*thol and them*) in their ports. This (likely) enabled them to hold markets within the Cinque Ports, to charge toll and to have their local courts adjudicate on disputes.
  - The charter of 1278 also provided that the Portsmen had a right to '*den and strond*' at Great Yarmouth, according to an Ordinance of 1277. This (likely) comprised an easement - a right to dry (and mend) nets on marsh land at the mouth of the river Yare in Norfolk (called the '*Dennes*') during the herring season. It was later interpreted as including the right to organize a large, and profitable, herring fair there (the Free Fair which lasted 40 days (from 29 September-11 November) - including the administration of law and order;
  - When this fair was first held is uncertain.<sup>357</sup> However, it seems clear that Hastings (one of the Cinque Ports) were owners of land at the herring fair of Yarmouth in the middle years of the 12<sup>th</sup> century and that a writ of Henry I c. 1155-6 may have permitted the Cinque Ports to hold a court there for their free tenants.<sup>358</sup> Thus, this fair may be c. 1150 in origin;
  - This fair became very important - and violent, since Yarmouth developed into a town whose people engaged with the men of the Cinque Ports in '*demarcation disputes*' as to who had what rights. An Ordinance of Edward III (1327-77) of 1377 attempted to solve the problem. However, violence continued until the fair declined and the Portsmen petitioned Charles I (1625-49) that they be discharged of their responsibilities *vis-à-vis* Yarmouth (it became Great Yarmouth in 1272). Finally, the Portsmen abandoned the fair by 1663. Subsequent to this, the Yarmouth Corporation sought to monopolize the sale of herrings at Yarmouth, leading to further decline in the fair which went into extinction in the 18<sup>th</sup> century.<sup>359</sup>

Other famous fairs comprised the following:<sup>360</sup>

- **Bishop of Ely's Fair**. This fair at Portepol (Holborn Bars, just outside the City in London)<sup>361</sup> was established before 1248 since, by that date, Portepool market was known as Ely Fair;
- **St Bartholemew** (Smithfield, London). In London, the most ancient fair - and the only one held within the walls of the City - was that of St Bartholomew in Smithfield. It commenced in 1133 as a cloth fair after a grant by Henry I (1100-35) to his court jester, Rahere (Rayer). This fair was closed down in 1855 - as were many other London fairs in Victorian times - on the grounds of being disorderly.<sup>362</sup>

<sup>355</sup> Ibid, p 282.

<sup>356</sup> Ibid. See also Muncey, n 348, pp 20-36; Bewes, n 34, p 134 and Walford, n 81, chs 7-14.

<sup>357</sup> It may have been that a charter of Edward the Confessor (1042-66) granted to the Cinque Ports the right to hold a herring fair at Yarmouth. See McBain, n 50, fn 396. See also T Potts, *A Compendious Law Dictionary* (1815), (*den and strond*) 'liberty for ships or vessels to run aground, or to come ashore. This privilege was granted to the barons of the cinque ports by king Edw. I.'

<sup>358</sup> Yarmouth was owned by the king at the time of Domesday 1086. It became a free borough in 1208 on being granted a charter by king John (1199-1216).

<sup>359</sup> See McBain, n 50, p 123. C Tooke, *The Great Yarmouth Herring Industry* (Tempus Publishing, 2008), p 11 also noted that, after 1968, the Yarmouth fishery ended and that 'Today, the Scottish boats, fishing off the West Coast, catch many of the herring now sold in this country, while others are imported from Norway.'

<sup>360</sup> Moore, n 210, pp, 9-10 considered that the main medieval English fairs were those of: (a) Stamford (Lent); (b) St Ives (Easter); (c) Boston (July); (d) Winchester (September); and (e) Northampton (November). Also, 'All the major fairs... could be serviced by the cargo vessels which were plying the northern waters in the twelfth and thirteenth centuries.'

<sup>361</sup> A useful map showing its close location to Staple Inn is provided in Williams, n 82, p 20.

<sup>362</sup> See Gross III, n 24, p xix. Also, Muncey, n 348, pp 37-53 and Lipson, n 140, pp 230 & 243 (proclamation at the opening of the fair). As for other London fairs, St Edmund's Fair at Westminster (said to have been created by a charter of Edward III (1327-77)), was suppressed in the 19<sup>th</sup> century; (b) Southwark Fair was suppressed in 1762; (c) St James' Fair was moved in 1665 and appears to have died out; (d) May Fair, created in 1689, was suppressed in 1764; (e) Bow Fair was suppressed in 1822; (f) Greenwich Fair was suppressed in 1850.

Some of these fairs were mentioned by Harrison, in his *Description of England* (1577).<sup>363</sup> Moore considered that the international fairs (including the English ones) reached their peak of prosperity, in terms of income levels, between 1180-1220.<sup>364</sup> For the major English fairs, cloth was the mainstay but furs, hunting fowl, wine, fine horses, spices and wool were also specialties.<sup>365</sup> As to financing arrangements:

Commercial practice at the fairs of England allowed for quite a variety of credit arrangements. In its simplest form, a contract of sale on credit could be established through payment of a God's penny or earnest money, with witnesses.<sup>366</sup> A tally was a popular alternative form of credit instrument. A number of municipalities, most notably London, plus the royal Chancery, provided enrollment facilities for debt recognizances even before 1285 [see **11(b)**], when such facilities became available at all fairs as well. But official credit instruments never superceded those of a private nature: the bond, occasionally accompanied by the seal of a debtor and creditor, occasionally drawn up by a chirography, but usually simple and short.<sup>367</sup>

### (c) Courts of Piepowder

When courts (later called courts of piepowder or *curia pedis pulverisati*) first occurred, it is impossible to say. However, the earliest was likely in London, given its position as the financial centre of trade in England and this seems to have been in 1221.<sup>368</sup> In 1268, Henry III granted to the citizens of London the right to appoint 4 or 5 of their number to try '*pleas of merchandise*' in which they were concerned in any fair throughout England and the same privilege is mentioned in various town charters modelled after that of London in the reign of Edward I (1272-1307). Treating a piepowder court as an integral part of a fair was upheld in due course by the courts. Thus, a yearbook case of 1472 stated:

*a chescun market est incident un court de pypowder pur faire justice as marchants deins le market.*<sup>369</sup>  
(at every market there is incident a court of piepowder to do justice to the merchants in the market)

This was also reflected in an Act of 1477.<sup>370</sup> These courts of piepowder applied the law merchant. That is, they applied the law (customs) of the merchants operating at that particular fair, which customs had, doubtless, grown up after a period of time.<sup>371</sup> It should be noted, however, that piepowder courts cannot be called '*mercantile courts*' since they dealt with a mass of other matters arising during the course of a fair, including breaches of the peace.<sup>372</sup>

<sup>363</sup> Jusserand, n 347, p 249 quoted Harrison: 'As there are no great towns without one weekly market at the least, so there are very few of them that have not one or two fairs or more within the compass of the year, assigned unto them by the prince. And albeit that some of them are not much better than Lowse fair or the common kirkemesses beyond the sea, yet there are divers [many] not inferior to the greatest marts [markets] in Europe, as Sturbridge [Stourbridge] fair near to Cambridge, Bristow fair, Bartholomew fair at London, Lin mart [Lynn market] Cold fair at Newport pond for cattle and divers other.' The Germans used the word *messe* to designate a church fair which opened after high mass. See also Bewes, n 34, p 98 and Kitchin, n 186, p 6 'we have *messen*, from the mass on that day, and in Brittany the *kermesse* is the kirk or church mass.'

<sup>364</sup> Moore, n 210, pp 22-3. See also Walford, n 81, chs 15-18.

<sup>365</sup> *Ibid*, p 24.

<sup>366</sup> See n 249.

<sup>367</sup> Moore, n 210, p 117. See generally, pp 117-21.

<sup>368</sup> See n 208.

<sup>369</sup> YB 12 Edw 4 pl 22 fo 8b-9b (1472), Seipp no 1472.030, *per* Sjt Jenney. See also YB 8 Hen 7 pl 1 fo 1a-5a (1493), Seipp no 1493.011, *per* Vavasour JCP 'a court of piepowder is incident to a fair.' See also Gross II, n 24, p 235, fn 1. Also, C St German, *Doctor and Student* (1528), SS, vol 91, p 47 'to every fair and market is incident a court that is called a court of piepowder which is only held in the time of the market.' A court of piepowder could exist without a fair or market, however, see YB 13 Edw 4 (1473), pl 2, fo 8b, Seipp no 1473.002. Translations of many of the 22,000 cases in the Yearbooks have been published online by professor David Seipp in the form of an Index, [www.bu.edu/law/faculty/scholarship/yearbooks](http://www.bu.edu/law/faculty/scholarship/yearbooks)).

<sup>370</sup> 17 Edw 4 c 2 (1477, rep 1948) 'divers fairs be holden and kept in this realm, some by prescription allowed before justices in *eyre*, and some by the grant of our lord the king that now is, and some by the grant of his progenitors and predecessors; and to every of the same fairs is of right pertaining courts of piepowders to minister in the same justice in this behalf; in which court it has been all times accustomed, that every person coming to the same fairs, should have lawful remedy of all manner of contracts, trespasses, covenants, debts, and other deeds made or done within any of the same fairs, and within the jurisdiction of the same, and to be tried by merchants being of the same fair.' Also, 1 Ric III c 6 (1483, rep 1948) (which renewed it). Coke, n 16, vol 4, p 271 'This court is incident to every fair and market, as a court baron to a manor, and is derived of two latin words [*pedis pulverisati*]...because that for contracts and injuries done concerning the fair or market, there shall be as speedy justice done for advancement of trade, and traffic, as the dust can fall from the foot.' See also Lipson, n 140, pp 250-8.

<sup>371</sup> As to the judges, Gross III, 24, p xxii 'The court of piepowder was held before the mayor or bailiffs of the borough, or before the steward if the market or fair belonged to a lord. The mayor or steward was often assisted by one or more sergeants or bailiffs....'

<sup>372</sup> Rogers, n 12, p 25 'These were not specialized commercial courts, whose jurisdiction depended on the commercial nature of a dispute. Rather, they were simply local courts of general jurisdiction held at places where a great deal of trade took place.'



- It may be noted that few records were kept of piepowder courts. Thus, exactly how they operated, and the extent to which the law merchant was applied in practice, is unclear.<sup>373</sup>
- The influence of merchants (who formerly judged the matter) in piepowder courts was much reduced by a decision in 1466 by the court of Common Pleas that the chief officer of the court of piepowder be the judge, with the merchants only acting as assessors and not as judges. Thus, a party could bring a writ of error before the courts of Westminster;<sup>374</sup>
- Further, legislation in 1477, limited the jurisdiction of courts of piepowder to matters arising within the limits of the fair (or market) and only during the course of its duration.<sup>375</sup>

Finally, there were other ways in which merchants could resolve disputes outside the piepowder courts. For example, Flemish merchants who came to English fairs to trade had their own internal (gild) procedures to punish dishonesty by their traders, including ostracizing them. They employed this latter punishment to English merchants as well.<sup>376</sup> The position was similar in the case of English merchants. They were responsible for each other's debts until 1275.<sup>377</sup> Further, their guilds often punished, or sanctioned, errant members.<sup>378</sup>

#### **(d) Decline of Fairs after 1400**

The heyday of fairs was in the period 1200-1400.<sup>379</sup> After that they declined.<sup>380</sup> The reasons are not hard to find and they were mainly economic:

- **Wars & Famine.** English wars - with Flanders and France especially - affected the cloth trade which was the mainstay of the principal fairs.<sup>381</sup> There was also a considerable population decline, through disease (including the Black Death), war and famine in the period 1348-1552. Indeed, only by 1552 had the population of England (likely) recovered to its 1086 level;<sup>382</sup>
- **Dissolution of Monasteries.** Many fairs were franchised to the Catholic church. On the dissolution of the monasteries by Henry VIII (1509-47), these franchises fell into abeyance. Or, they were sold to local tradesman who allowed them to fall into abeyance since the fairs conflicted with their regular markets;<sup>383</sup>
- **Markets & Shops in Towns.** The growth of markets and shops in towns and villages meant that goods which could not, formerly, be acquired locally, now could.<sup>384</sup> Further, wandering merchants (chapmen, pedlars) became settled in towns and villages;<sup>385</sup>

<sup>373</sup> For the most detailed records, see Gross III and Hall, n 24.

<sup>374</sup> Kiralfy, n 208, p 105 citing YB 6 Edw IV (1466), pl 9, fo 3b, Seipp no 1466.011. Gross III, n 24, p xxv 'In the Middle Ages the merchants were the suitors or doomsmen; they found the judgment or declared the law. But in the time of Edward IV (1461-83) the justices at Westminster held that the steward or chief officer of the court was a judge, and hence a party might have a writ of error, but not of false judgment.' See also Holdsworth, n 26, vol 1, p 539 and Sanborn, n 35, p 355. See also 19 Geo III c 70 (1779)(writ of error).

<sup>375</sup> See n 370. See also Reeves, n 190, vol 1, p 292; Holdsworth, n 26, vol 1, p 539. JM Holden, *The History of Negotiable Instruments in English Law* (1955), p 14, the Act of 1477, 'was probably the most important single factor which contributed to their decay.' See also J MacDonell (ed), *A Compendium of Mercantile Law* (10<sup>th</sup> ed, 1890), p lxxvii.

<sup>376</sup> Moore, n 210, pp 98-9. Also App 1, pp 297-301 (*Flemish Regulations for Trade at English Fairs*).

<sup>377</sup> This communal responsibility was abolished by the Statute of Westminster 1275 c 23. See also Moore, n 210, p 104.

<sup>378</sup> Moore, n 210, p 103.

<sup>379</sup> Moore asserted that fairs had peaked even earlier, reaching their height of prosperity between 1180-1220, see n 364.

<sup>380</sup> Green, n 320, vol 2, p 25 'as long ago as the fifteenth century the superannuated fair was...failing into a slow decrepitude, and giving place to [markets]'. Baker I, n 38, p 1245 'Towards the end of the medieval period the local mercantile courts suffered a decline. The reasons for, and the extent of, that decline have yet to be firmly established, but it is possible to guess. Many of the courts came under the control of legally trained recorders or stewards who, unwittingly or otherwise, may have substituted some of the formality of the common law for the flexible procedures which characterised the medieval law merchant.' See also Moore, n 210, ch 5.

<sup>381</sup> Moore, n 210, pp 217-22.

<sup>382</sup> London, however, had increased. By 1552, it probably had a population of 50-60,000. For the effect of this on markets, see Britnell, n 61, ch 7.

<sup>383</sup> When a fair took place, generally, markets in the vicinity were ordered closed. See e.g. Lipson, n 140, pp 241-2 and Bewes, n 34, p 90.

<sup>384</sup> Britnell, n 61, p 90 'By 1300 the larger towns, and notably London, offered all-year trading in commodities that had previously been available only in periodic fairs. This inevitably reduced the importance of the larger fairs for the wholesale and luxury trades.' For a list of the fairs in England and Wales in 1788 see W Owen, *Owen's New Book of Fairs* (1788). For example, in the case of Surrey, it records 32 fairs during the course of 1788, in various towns.

<sup>385</sup> Gross II, n 24, p 236 'the increase of wealth, bringing a permanent and continuous local demand for commodities, together with the improvement of transport facilities and means of communication, due largely to the creation or repair of roads in the eighteenth century,

- **Change in Meaning of ‘Piepowder’.** Piepowder courts could be oppressive (and expensive) in practice.<sup>386</sup> Also, merchants did not *have* to resort to them. They could refer the dispute to: (a) the local (borough) court which, often, comprised the piepowder court in special session,<sup>387</sup> (b) where relevant, to the court of the staple; (c) to a common law court, obviating the need for a piepowder court. The could also resolve the matter by using peer pressure or the assistance of guild members. Finally, the word ‘*piepowder*’ was de-linked from its application to fairs (to the extent that it had been exclusively so used) and it became a reference to any court which employed a summary process for ‘*foreigners*’ (non-citizens) and merchants;<sup>388</sup>
- **Local Customs Replaced.** It is likely that local customs in respect of buying and selling at fairs were soon replaced by the common law as to buying and selling, so that any local customs of merchants died away or became merged into the former.

In respect of the demise of piepowder courts, the following may be noted:

- **No Longer a Court for Merchants.** By 1612, the piepowder court was no longer just: (a) at fairs; or (b) for merchants. As *Goodson v Duffield* (1612) noted, the word ‘*piepowder*’ was now also used to refer to any expedited process in borough courts.<sup>389</sup> Indeed, this seems to have occurred as early as 1364, in the case of London;<sup>390</sup>
- **Piepowder Courts Obsolete.** By the mid-18<sup>th</sup> century, piepowder courts were rare. Barrington (writing in 1766) stated ‘*we hear little of these courts [of piepowder] at present*’<sup>391</sup> and Blackstone (in 1768) dealt with them cursorily;<sup>392</sup>
- **Decline of Fairs.** As it is, many fairs were suppressed pursuant the Fairs Act 1871,<sup>393</sup> since they had become venues for crime. By 1927, it was calculated that there were some 1,500 fairs left - albeit most of them were not true ‘*fairs*’ but, rather, specialist markets - such as *cattle auctions* (which were introduced c. 1836), *agricultural fairs* (these developed in the early 19<sup>th</sup> century), *trade and industrial fairs* (these commenced from 1756), *funfairs* (offering entertainment but no sale of goods) and *wakes*.<sup>394</sup>

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diminished the importance of fairs and periodical markets, and tended to sap the vitality of the old tribunals of justice or rendered many of them obsolete.’

<sup>386</sup> Thornely, n 32, p 4 ‘by...1478 the regulation of the English fairs was generally unsatisfactory, while the *pypoudre* courts were working badly and continually exceeding their jurisdiction.’ See also Baker I, n 38, p 1246 (possible exorbitant or unfair legal action) and Rogers, n 12, p 23. The same seems to have happened to fairs in France, see Piergiorgio I, n 41, pp 151 (oppressive extension of jurisdiction), 154 (procedural delays).

<sup>387</sup> Gross II, n 24, p 237 ‘Sometimes the proceedings of a piepowder court are entered in the ordinary plea rolls of the borough court, as though the former tribunal were regarded as a mere phase or special session of the latter without any separate organisation of its own.’ Ibid, Goss III, n 24, p xx, ‘nothing [was] altered but the title or style of the court.’ See also Sanborn, n 35, p 340 and Bateson, n 31, vol 2, pp lxxxiv-v. See also Basile, n 6, p 42.

<sup>388</sup> Thus, in the town of Torksey, its custumal (c. 1345), see Bateson, n 38, vol 2, pp 189-90, provided for a piepowder court to be held ‘twice a day and from day to day, when necessary, before dinner and after dinner, for merchants and foreigners passing through, to have cognizance of covenants, contracts, trespasses, debts, both exceeding 40s and of less amount, and of acquitting plaintiffs and pledges and the like wherever they were made.’ Ibid, p 192 ‘no one dwelling in Torkey or having lands or tenements in Torksey is bound to come to the said piepowder court, or can be impleaded or amerced in the said court, unless he chooses of his own free will, but nevertheless in the said court they can plead in the form above written.’ See also p 192 which refers to the Cinque Ports.

<sup>389</sup> *Goodson v Duffield* (1612) Cro Jac 313 (79 ER 268) ‘resolved by the court, that...properly a court of piepowders is for fairs and markets, and for causes arising within fairs and markets, and not for any other; but a court of piepowders, so termed for the speed thereof, may be, by custom in vills of boroughs for any causes, as debts upon bonds or otherwise; for they are courts raised by custom and prescription, and may be for some causes done at any time done at any time, being transitory and personal.’ See also 2 Bul 21(80 ER 926). Also, Carter, n 27, p 164.

<sup>390</sup> See n 211. Indeed, this may have occurred even earlier, see Basile, n 6, p 43, n 48 (the term ‘*piepowder*’ used to describe the pleas of a type of person and type of justice, not a type of court). Kiralfy, *A Source Book of English Law* (1957), pp 251- 8 cited piepowder cases in 1585 and 1600 where the parties were not merchants.

<sup>391</sup> Barrington, n 186, p 257.

<sup>392</sup> Blackstone, n 186, vol 3, p 32-3. Kiralfy, n 208, p 105 ‘Changing economic conditions and improved communications were rendering it less imperative that disputes should be settled in these local courts, and by the seventeenth century their procedure and process had become too cumbersome and ineffectual to be popular. The forms of commerce were also changing and merchants were ceasing to travel about with their wares.’

<sup>393</sup> It stated, in its preamble ‘Whereas certain of the fairs held in England and Wales are unnecessary, are the cause of grievous immorality, and are very injurious to the inhabitants of the towns in which such fairs are held, and it is therefore expedient to make provision to facilitate the abolition of such fairs.’ See also Walford, n 81, p 52.

<sup>394</sup> A ‘*wake*’ (*wach, vigilia*) was a fair that happened without a charter (an *ad hoc* fair) and there was no court of piepowder. See Muncey, n 347, p ix. Also, McBain, n 120, p 279, n 21 and Britnell, n 61, p 15.

The last piepowder court was (likely) held at Hemel Hempstead in 1898, albeit it was nominal since no pleas were entered.<sup>395</sup> One suspects that, by the 1850's at the latest, they were all gone.<sup>396</sup> In any case, the Administration of Justice Act 1977, s 23 prevented any courts of piepowder from continuing to operate.<sup>397</sup>

#### (e) Conclusion

The classic instance of the '*law merchant*' in operation (and one often cited in legal texts) was at courts of piepowder since they dispensed justice in accordance with the same. Today, such courts are long obsolete as, indeed, are fairs themselves.<sup>398</sup>

*In conclusion, piepowder (fair) courts may have existed in Anglo-Saxon times. More likely, they arose post 1220. Their heyday was in the period 1200-1400. By the end of that period, the term 'piepowder' was being used to cover not just fair courts but any expedited process in local courts. Further, by 1613 (if not earlier), it is likely that fair courts could be availed of by anyone at the fair and not just merchants. By the 18<sup>th</sup> century, piepowder courts were moribund. They became extinct by 1898.*

#### 14. SUMMARY - LAW MERCHANT BY 1290

As noted at the beginning of this article, the law merchant is - like the *dodo* - an elusive creature, difficult to pin down. That said, it seems clear that the concept of '*law merchant*' was, likely, unknown prior to 1189. And, that it was restricted in nature up until 1220 (at least) for the following reasons:

- **Anglo-Saxon Law**. There is no evidence that the concept of '*law merchant*' applied in Anglo-Saxon times when such commercial law as there was (mainly, in respect of debts and vouching to warranty) was contained in legislation (dooms) which applied to all citizens generally and not just to merchants.<sup>399</sup>
- **Magna Carta 1215**. While Magna Carta gave protection to foreign merchants, it did not refer to the law merchant as such and added nothing to the same. Indeed, legislation up to 1290 made little reference to the '*merchant*';<sup>400</sup>
- **Exchequer of the Jews 1194-1290**. Legislation of 1194 in respect of the enrollment of debts (and pledges) owed to Jewish merchants may be regarded as part of the law merchant since enrollment was restricted to those borrowing money from merchants. That said, this legislation applied to Jewish merchants only and it became redundant after the Jews were expelled from England in 1290;
- **Assizes of Bread, Wine, Cloth etc.** Laws on the weight and measurement of various goods comprised legislation, at least, as early as an Assize of Richard I in 1197 (and, indeed, there was some attempt at the standardization of weights and measures in Anglo-Saxon times). However, these trade matters cannot be said to be part of the law merchant since they comprised general legislation and they did not

<sup>395</sup> Gross III, n 24, p xix. Gross II, n 24, p 237 referred to sessions of such courts in 1835 in a few boroughs. The County Courts Act 1888 enabled the lord of a manor (or any fair owner) to surrender the right of holding such a court to the Crown, and many were surrendered. The Ministry of Agriculture and Fisheries, *Report on Markets and Fairs in England and Wales* (HMSO, 5 vols, 1927-30), vol 1, p 8 described them as '*obsolete*'. See also JG Pease & H Chitty, *A Treatise on the Law of Markets and Fairs*, (1899), p 6 'nearly all these courts have ceased to be held'. Besides Hemel Hempstead piepowder court, it referred to the Bristol Court of Tolzey. However, the latter was a borough court although it dealt with piepowder pleas.

<sup>396</sup> JR McCulloch, *A Dictionary of Commerce and Commercial Navigation* (London, 1859), p 593 'Formerly *pie poudre* courts were held at every considerable fair: but they are now entirely laid aside.'

<sup>397</sup> See also GS McBain, *Abolishing various Obsolete Courts* (2012) Coventry LJ, vol 17, issue 1, pp 25-6 discussing the Administration of Justice Act 1977, s 23 (1) and sch 4, pt 1.

<sup>398</sup> Today, it is unlikely any true '*fairs*' (that is, annual or non-regular markets which sell goods) exist. And, such as do, likely operate pursuant to legislation and not pursuant to any charter or by way of prescription. As to regular '*markets*', it is dubious whether any operate pursuant to a charter, by way of prescription or, indeed, pursuant to any local Act of Parliament. For the last of the latter in Wales, see McBain, n 120, p 289. Most markets today are regulated pursuant to the Food Act 1984. Ibid, pp 287-8. As it was, by 1859, McCulloch (writing in 1859), n 396, p 593 stated 'A fair, as the term is now generally understood, is only a greater species of market recurring at more distant intervals. Both are appropriated to the sale of one or more species of goods, the hiring of servants, or labourers *etc*: but fairs are, in most cases, attended by a greater concourse of people, for whose amusement various exhibitions are got up.'

<sup>399</sup> There is also scant reference to '*merchants*' in Anglo-Saxon law.

<sup>400</sup> A word search of the Statutes of the Realm (1814), vol 1. Indeed, up to 1377, references in legislation to '*merchants*' in legislation tended to cover only: (a) their protection and freedom to trade; (b) customs payable by them; (c) issues in respect of the export of coinage or merchandise.

specifically cover merchants.<sup>401</sup> Further, the penalties imposed for infractions (the pillory, tumbrel and fines) were criminal ones, being part of the common law of the land;<sup>402</sup>

- **City of London charters.** A charter of c.1131-2 gave citizens of London certain privileges by way of franchise. A few of these touched on commercial matters. However, they applied to the citizens of the City generally and not just to merchants. These were soon extended to the Cinque Ports and to boroughs, with similar effect;
- **Bracton, Fleta, Britton, Lex Mercatoria.** Legal texts in the period c. 1240-90 do not suggest other than that the 'law merchant' was part of the common law. Indeed, *Lex Mercatoria* (c. 1280) stated that the 'common law ...is the mother of mercantile law.'<sup>403</sup>
  - Bracton (see 7) cited two relaxations in legal process for merchants *re*: (a) summons; (b) attachment. However, these were also available to others, besides merchants;
  - *Lex Mercatoria* (see 8) referred to: (a) market law delivering a judgment more quickly; (b) at fairs, a pledgee being liable for the whole debt; (c) there being no wager of law on the negative side. However, a quick judgment (speedy justice) was also available to citizens in London (not just to merchants) and this was extended to borough courts.<sup>404</sup> Also, exceptions to the legal process of wager of law applied to others and not just to merchants;
  - Britton (see 10) referred to merchants having a distinct custom with respect to dry goods. However, standardization of weights and measures ended this by 1353 at the latest;<sup>405</sup>
  - Fleta (see 10) mentioned a custom of merchants, as to the penalty, when a seller backed out of a sale after earnest money had been paid. This was, later, replaced by the common law.<sup>406</sup>

In conclusion, these benefits accorded to merchants by way of a quicker or simplified legal process were few and they applied in other instances.

- **Statute of Acton Burnell 1283 & Statute of Merchants 1285.** These were designed to benefit merchants. However, London citizens had a debt registration process even earlier, from 1268.<sup>407</sup> In any case, the Acts of 1283 and 1285 were availed of by non-merchants from the 14<sup>th</sup> century;
- **Carta Mercatoria 1303.** While this charter endorsed speedy justice for merchants, it was revoked in the period 1311-22 and it may have been of limited use after 1327. In any case, it did not accord any additional legal benefits to foreign merchants;<sup>408</sup>
- **Fair Courts.** These seem likely to have existed from the early 13<sup>th</sup> century. While they may have originated from French practice they could have, as easily, originated from early English maritime practice.<sup>409</sup> As it is, while piepowder courts at fairs dealt with claims by merchants, one would suggest that - by the 15<sup>th</sup> century - they were available to anyone. Further, that such courts were subsumed into borough courts when fairs began to decline from 1400 onwards.

*Given all this, was there a 'law merchant' in existence by 1290 or before ?* Baker maintained that the law merchant in earlier times was not - in fact - a substantive body of law. Rather, it was an expeditious legal

<sup>401</sup> This is not to say that they could not be dealt with by courts of piepowder. They could. Gross II, n 24, p 240.

<sup>402</sup> These criminal punishments also applied to forestalling and to selling putrid food, which seem to have been common law offences (although mentioned in the Assize of the Pillory c. 1266). Later, see An Act against Regrators Forestallers and Engrossers (1551) 5 & 6 Edw 6 c 14 (rep 1851).

<sup>403</sup> See n 223.

<sup>404</sup> See n 389.

<sup>405</sup> See Britton, ns 243 & 245.

<sup>406</sup> See n 249.

<sup>407</sup> See n 298.

<sup>408</sup> Cf. the more onerous position of foreign sellers in respect of earnest money, see n 249.

<sup>409</sup> Moshenskyi, n 343, p 100. The fairs of Champagne became international c. 1130-60 and they had distinct courts at them from c. 1174. It is possible that the practice of the distinct maritime court at Oleron may have become part of English law I in the reign of Richard I (1189-99), see 17(e). It is also possible the Cinque Ports, in Anglo-Saxon times, may have had a maritime court utilising a summary process (Court of Shepway), due to a lost charter from Edward the Confessor, see 17(a). Or, that the court of Shepway, which seems to have been operating from 1150 (see 524) may have introduced such a summary procedure in Anglo-Norman times.

process.<sup>410</sup> Pollock and Maitland held a similar view, stating:

Before the end of the thirteenth century ‘*the law merchant*’ was already conceived as a body of rules which stood apart from the common law.<sup>411</sup> But it seems to have been rather a special law for mercantile transactions than a special law for merchants.<sup>412</sup> It would we think 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, rules as to the value of the tally<sup>413</sup> and the God’s penny;<sup>414</sup> for example, the law merchant took one view of the effect of an ‘*earnest*’, the common law another.

These special mercantile rules were conceived as being specially known to merchants; in the courts of fairs and markets the assembled merchants declare the law; in Edward II’s [1307-27] day twelve merchants are summoned from each of the four cities to testify before the king’s bench about a doubtful point in the ‘*lex mercatoria*’.<sup>415</sup>

Thus, it is asserted that, in 1290, and before:

- The expression ‘*law merchant*’ (the custom of merchants *etc.*) was a ‘*short form expression*’ employed to refer to certain privileges given to merchants. These privileges were few (see **Appendix A**);
- Many of these privileges applied not just to merchants but to others. And, many derived from London customs.<sup>416</sup> Others, when not simply matters of legal process, became part of the common law when accepted by the courts (or, at a later date, when certified by the Recorder of London),<sup>417</sup>
- The term ‘*merchant*’ in this period covered anyone who traded. That is, who bought and sold goods, other than in a household or village context. Thus, it covered those who bought and sold slaves, cattle, horses, mercery - whether in fairs, markets or (the relatively few) shops.
  - Most of such people would not have been able to read, write or even count.<sup>418</sup> Most also, at more distant fairs and markets, may have had language difficulties. Also - with the exception of the (relatively few) *foreign* merchants - most would have travelled only a short distance to the market or fair. Perhaps, less than a day’s journey.<sup>419</sup> Given all this - as a matter of practicality - merchants (anxious to get on) would, as a matter of commerce and profit, have avoided courts in most instances to resolve disputes;<sup>420</sup>

<sup>410</sup> Baker I & II, n 38. Also, Basile, n 6, p 25. Gross II, n 24, p 243 ‘A striking feature of the court of piepowder was its summary procedure... Formalities were avoided, few *essoins* were allowed, and an answer to the summons was expected within a day, often indeed within an hour. If judgment is against the defendant and he does not pay his debt, his goods are seized forthwith, appraised, and sold.’

<sup>411</sup> P & M, n 52, vol 1, p 467. See also Basile, n 6, p 26.

<sup>412</sup> Maitland, n 249, p 132 ‘Probably in some respects it took a more liberal and modern view of contractual obligations than that which was taken by the common law.’ Gross saw the difference more in the speedy process, see Gross II, n 24, p 243 ‘A striking feature of the court of piepowder was its *summary procedure*... Formalities were avoided, few *essoins* were allowed, and an answer to the summons was expected within a day, often indeed within an hour. If judgment is against the defendant and he does not pay his debt, his goods are seized forthwith, appraised, and sold.’ (*italics supplied*)

<sup>413</sup> However, Pollock and Maitland did not note that *London citizens* had this benefit as well as merchants, see n 218, and, indeed, it seems likely to have been designed more with the former than the latter in mind. See also Fleta, n 190, vol 72, p 63 and Basile, n 6, p 29.

<sup>414</sup> See n 249.

<sup>415</sup> P & M, n 52, vol 1, p 467. P & M continued ‘Also, these rules are not conceived to be purely English law; they are, as we may say, a *ius gentium* known to merchants throughout Christendom, and could we now recover them we might find some which had their origin on the coasts of the Mediterranean. But this is not the place for their discussion, for we take the law merchant to be not so much the law for a class of men as the law for a class of transactions.’ The idea that such legal processes existed throughout Christendom is more dubious.

<sup>416</sup> At a later date these could be amended or abrogated by the Common Council of the City, see n 231.

<sup>417</sup> See n 232.

<sup>418</sup> Moshenskyi, n 343, p 79 ‘The illiteracy of merchants during the Middle Ages is also significant. Only few merchants could read and write throughout Europe during the Middle Ages. The commercial activity calculation ability was very low and the majority of the medieval and even Renaissance populations were unable to count at all. Any physical work was considered easier than arithmetic calculations.’

Even in the 11<sup>th</sup>-13<sup>th</sup> centuries many commercial transactions were oral. *Ibid.*, p 92.

<sup>419</sup> The roads in England, post Roman times were atrocious up to the 18<sup>th</sup> century. London only started to be paved from 1353 (Temple Bar to Westminster) and there were few highways, see Gough’s Map of 1360. It seems that only the London-Dover road had hackney stages by 1397. Thus, apart from the main international fairs - as well as travel to markets in the major cities - most travel to town markets would have been short. Not least, since being caught out on the road at night would have been dangerous and town gates were closed at night. Also, there would have been no profit margin for most merchants travelling long distances (it being better for them to concentrate on the bigger fairs and markets where people had more money). See McBain, n 3, p 550.

<sup>420</sup> Merchants would have wanted to settle disputes quickly, to avoid wasting time, which was at a premium. Thus, they would likely have used negotiation, peer pressure, gild support *etc.*, to achieve resolution. Spending time in a piepowder court would have wasted what was a limited

- Further, it is unsurprising that the law would have permitted simpler rules at markets and fairs in respect of: (a) evidencing payment or debts by way of tally;<sup>421</sup> (b) sales effected orally (probably, accompanied by a custom such as a handshake or ‘wetting the bargain’); (c) more expeditious summons and attachment *etc.*

***In conclusion, the writings of Glanvill (c. 1189), Bracton (c. 1240), the author of the Lex Mercatoria (c. 1280), Britton (c. 1290) and Fleta (c. 1290) provide no evidence of a distinct law merchant. Rather, the term referred to a few privileges granted to those who bought and sold as a profession in fairs and markets - which privileges were also accorded to others in many cases. That said, since the law merchant was not restricted just to markets and fairs, reference is now made to other aspects of it, including: (a) the gild merchant; (b) the staple; (c) maritime law; (d) bills of exchange (‘BOE’) and other debt instruments. These are now discussed.***

## **15. GILD MERCHANT**

The gild merchant was closely associated with the law merchant in that members of these gilds<sup>422</sup> usually comprised merchants. The history of the gild merchant may be stated briefly.

### **(a) Anglo-Saxon Gilds**

Gross, who wrote a seminal text, *The Gild Merchant* (1890),<sup>423</sup> declared:

In the sources for the history of the Anglo-Saxon period there is no trace of the gild merchant, or of any gilds forming the nucleus of town government, or even participating in the latter. The history of the gild merchant begins with the Norman Conquest.<sup>424</sup>

One would agree. Anglo-Saxon law makes no mention of any domestic gilds of merchants operating in England. Further, an instance often cited - the Ordinance of the City of London (*Judicia Civitatis Lundoniae*)(c.1042)(see 3, laws of Athelstan) - while it refers to an association, this was for the purpose of policing criminality, not to regulate mercantile activity.<sup>425</sup> Other references in Anglo-Saxon times to knights (*cnihts*) gilds were to voluntary associations of a religious nature.<sup>426</sup>

### **(b) Norman Conquest**

It seems likely that William I (1066-87) encouraged foreign trade<sup>427</sup> and Gross maintains that:

The close union between England and Normandy led to an increase in foreign commerce, which in turn must have greatly stimulated internal trade and commerce... With this expansion of trade the mercantile element would become a more potent factor in town life, and would soon feel the need of joint action to guard its nascent prosperity against encroachments.<sup>428</sup>

opportunity for concluding deals. Also - given the violence of medieval times - one would suggest that merchants would have not wanted to make enemies and, rather, would have sought to settle matters amicably, to avoid being waylaid on the way home or killed later in a brawl.

<sup>421</sup> There was very little coinage in England pre-Henry I (see also n 432) and - even after that - the gold and silver coinage was of too high a value to be used for most market purchases (which is why it was endlessly clipped, with the small bits then being easily lost). Also, much coinage was counterfeit. Further, tallies took time to cut. Given this, one would surmise that a large amount of trade at markets and fairs in medieval times was by way of exchange or using tokens (private coinage, such as jettons) to effect part payment, with settlement at the end of the fair. An Act of Suppression 1817 (57 Geo 3 c 113) prohibited private coinage.

<sup>422</sup> Gross thought that the word ‘*guild*’ came from ‘*gilden*’ to pay. That is, to pay to join an association. Gross I, n 24, pp 29 & 59.

<sup>423</sup> See Gross I, n 24 (and texts cited therein). Also, (a) texts listed in Sweet & Maxwell, n 320, vol 1, pp 529-34; (b) Salzman, n 214, chs 4-6; (c) Green, n 320, vol 2, chs 5 & 6 (craft gilds) & 8 (gild merchant); (d) Holdsworth, n 26, vol 1, pp 540-1.

<sup>424</sup> *Ibid*, p 2.

<sup>425</sup> *Ibid*, p 179 ‘we find them [the Ordinance] incorporated among the other laws of the kingdom; they emanate from the public authorities, the king’s officers, not from persons privately banded together; and all the inhabitants of the city and its suburbs are bound by the enactments...’. *Ibid*, p 181 ‘It certainly was no gild merchant, no allusion being made to trade.’ See also Whitelock, n 73, pp 347-8 and FW Maitland, *The Collected Papers of Frederic William Maitland* (Cambridge UP, 1911), pp 226-31.

<sup>426</sup> *Ibid*, pp 174-91 (App B). *Ibid*, p 191 ‘In conclusion...our survey of Anglo-Saxon gilds has revealed no trace of a gild merchant.’ See also pp 78-80 (London *cnihten gild*); Douglas, n 131, pp 948-50 and FW Maitland, *Domesday Book and Beyond* (Fontana, 1965), p 233.

<sup>427</sup> *Ibid*, pp 2-3 cites William of Poitiers, *Gesta Willelmi* (ed Maseres, written c. 1071), p 149, ‘All ports and roads he ordered to be open to merchants, and no injury to be done to them.’ Anglo-Saxon Chronicle, n 60, p 164 ‘any honest man could travel over his kingdom without injury with his bosom full of gold...’ Gross I, n 24, p 3 ‘The improved communication with the continent and the augmentation of internal security by a strong central power soon expanded trade and industry far beyond the narrow limits by which they were circumscribed in Anglo-Saxon times.’

<sup>428</sup> *Ibid*, pp 2-4.

Gross thought that the English gild was, likely, a Continental transplant.<sup>429</sup> He traced the earliest references to a gild in England to a charter of 1087-1107.<sup>430</sup> He also noted that references to a gild merchant appeared in various charters of the time of Henry I (1100-35).<sup>431</sup> This is unsurprising since, from the time of Henry I (1100-35), the use of money increased<sup>432</sup> and that monarch also encouraged foreign trade. As to what the early gilds merchant comprised:

- They were associations of merchants who banded together for mutual advantage, to secure benefits for their members in respect of trading activities;
- In larger towns, they were created by citizens (burgesses) forming societies to which persons engaged in trade belonged. These became known as ‘gilds’ and their members ‘gild merchants’;<sup>433</sup>
- In his text, Gross cited all the towns in which he found a gild merchant, with the date of the earliest reference to the same. London and Norwich (also, the Cinque Ports) were (likely) the main towns without gilds merchant. However, their citizens had the same protections, by charter in the case of London (and the Cinque Ports).<sup>434</sup>

Gilds merchant should be distinguished from: (a) craft guilds (which, later, became livery companies); (b) trade guilds (which, later, became trade unions); and (c) borough government. As to this:

### (c) Gild Merchant & Craft Guilds

Gross distinguished gilds merchant (associations of merchants in general) from craft guilds (associations of persons practicing particular trades) with the latter originating later.

Craft guilds are first mentioned during the reign of Henry I [1100-35], about a half a century after the first appearance of the gild merchant.<sup>435</sup> The latter included merchants proper and artisans belonging to different trades; the craft guild, at first, included only artisans of a single trade.<sup>436</sup> The position of these craft fraternities in the town community during the twelfth and thirteenth centuries was different from that of the gild merchant. They had not yet become official civic bodies, like the ‘*gilda mercatoria*’, forming part of the administration machinery of the town. Their existence was merely tolerated in return for a yearly *ferm* paid to the Crown, whereas the gild merchant constituted a valuable burghal privilege, whose continuance was guaranteed by the town charter... The craftsmen thus associated remained in the common gild merchant; but the strength of the latter was weakened and its sphere of activity was

<sup>429</sup> Ibid, pp 4-5 ‘Whether it was merely a re-organisation of older gilds, a spontaneous adaptation of the gild idea to the newly begotten trade interests, or a new institution directly transplanted from Normandy, we have no means of determining with certainty. The last-mentioned view is strongly favoured by the circumstances that, at the time of the Conquest, the gild merchant doubtless existed in Northern France and Flanders. From the Frenchmen who became burgesses of English towns, and from the Norman merchants who thronged the marts of England after the Conquest, the English would soon ascertain the advantages of formal trade organisation.’

<sup>430</sup> Gross I, n 24, p 5 ‘The earliest distinct references to the gild merchant occur in a charter granted by Robert Fitz-Hamon to the burgesses of Burford (1087-1107), and, in a document drawn up while Anselm was Archbishop of Canterbury (1093-1109). According to the latter the chapman gild of Canterbury gave to the community of Christ Church eight houses in exchange for nine others.’ See also Britnell, n 61, p 27.

<sup>431</sup> Douglas, n 131, p 80 ‘the early charters of Burford suggest that such body [a gild] was already in existence in Oxford before the end of the eleventh century, and at York it was certainly established by the time of Henry I [1100-35].’ For the charter in favour of Burford, Ibid, p 965 (c.1088-1107) (‘let them have the gild and customs which the burgesses of Oxford have in the gild merchant.’).

<sup>432</sup> Up to the time of Henry I, payments to the Crown were not usually in money but *in specie* (such as food, drink, animals *etc*). See T Madox, *The History and Antiquities of Exchequer of the Kings of England* (2<sup>nd</sup> ed, 1769, rep Greenwood Press), ch 9. Also, Britnell, n 61, pp 29-30, 41.

<sup>433</sup> Gross I, n 24, p 29 ‘To become a gildsman (‘*gildanus*’, ‘*congildanus*’, ‘*frater*’), or to obtain gildship (‘*gilda*’, ‘*societas*’), it was necessary to pay certain initiation-fees, in some places called the ‘rights’ (‘*jura*’) of the house. This payment was probably proportionate to the means of the new member, or to the extent to which it was likely that he would use the privileges of the society...’. *City of London’s Case* (1610) 8 Co Rep 127 (77 ER 658) *per* Coke CJ at p 125 ‘*guildan* is a Saxon word, and signifies *solvere*, i.e. that all of such fraternity shall be subject to pay scot and lot.’

<sup>434</sup> Ibid, p 116 ‘The rapid economic growth of London probably produced a net-work of craft guilds earlier than elsewhere in England, and thus the city dispensed with a single general gild merchant.’ Being a ‘*freeman*’ of the City brought many benefits. Letterbook D, n 44, p ii ‘The freedom of the city of London was no empty honour. Without it a man was not at liberty to open a shop, to traffic by retail, or even to reside within the City’s walls, except for a limited time, and then only in the houses of freemen and under frankpledge. On the other hand, a man who had acquired freedom [of the City]... was free to trade by wholesale or retail with fellow-citizen or stranger, to carry his goods throughout the length and breadth of the land, and to enter any town without payment of murage or other toll.’

<sup>435</sup> Douglas, n 131, p 81 ‘Craft guilds, such as that of the weavers in London, also came into existence about this time and probably existed before the death of Henry I [i.e. before 1135] at Huntingdon, Lincoln, Oxford and Winchester, but their influence at this period was subordinate.’ For the weavers charter (c. 1154-62), see Ibid, pp 947-8 (‘granted to the weavers of London to have their gild in London’).

<sup>436</sup> For example, the Goldsmiths obtained a charter in 1327, the Mercers in 1393, the Haberdashers in 1407, the Fishmongers in 1433, the Vintners in 1437 and the Merchant Taylors in 1466. See Cawston, n 107, p 2.

diminished with every new creation of a craft fraternity, though these new bodies continued subsidiary to, and under the general regulation of, the older and larger fraternity.<sup>437</sup>

Thus, the guilds merchant began to fragment into *craft guilds* - albeit, in smaller towns, there were no craft guilds and the guild merchant remained the unitary body dealing with trade and trade regulation. After the craft guilds emerged, there also emerged *trade guilds* (later, trade unions) which started to compete with the craft guilds (and the guilds merchant) from the reign of Edward II (1307-27). In respect of the distinction between craft, and trade, guilds:

- Craft guilds comprised employers and employees and they considered their mutual interests. Trade guilds comprised workers (or wage earners) in respect of one particular industry and they considered their interests alone;
- Craft guilds were confined to particular towns and regulations, for their particular trade varied between towns.<sup>438</sup> Their trades also had a system of a master, apprentices (the latter, usually, a 7 year service) and journeyman.<sup>439</sup> Trade guilds were more loosely regulated.<sup>440</sup>

All these forms of association (of guilds merchant, craft guilds and trade guilds) should be viewed in the light of their trading practice, which also helps explain, in large part, their demise.

- In medieval times, persons kept to their own trade. 'Stores' (selling all types of goods) were unknown. Further, in respect of the method of sale, there were markets - usually selling specific types of goods, such as the fish market, the corn market, the cloth hall *etc.*;
- There were also shops which comprised ground floor rooms open to the public street,<sup>441</sup>
- Finally, there were wandering merchants such as pedlars, costermongers and chapmen.<sup>442</sup>

By the 14<sup>th</sup> and 15<sup>th</sup> centuries, the guilds merchant were eclipsed by craft and trade guilds.<sup>443</sup> Also competing were foreign merchants<sup>444</sup> - especially Italian and German merchants.<sup>445</sup> These were, after the expulsion of the Jews in 1290, favoured money-lenders to the Plantagenet kings and they secured valuable trading privileges as a

<sup>437</sup> Gross I, n 24, pp 114-5. Also, pp 116-7. Ibid, p 123 'whether as to the totality of the crafts, or as the meetings of the latter in their collective capacity, or as their re-organisation into a single association, the guild merchant was tantamount to, or was replaced by, the aggregate of the craft fraternities.' Lipson, n 140, pp 440-1 'The earliest craft guilds in this country were the weavers' guilds; and the subsequent decay of the guild bodies, and the rise of other forms of industrial grouping, find in the textile manufacture their most apt expression.'

<sup>438</sup> As for the capitalist, Salzman, n 283, p 237 noted that 'It was not until the fifteenth century that the capitalist employer - the man who provides materials and wages, and sometimes brains, but not the work of his own hands, for the production of goods - became prominent.'

<sup>439</sup> Journeyman were those who had insufficient funds to become masters (a person had to pay a fee to the guild to become a master) but who, instead, hired themselves out by the day (French *journee*). Journeymen often formed guilds of their own and so there was competition (and antagonism) between the craft guilds proper and guilds of journeymen.

<sup>440</sup> Salzman, n 283, p 73 'if one member of the guild bought any goods wholesale to be sold retail, any other member who was present could insist upon taking part in the deal. This prevented any one getting a monopoly or unfair share of any particular trade.'

<sup>441</sup> Ibid, pp 243-4 'The shop was a room on the ground floor, with an unglazed window, closed by a shutter that let down to form a shelf; within the room would be a table, or counter, and shelves and hooks for the goods to stand or hang upon.'

<sup>442</sup> Costermongers ('*costards*' being apples) and pedlars hawked fruit and fish about the streets as well as small items (they later became known as barrowmen or borrowboys). Chapman (the word, likely, derived from the Anglo-Saxon *clepmon*, *ciepemann* or *chepmon*, see 3, Laws of Ine) went about the country with packhorses, with small merchandise to sell. See also OED, n 6 (*chapman* and *costermonger*).

<sup>443</sup> Gross I, n 24, p 117 'This transference of authority from the ancient general guild merchant to a number of distinct bodies, and the consequent disintegration and decay of the former, was a gradual, spontaneous movement, which, generally speaking, may be assigned to the fourteenth and fifteenth centuries, the very period in which the craft guilds attained the zenith of their power.'

<sup>444</sup> A Beardwood, *Alien Merchants in England 1350-1377* (The Medieval Academy of America, 1931), p 3 'During the latter half of the reign of Edward III, [1327-77] between 1350 and 1377, some of the most important merchants in England were aliens.' Ibid, pp 23-4 'The clearest indication of the importance of alien merchants in England in the fourteenth century is the part they took in English foreign trade. They had, of course, other interests, especially in various kinds of financial activity. They lent money, supplied bullion to the mint, and held office as masters of the mints and wardens of the exchanges in London and their ports. Lombard bankers were also authorised to hold private exchanges, where, by royal authority, they changed money and issued letters of exchange, which travellers to the continent carried, and by which money was transferred to the papal court or to merchants on the continent. Nevertheless, foreign merchants were primarily importers and exporters...'

<sup>445</sup> Ibid. Beardwood mentions: (a) merchants from Genoa and Venice (Edward III [1327-77] was keen to secure their aid against French naval power); (b) merchants from Turin (among the king's bankers); (c) the Bardi and the Peruzzi from Florence (among the king's bankers, and whom he helped bankrupt); (d) German Hanse of Almain; (e) the Lombards who dealt in jewels, spices, mercery and also were among the king's bankers. Jusserand, n 347, p 234 'there was a constant intercourse with Flanders, with Bruges above all other towns, for the sale of home produce: wools especially, and woollfells, cheese, butter, tin, coals *etc* with the Rhine country, with Gascony, with Spain, for the purchase of wines; with the Hanse towns, Lombardy, Venice, and the East.' See also Beardwood, Appendix G (list of alien merchants who were freemen of London and other cities). Likely, there were no more than 150 foreign merchants in England in the time of Edward III.



result.<sup>446</sup>

#### **(d) Gild Merchant & Borough**

Gross (rightly) also distinguished the gilds merchant from boroughs and their burgesses (citizens). Originally, the borough was the Anglo-Saxon ‘*burgh*’, a fortified town as distinct from a mere village (*vill*). After London received a franchise of Crown prerogatives from the time of Henry I (1100-35)<sup>447</sup> boroughs also secured Crown prerogatives including - in the commercial sphere - rights such as: the right to hold markets and fairs, exemption from tolls,<sup>448</sup> the right to have (that is, to form) a gild merchant (*gilda mercatoria*) *etc.*<sup>449</sup> By way of example, Gross cited a charter of king John (1199 -1216) to the town of Ipswich in 1200 which, *inter alia*, provided:

We have also granted to them that all burgesses of Ipswich may be quit of toll and stallage, lastage, passage, pontage, and all other customs throughout our whole land and in our sea-ports. We have also granted to them that none of them shall plead without the borough of Ipswich in any plea save pleas of foreign tenures, excepting our officers; and that they may have a gild merchant and their *hanse*... and that they may duly have their lands and their pawns and all their debts, from whomsoever these may be due...<sup>450</sup>

Thus, gilds merchant were not the *same* as the borough with its mayor and aldermen (i.e. councillors) - persons who dealt with the overall civic aspects of the borough that comprised municipal (local) government.

- The gilds merchant, instead, comprised one *aspect* of local government - the commercial aspect.<sup>451</sup> Thus, they helped uphold trade regulation within the borough - while the borough court dealt with enforcement and the clerk of the market dealt with weights and measures, market tolls *etc.*;
- That said, as with London, it became common for the mayor of a borough to also be head of the local gild merchant (as well as, where relevant, the Staple, see **16**) *etc.*<sup>452</sup> This not only saved money; it helped augment the power of all three interests.

#### **(e) Purpose of Gild Merchant**

The gild merchant was not just a private society of merchants (like today’s chambers of commerce); its purpose was directly related to securing trade privileges. Gross referred to wording often encountered in many borough charters:

the words ‘*so that no one who is not of the gild may trade in the said town, except with the consent of the burgesses,*’ which frequently accompanied the grant of a gild merchant, express the essence of this

<sup>446</sup> Salzman, n 283, p 246 ‘During the reigns of the three Edwards the Italians constantly advanced large sums to the English king, and although the fraudulent bankruptcy of Edward III [1327-77] ruined the great houses of the Bardi and Perruzzi and brought appalling disaster upon the city of Florence, they continued to play an important part in English finance until the latter part of the fifteenth century, when, during the Wars of the Roses, the German merchants of the Hanse took their place.’ See generally, G Unwin, *Finance and Trade under Edward III* (Manchester UP, 1918), pp 93-135 (*Societies of the Bardi and the Peruzzi and their dealings with Edward III 1327-1345*).

<sup>447</sup> For the London charters, see McBain, n 44.

<sup>448</sup> Tolls, a form of local government taxation, were extensive and varied. They were also, often, oppressive and a great restraint on trade. For various types of toll see McBain, n 44, pp 33-6 and McBain, n 50, pp 96-8.

<sup>449</sup> *Ibid*, pp 5-6.

<sup>450</sup> *Ibid*, p 7. Gross I, p 24, p 8, noted that, in many charters, there was a clause similar to the following ‘We grant a gild merchant with a hanse and other customs belonging to the gild, so that [or ‘*and that*’] no one who is not of the Gild may merchandise in the said town, except with the consent of the burgesses.’ ‘*Hanse*’ often was a synonym for gild (*geld*), the payment (contribution) made by a person to become a member of the Gild Merchant. Moore, n 210, p 101 ‘*hansa*’ itself simply means gild merchant.’ For examples of charters following the London privileges, see Douglas, n 131, p 964 (Bristol, c. 1189); p 966 (Bury St Edmunds, c. 1121-38); p 969 (Lincoln, c. 1157); p 972 (Oxford, c. 1152-62). See also Sanborn, n 35, p 366 (*hanseatics*).

<sup>451</sup> Gross I, n 24, p 61 ‘in the twelfth and thirteenth centuries this fraternity [the gild merchant] was an official civic body, an organic and constituent part of the municipal government.’ *Ibid*, p 63 ‘the gild merchant of the twelfth and thirteenth centuries was not a body in which the general local government was centred - that it was a very important, but only a subsidiary part of the municipal administrative machinery, subordinated to the chief borough magistrates, though far more autonomous than any department of the town government of to-day.’

<sup>452</sup> *Ibid*, p 75 ‘This tendency toward amalgamation in the membership of the two bodies [i.e. borough and gild] may also be seen in their administration. The bailiffs, provost, *etc* of the borough, and the alderman, stewards, *etc* of the gild were taken from one and the same circle. Indeed, a person could be serving in each of these two groups of offices at the same time. Thus, the same men swayed the counsels of the borough and gild.’ The decline of the court leet in the 15<sup>th</sup> century likely exacerbated this and, indeed, the mayor and other aldermen also often became justices of the peace - securing a concentration of civic, commercial and judicial power in local communities. Green, n 320, vol 1, pp 233-4 ‘The mayor was invariably appointed as the king’s clerk of the market, the measurer and gauger at the king’s standard, the manager of the king’s assize; he became the representative of the sovereign in the most important charges of administration, as one of the king’s justices in the town, as admiral, as mayor of the staple.’ See also, *Ibid*, vol 1, p 195 and Sanborn, n 35, pp 342, 344.

institution. It was clearly a concession of the exclusive right of trading within the borough. The gild was the department of town administration whose duty was to maintain and regulate the trade monopoly. This was the *raison d'être* of the gild merchant of the twelfth and thirteenth centuries; but the privilege was often construed to imply broader functions - the general regulation of trade and industry.<sup>453</sup>

The effect of this *raison d'être* was to separate those merchants in the gild - who secured many trading privileges - from those not in the gild. This created not only an incentive for persons to join the gild<sup>454</sup> but also tension with those unable to join, mainly because they lacked either the social connections or the wherewithal to pay the *geld* (the membership fee). The latter were usually termed foreigners (*forinseci*).<sup>455</sup> However, this trade monopoly was not absolute:

Even the narrow-visioned gildsman perceived that to wholly exclude strangers from the trade of the town would militate too much against their own interests and the general prosperity of the borough. But while they themselves enjoyed the right 'to trade freely'...unfranchised merchants, when allowed to practice their vocation, were hemmed in on every side by onerous restrictions. Of these the most irksome was probably the payment of toll on all wares that they were permitted to buy or sell. From such payments the gildsmen were generally wholly exempt; even when this was not the case, they usually enjoyed discriminating rates of toll in their favour.<sup>456</sup>

Other restrictions imposed on *non-gildsmen* often included their being forbidden to (or being restricted in):

- keeping shops;
- selling goods;
- buying certain goods;
- trading at certain times.<sup>457</sup>

There were also, often, restrictions on the period of time in which non-gildsmen might reside in the borough as well as a requirement *vis-à-vis* inspection of their goods. As Gross noted, the outcome of this trade protectionism was to shackle commerce and even kings were powerless to do much about it.<sup>458</sup>

#### **(f) Decline of the Gild Merchant**

These restrictive trade practices of the gilds merchant spelt their decline since it was inevitable that competitive trade activity would, eventually, circumvent them. In the case of London, the growth in population from the 1500's<sup>459</sup> meant that it expanded beyond the bounds of the (walled) City, into the suburbs, where there were no such restrictions. This was replicated elsewhere and resistance to it in the 15<sup>th</sup> and 16<sup>th</sup> centuries engendered the widespread decay of boroughs - with commerce moving to free trade towns, such as Birmingham, Manchester and Leeds, that did not have such restrictions.<sup>460</sup> Further, competition between the gilds merchant and the craft guilds resulted in the former being supplanted by the craft guilds.<sup>461</sup> However, the latter were not victorious; being challenged by the trade guilds as well as by increasing levels of foreign trade. Also, new varieties of trade

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<sup>453</sup> Gross I, n 24, p 43.

<sup>454</sup> Salzman, n 283, p 74 'foreigners' were thus usually made to pay if they came into the town to trade, and were not allowed to settle in the town unless they joined the gild merchant...'

<sup>455</sup> Other terms were: *foranei*, *extranei*, *extrinseci*, *estraunges*, see Gross I, n 24, p 66. Latin, *foris* (outside).

<sup>456</sup> Gross I, n 24, p 79, pp 43-4.

<sup>457</sup> Ibid, pp 44-50. For an example of these restrictions, see CE Woodruff, *A History of the Town and Port of Fordwich* (1895), pp 215-6. Holdsworth, n 26, vol 2, p 307 treated these borough customs as a part of the law merchant. See also Ibid, pp 386-7 and 393. Care needs to be taken with the borough customals since some of the customs described might be less old than supposed. See Ibid, pp 374-5.

<sup>458</sup> Ibid, p 50 'Such were the fetters with which the English gild merchant of the middle ages, under the guise of a so-called 'freedom' completely shackled free commercial intercourse...Enlightened rulers like Edward I [1272-1307] and Edward III [1327-77] duly appreciated the evil, but tried in vain to eradicate it.'

<sup>459</sup> Salzman, n 283, p 78 considered that - by the end of the 14<sup>th</sup> century - the population of London was about 35,000 persons. He thought it was more than 3 times as big as York. Also, that these cities as well as Bristol (9500), Coventry (7000) and Norwich (6000), were probably the only towns in England with more than 5000 inhabitants.

<sup>460</sup> Gross I, n 24, pp 51-2. Gross cited an Act of 3 Hen VIII c 8 [1511, rep 1863] 'Many and the most part of all the cities, boroughs, and towns corporate within this realm be fallen in ruin and decay'. Ibid, p 52 'There can be no doubt that the gild merchant was one of the most potent factors that led to this revolution. The tyranny of the gilds...drove commerce and industry to rural districts and to smaller 'free trade' towns, such as Birmingham, Manchester, and Leeds, where their natural, spontaneous expansion was not hampered by ancient privileges. Thus the rigid protection of the older chartered boroughs sapped their commercial prosperity, silencing the once busy looms of Norwich and Exeter, and sweeping away the cloth-halls of York and Winchester.'

<sup>461</sup> Ibid, p 123 'the gild merchant was tantamount to, or was replaced by, the aggregate of the craft fraternities.'

organization developed:

- **Regulated Companies.** The first English corporate body to receive a charter for trading purposes is said to have been the Mayor, Constables and Company of Merchants of the Staple of England. They alleged they received their first charter from Edward III (1327-77), albeit it was subsequently lost.<sup>462</sup> They controlled, for a time, the staple (and staple goods) (see 16). Other corporate bodies (called regulated companies) were established in the reigns of Elizabeth I (1558-1603) and James I (1603-25).<sup>463</sup> They grew out of the guilds, being adapted for foreign trade.<sup>464</sup> The most famous was probably the Merchant Adventurers, who received a charter in 1406;<sup>465</sup>
- **Joint Stock Companies.** The first English joint stock company trading (and still trading) was the Hudson's Bay Company which received its charter in 1670.<sup>466</sup>

### (g) End of Guilds Merchant

The merchant guilds - as well as the craft guilds - owed their existence to being able to secure a trade monopoly by virtue of upholding restrictive trade practices; ones which benefitted them but not non-members. It was inevitable that increases in trade and in the population of England - concomitant with an increased ability to circumvent their restrictive practices - would result in their eventual extinction. By the 15<sup>th</sup> century, the guild merchant was replaced by (or merged with) craft guilds. Or, in towns lacking the latter, they merged into municipal government.<sup>467</sup> The term 'guild', however, lingered on, in various instances until the 19<sup>th</sup> century.<sup>468</sup> The death sentence for remaining merchant guilds and craft guilds was the Municipal Corporations Act 1835<sup>469</sup> which, *inter alia*, provided that:

every person in any borough may keep any shop for the sale of lawful wares and merchandizes by wholesale or retail, and use every lawful trade, occupation, mystery, and handicraft, for hire, gain, sale, or otherwise, within any borough.<sup>470</sup>

This legislation ended the monopoly on which the guilds merchants and craft guilds were founded and, although Gross asserted that the last guild merchant held was in 1882, at Preston, this seems to have only been a ceremonial affair.<sup>471</sup> Thus, guilds were extinct by the 1830's.

<sup>462</sup> See *Mayor, Constables and Company of the Merchants of the Staple of England v The Governor and Company of the Bank of England* (1887) 21 QB 160.

<sup>463</sup> See generally, (a) Cawston, n 107; (b) W Sheppard, *Corporations, Fraternities and Guilds* (1659); (c) CT Carr, *Select Charters of Trading Companies AD 1530-1707* (1913); (d) W Cunningham, *The Growth of English Industry and Commerce in Modern Times* (Cambridge, 1925), p 214 *et seq.*

<sup>464</sup> Cawston, n 107, p 11 'in the very elements of their constitution the regulated companies were merely a development of the local guilds adapted for trading purposes beyond the seas.' See also Carr, n 463, p xi. Nearly all these regulated companies had ceased by the end of the 18<sup>th</sup> century. Today, none exist.

<sup>465</sup> See generally, Cawston, n 107, ch 3. They received a fresh charter in 1505. See also WE Lingelbach, *The Merchant Adventurers of England* (Philadelphia, 1902) and J Wheeler, *A Treatise of Commerce* (1601).

<sup>466</sup> See www.hbc.com. See generally, H Laski, *The Early History of the Corporation in England* (1917) 30 Harvard LR 561. The East India Company was chartered in 1600 but, later, became a joint stock company. It was dissolved in 1874. See Cawston, n 107, chs 7 & 8 and Carr, n 463, pp xlvi-iv. For the difference between the regulated and the joint stock companies, see Carr, n 463, p xxi.

<sup>467</sup> See generally, Gross I, n 24, ch 9.

<sup>468</sup> Gross I, n 24, p 163 'the machinery of the guild merchant fell to pieces, but its name vaguely clung either to the aggregate of the craft fraternities, to the town polity as a whole, to the narrow governing corporation, or to a private social-religious guild.' Ibid, p 164 'The Municipal Corporations Commission, in 1835, found it [the term 'guild merchant'] still used in only a few boroughs.'

<sup>469</sup> McKechnie, n 167, p 407 'The influence of the English boroughs and their political allies was strong enough to make the strict enforcement of such legislation impossible; and later statutes, bowing to the inevitable, restored the privileges of the boroughs, while continuing to enunciate an empty general doctrine of free trade to foreigners. The English boroughs, to which Parliament in the reign of Richard II [1377-99] thus restored their franchises and monopolies, were able effectually to exclude foreign competition, in certain trades at least, from within their walls, for four centuries, until the Statute of 1835 ushered in the modern era of free trade.'

<sup>470</sup> 5 & 6 Will IV (1835, rep 1882) c 76, s 14. See also n 8. The preamble to this Act reads: 'And whereas in divers cities, towns, and boroughs a certain custom hath prevailed, and certain bye laws hath been made, that no person, not being free of a city, town, or borough, or of certain guilds, mysteries, or trading companies within the same, or some or one of them, shall keep any shop or place for putting to show or sale any or certain wares or merchandise by way of retail or otherwise, or use any or certain trades, occupations, mysteries, or handicrafts for hire, gain, or sale within the same. Be it enacted that, notwithstanding any such custom or bye law, every person in any borough may keep any shop...' *etc.* See also Holdsworth, n 26, vol 1, p 568.

<sup>471</sup> Gross I, n 24, p 165. Another well-known guild was at Preston. However, it became a ceremonial affair from, at least, 1862. See A Abram, *Memorials of the Preston Guilds* (1882). Also, www.preston.gov.uk. For other boroughs and towns see the texts cited in Sweet & Maxwell, n 320, vol 1, pp 529-30.

- As for the *craft guilds*, they endured in the form of the livery companies. These still exist today, albeit they do not practice the trades they represent or - to the extent they do - such trades are governed by the general law and not by any law merchant;<sup>472</sup>
- In practical terms, the obsolescence of guilds merchant and craft guilds is explicable by the growth in population, the number of shops (over 60,000 in London alone by 1837)<sup>473</sup> and the huge expansion of London (and other cities and towns) beyond their walls.

#### (h) Conclusion

The gild merchant was an association of merchants. *To what extent can its rules, and restrictive practices, be interpreted as part of the 'law merchant'?*

- Since the rules of the gild merchant - like those of craft guilds - sought to regulate buying and selling (as well as how trade might be exercised), it might, legitimately, be described as a distinct body of law which governed merchants;
- That said, to the extent that guilds merchant (and craft guilds) can be said to be part of the law merchant, by 1835 - if not long before - they became obsolete, with the panoply of restrictive trade practices associated with them, also ending.

As for livery companies, today, it would be inappropriate to refer to their membership (and any internal rules) as comprising part of the law merchant, since they no longer engage in trade as such. And, in the case of trade guilds (now trade unions), their internal regulation is a matter of '*trade union law*', rather than any aspect of commercial law - including the law merchant.

***In conclusion, the gild merchant (and craft guilds) might be construed as an aspect of the law merchant, if expansively interpreted. However, such guilds were becoming obsolete by the 15<sup>th</sup> century. By mid-Victorian times, they were extinct.***

#### **16. STATUTE OF THE STAPLE (1353) & THE LAW MERCHANT**<sup>474</sup>

Wool, woolfells (i.e. sheepskins) and leather were always important export goods for England. From medieval times, a monopoly on their export was secured by the Crown, to ensure the due payment of customs. Hence, these commodities could only be exported *via* certain designated staple towns and only foreign merchants could export them. There were also courts of the staple, applying the law merchant, to resolve disputes.

##### (a) Nature of the Staple

Even in Anglo-Saxon times, wool was an important trade commodity, the price of which was regulated.<sup>475</sup>

- The word '*staple*' likely denoted a '*pillar*' - referring to where a pillar was set up to indicate where a market (or fair) was held.<sup>476</sup> By Plantagenet times, '*staple*' referred to the market itself<sup>477</sup> and '*staple inn*' to the house where goods chargeable to customs duty might be examined;<sup>478</sup>

<sup>472</sup> See [www.cityoflondon.gov.uk](http://www.cityoflondon.gov.uk).

<sup>473</sup> For a useful text of how London was in 1837 see GL Gomme, *London in the Reign of Queen Victoria* (London, 1898). He estimated, p 30, the population of London in 1837 was 1.6m (but only 123,000 in the City) and the number of shops was c. 60,000. Ibid, p 12. By 1871, the City's population had declined greatly, to 75,000 (by 1896, it was just 31,000). Ibid, p 3. For trade and commerce in 1837, see, Ibid, ch 3.

<sup>474</sup> For useful texts see: (a) AL Jenckes, *The Origin, the Organization and the Location of the Staple of England* (Philadelphia, 1908); (b) Gross I, n 24, vol 1, pp 140-7; (c) Gross III, n 24, vol 23, p xxvii; (d) Lipson, n 140, ch 9 (*woollen industry*); (e) Green, n 320, vol 1, pp 45-54 (*general account*); (f) Salzman, n 214, chs 15 (*wool trade*) & 16 (*cloth trade*); (f) Malynes, n 22 (3<sup>rd</sup> ed, 1686), vol 1, pp 337-9; (g) Holdsworth, n 26, vol 1, pp 542-3; (h) BES Brodhurst, *The Merchants of the Staple* (1901) 17 LQR, pp 56-76; (i) Hall (ed), SS vol 49, introduction; (j) *The Staple Court Books of Bristol 1509-1601* (Bristol Record Society, vol 5).

<sup>475</sup> See n 96. Also, Lipson, n 140, pp 442-3. For the Assize of Cloth in 1197, see n 266.

<sup>476</sup> Williams, n 82, p 5 'it is not unlikely that in the days when town and mart were synonymous, a staple was a pillar set up to indicate the place where a fair with its collection of booths might be held, and in that respect it was the predecessor of the cross with which in later times the market was hallowed.' Cf. Jenckes, n 474, p 6. See also Cawston, n 107, p 16, fn.

<sup>477</sup> Coke, n 16, vol 4, p 238 'This word staple, anciently written *estaple*, comes of the French word *estape*, which signifies a mart or market. So as the court of the staple is, as much to say, as the court in the staple market, and is incident to that market, and it was often times kept at Calais, and sometimes in Bridges [Brouges] in Flanders, and at Antwerp, Middleborough *etc* (and therefore it was necessary that this court should be governed by the law merchant) and at several times in many places within England, and now (as has been said) is kept at Westm[inster].'

<sup>478</sup> Williams, n 82, p 6 'The French in Plantagenet times used the word *estaple* both for a mart and marketable goods, and also for the public storehouse within which merchant strangers [foreign merchants] lodged their commodities which they meant to sell; *estape*, its modern derivative, has the meaning of store-house in English...*Le stapled halle*, therefore, in the reign of Edward III [1327-77] would, no doubt, have the same meaning as the Dutch *stapel-huys*, that is, a staple house or warehouse where commodities chargeable with export duties might be examined and taxed.'

- In 1275, in the first Parliament of Edward I (1272-1307), a tariff was fixed on wool, woolfells and leather;<sup>479</sup>
- Jenckes asserted that the first recorded English staple (market) of wool existed abroad - in Dordrecht (Holland) - and that it existed by 1285.<sup>480</sup> And that, in 1291, Edward I (1272-1307) made provision for a staple of wool, leather and skins to be held in 17 towns within this dominions.<sup>481</sup>

Staples were distinct from the usual market (or fair), being continuous and the town was usually known as a 'staple town' with its 'staple merchants' (also called 'staplers').<sup>482</sup> *Did they exist prior to 1285, perhaps, as early as 1267?* Gross stated:

The staplers were merchants who had the monopoly of exporting the principal commodities of the realm, especially wool, woolfells, leather, tin, and lead; wool figuring most prominently among these 'staple' wares. The merchants of the staple used to claim that their privileges dated from the time of Henry III [1216-72], but existing records do not refer to the staple before the time of Edward I [1272-1307]. Previous to this reign the export trade was mainly in the hands of the German *Hanse* [guild] merchants.<sup>483</sup>

The 5 main staple articles ('five great staple articles') were: wool, woolfells, leather, lead and tin. Edward III added worsted cloth, feathers, cheese, butter, honey, osiers (which seems to refer to articles made of willow), peltries (undressed skins) and tallow.<sup>484</sup> At each staple a Meter (or Corrector) of the Staple measured, tested and valued the goods, apportioned the customs duty and registered the bargains made between the local and the outside ('foreign') merchants.<sup>485</sup> The purpose of the staple was to enable the Government to retain a monopoly on the export of the staple goods abroad, as well as to impose, and recover, customs duty on the same. Thus, as Thornely noted, there were 4 main benefits to the system:

- **Customs & Tolls.** It made the taking of customs and tolls easier than if merchants and manufacturers were permitted to ship goods from any port in England they chose;<sup>486</sup>
- **Quality of the Product.** It kept up the quality of the product by providing a mechanism for their examination by responsible officials. Also, the fact that the product bore an official mark, was a kind of warranty that it was of a certain quality or quantity (or both),<sup>487</sup>
- **Gold & Silver.** It was used to bring gold into the country by reason of the merchants refusing to take anything but gold or silver in payment for their goods;<sup>488</sup>
- **Staple Courts.** It provided a court which met with the approval of the foreign merchants.<sup>489</sup>

### (b) Staple: 1313-53

Until 1313 (it seems), the king of England chose the location of the staple abroad, resulting in much evasion.<sup>490</sup>

<sup>479</sup> McKechnie, n 167, p 405 'In 1275, in Edward's first parliament, a tariff was fixed by 'the prelates, magnates, and communities at the request of the merchants' on most of what then formed the staple exports of England: half a mark on every sack of wool, half a mark on every three hundred wool-fells (that is untanned skins with the fleeces on), and one mark on every load of leather.'

<sup>480</sup> Jenckes, n 474, pp 7, 40. Cf. p 17 where Jenckes asserted that there was a staple prior to 1285, in Bruges (Flanders).

<sup>481</sup> Ibid. These towns were Newcastle-upon-Tyne, York, Lincoln, Norwich, London, Winchester, Exeter and Bristol for England; Dublin, Drogheda and Cork, for Ireland; Shrewsbury, Carmarthen and Cardiff for Wales; Lostwithiel and Truro for Cornwall; and Ashburton, for Devon.

<sup>482</sup> Ibid, p 10.

<sup>483</sup> Gross I, n 24, p 140. Cf. Jenckes, n 474, p 40 'The practice of having one particular staple for English merchandise located in one or other of the three provinces of Brabant, Flanders or Artois, was probably begun in the reign of Henry III [1216-72]. The native merchants declared, in 1320, that there had been a staple in those lands in Henry III's life-time; and in the sixteenth century the Company of the Staple set up a claim that they could prove the existence of such a Staple, with officials, in 1267. We may concede that the Staplers had proofs of their statement, since the Merchant Adventurers (see n 465), with whom they were contending for the export trade in woollen cloth, admitted the claim of their adversaries. But there is no evidence of the town where it was located, and no contemporary record of its existence at that time has been found.'

<sup>484</sup> Jenckes, n 474, p 11. See also Thornely, n 32, p 11.

<sup>485</sup> Ibid, p 17.

<sup>486</sup> Gross I, n 24, vol 1, p 144 'the staple was primarily a fiscal organ of the Crown, facilitating the collection of the royal customs.'

<sup>487</sup> Thornely, n 32, p 12 'Wool intended for exportation had to be taken to one of the fifteen staple towns mentioned in the [Statute of the Staple 1353], weighed and certified there, and, where the particular staple town was not itself a seaport, weighed and certified again at the port of shipment.' See also Gross I, n 24, vol 1, p 144.

<sup>488</sup> See also Jenckes, n 474, p 21.

<sup>489</sup> Thornely, n 32, p 13. See also Gross I, n 24, vol 1, p 144.

<sup>490</sup> Jenckes, n 474, p 11. For the location of the staple 1285-1617, see p 79.

However, a charter of 20 May 1313 granted to the ‘*mayor and communalty of the merchants of the realm*’ the right to choose the place in Flanders, Brabant or Artois where the staple should be held and to which all merchants should go.<sup>491</sup>

- **Temporary Cessation.** An Act of 1328 ended the staple.<sup>492</sup> It was re-established in 1332 and it ended again in 1334. Jenckes indicated that the staple was in existence once more by 1337;<sup>493</sup>
- **Company of Merchants of the Staple.** As for the merchants of the staple it is said that they became a chartered company in the reign of Edward III.<sup>494</sup> However, no charter earlier than one of Elizabeth in 1561 has been found.<sup>495</sup> A new charter of incorporation was given to them in 1669 and the Company was engaged in litigation in 1887.<sup>496</sup> It is said to still exist, but only for charitable purposes.<sup>497</sup>

### (c) **Statute of the Staple 1353**

The Statute of the Staple 1353 (the ‘**Statute**’) also called the Ordinance of the Staple or *Ordinacio Stapularum*<sup>498</sup> provided that:

We have ordained...first, that the staple of wools, leather, woolfels, and lead, growing or coming forth within our said realm and lands shall be perpetually holden at the places underwritten, that is to say, for England at Newcastle-upon-Tyne, York, Lincoln, Norwich, Westminster,<sup>499</sup> Canterbury, Chichester, Winchester, Exeter, and Bristow... and not elsewhere; and that all the said wools, as well old as new, woolfels, leather, and lead, which shall be carried out of the said realm and lands shall be first brought to the said staples, and there the said wool and lead, betwixt merchant and merchant or merchant and others, shall be lawfully weighed by the standard; and that every sack and sarpler [a large sack of coarse canvas for wool] the same wools so weighed, be sealed under the seal of the mayor of the staple.<sup>500</sup>

The Statute also provided that:

the mayors and constables of the staple shall have jurisdiction and cognisance within the towns where shall be, of people, and of all manner of things touching the staple; and that all merchants coming to the staple, their servants and *meiny* [retainers] in 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...<sup>501</sup>

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<sup>491</sup> Ibid, p 12.

<sup>492</sup> 2 Edw III c 9 (rep 1863) ‘the staples beyond the sea and on this side, ordained by kings in times past, and the pains thereon grounded, shall cease; and that all merchant strangers and privy, may go and come with their merchandises into England, after the tenor of the Great Charter [i.e. Magna Carta].’ See also 9 Edw III c 1 (1335, rep 1863) merchants may buy and sell except to enemies. McKechnie, n 167, pp 406-7, noted that this Act of 1335 placed strangers and denizens on an exact equality in all branches of trade, both wholesale and retail, under the express direction that no privileged rights of chartered boroughs should be allowed to interfere with its enforcement. However, this infringed Magna Carta, ch 13 (see n 174) and was prevented in being implemented in practice until the Municipal Corporations Act 1835 (see n 470).

<sup>493</sup> Jenckes, n 474, pp 17 & 44.

<sup>494</sup> See generally Cawston, n 107, ch 2.

<sup>495</sup> Jenckes, n 474, pp 15-6. The title was the ‘*Mayor, Constables and Society of the Merchants of the Staple of England*’. This charter was confirmed by James I (1603-25) in 1617.

<sup>496</sup> Ibid, p 16. See also *Mayor, Constables and Company of the Merchants of the Staple of England v The Governor and Company of the Bank of England* (1887) 21 QB 160. Jenckes, n 474, p 16 ‘The Company was, in 1887, an association of about thirty members; it maintained nominally some of its officers, and owned stock to the value of about 4250£, from which annual dividends were paid. But the reason for its existence had been lost long ago. It was no longer a merchant association; its character had changed to that of a [dining] club, meeting occasionally for social purposes.’ Cawston, n 107, p 17 stated that, by 1762, the Company of Merchants of the Staple were a ‘mere name, without any virtual existence.’

<sup>497</sup> Wikipedia states that: ‘The Company still exists, based in Yorkshire, and makes charitable contributions through bursaries and awards to charities involved in the wool business such as the Nuffield Trust, and to educational travel.’ See also Cawston, n 107, p 18 (position in 1896).

<sup>498</sup> For the background to this legislation, see Unwin, n 446, pp 179-255 (*the Estate of Merchants 1336-1365*).

<sup>499</sup> This replaced a reference to London, as Williams, n 82, noted, p 95.

<sup>500</sup> 27 Edw III stat 2 (rep 1863). Jenckes, n 474, p 32 ‘By the [Statute of the Staple 1353] all merchants, alien as well as denizen, were allowed to go about the country and buy up wool wherever they pleased, but they were obliged to take it to a staple before it could be exported.’ Ibid, p 36 ‘The Staple thus provided the machinery for the strict supervision over the collection of customs. By this system of checks, made effective by repeated weighing, and by the certificates and indentures of the Mayor and Constables, an attempt was made to prevent fraud on the part of the customs officers and exporters.’ See also Gross I, n 24, vol 1, pp 143-4.

<sup>501</sup> Ibid, s 8. Gross III, n 24, p xxvii ‘In certain boroughs, from 1353 onward, there was a court of the staple, in which justice was administered by the mayor and constables of each staple according to the law merchant, as in the fair *cortes*’. In his text are published two cases of the staple courts, Ibid, pp 113, 116. Coke, n 16, vol 3, p 237 ‘[The Court of the Mayor of the Staple]. This court is guided by the law merchant, which is

The staplers could choose between the law merchant or the common law, when suing:

[in] all manner of contracts and covenants made betwixt merchant and merchant, or other whereof the one party is a merchant or minister of the staple, whether the contract or covenant made be within the staple or without, and also of trespasses done within the staple to merchants, or to ministers of the staple by other, or by any of them to other, 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, or in other place [of] the common law, and he shall be thereto received.<sup>502</sup>

The Statute also provided that justice should be speedy<sup>503</sup> and that every mayor of the staple had power to take recognizances of debts.<sup>504</sup> However - as with the system of registration in respect of the Statutes of Acton Burnell and of the Merchant 1283-5 (see **II**)<sup>505</sup> - while the system of registration under the Statute of the Staple 1353, initially, applied only to merchants, before 1531, it was being utilized by non-merchants.<sup>506</sup> Blackstone stated:

both the statute merchant and statute staple are securities for money...securities for debts, originally permitted only among traders, for the benefit of commerce; whereby the lands of the debtor are conveyed to the creditor, till out of the rents and profits of them his debt may be satisfied: and during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the *recognizance in the nature of a statute staple*, which extends the benefit of this mercantile transaction to all the king's subjects in general, by virtue of the statute 23 Hen VIII c 6 [1531].<sup>507</sup> (*italics supplied*)

This Act of 1531 acknowledged that mayors of the staple had, in practice, been taking recognizances of the staple even though neither party to the debt was a merchant.<sup>508</sup> Without invalidating these, the Act (while prohibiting mayors from continuing to do so) enabled non-merchants to obtain a similar benefit.

the law of the staple, and is holden at the wool-staple at Westminster. And there are also two constables, and a certain number of correctors to do that which pertains to their office, as in other staples is accustomed...'. See also Mitchell, n 30, p 113.

<sup>502</sup> Williams, n 82, p 96. Appeals from the Court of the Staple were to be made in Chancery. See also Jenckes, n 474, p 14 'This ordinance shows that in each town there was a staple, the merchants who attended it were entirely distinct from the townsmen. They dwelt by themselves in certain streets and houses set apart for them; they elected their own officers, who governed them according to royal ordinances, and who judged them according to the law merchant, not according to the common law.' That said, as Thornely noted, n 32, p 13, the mayor of the town often became the mayor of the staple. Thus, there was considerable merger. See also Gross I, n 24, vol 1, p 145 and Coke, n 16, vol 3, p 238.

<sup>503</sup> Statute of the Staple 1353, s 19 'because that merchants may not often long tarry in one place [for levying of their merchandise] we will and grant, that speedy right be to them done from day to day, and from hour to hour, according to the laws used in such staples before this time holden elsewhere, at all times when they will them complain of any, or that any will complain of them; so that the merchants be not by malice delayed for default of speedy remedy.' See also s 20 (merchant strangers shall have present remedy for grievances done to them according to the law merchant). See also Beardwood, n 444, pp 76-7, 'In 1354, after the enactment of the Statute of the Staple, providing that all cases falling within the jurisdiction of the staple should be tried by law merchant, whether the persons concerned were merchants or not, the commons petitioned that the laws and uses of the staple were unknown and should be set forth in writing. The king was pleased that this should be done, and decreed further *'quel nul homme autre que marchant denizen ou alien qi ne conissent mye les usages, soit chargez par cel point tant que les dites usages soient declarez en parlement'*. It is unlikely that this was ever done. Merchants who came into the king's courts seem to have been satisfied with the common law or whatever means of justice was provided.' Beardwood noted generally that aliens in England were treated the same as subjects with the ordinary courts being open to them (p 85). Also, p 117 'The difference in status between alien and native merchants seems to have been economic rather than legal.'

<sup>504</sup> 27 Edw III stat 2 s 9 'every mayor of the said staples shall have power to take recognizances of debts, which a man will make before him.' See also Jenckes, n 474, p 31.

<sup>505</sup> Baker, n 52, p 312 'At first these devices [the Acts of 1283 and 1285] were only for merchants - and they were the only kind of mortgage available to alien merchants (who could not own freehold land) - but in 1532 a *'recognizance in the nature of a statute staple'* was introduced for non-mercantile parties, the charge being registrable in one of the central courts or in the City of London.'

<sup>506</sup> The Statute of the Staple 1353 was ambiguous on this in any case. Section 1 referred to wool *etc* being brought to the staple to be weighed and sealed 'the said wool...betwixt merchant and merchant, or merchant *and others...*' (*italics supplied*). See also Hall (ed), SS 49, pp xxvii-iii 'For a hundred years after the passing of this [Statute of the Staple 1353] the Statute Staple procedure continues to be used in preference to that of the Statute Merchant, although both are now available to all classes of the community.'

<sup>507</sup> Blackstone, n 186, vol 2, p 160. MacDonell, n 375, p lxxiv 'In course of time persons who had nothing to do with the staple availed themselves of this useful security. This was prohibited by the 23 Henry VIII [Act of 1531]; but a similar statutory security, known as *recognizance in the nature of a statute staple*, was created.' For examples of a statute merchant and a statute staple in 1700, see W Brown, *Tutor Clericalis Instructus* (1701).

<sup>508</sup> Quite when this started is unclear. Cf. Letter Book E, n 44, p 53 refers to a writ to mayor and sheriffs of London in 1315 'that they inquire whether [X] was a clerk (as he declares) and not a merchant when he entered into a recognizance of debt due to [Y], according to the Statute of Acton Burnell which prescribed that recognizance should be made only between *'merchant and merchant.'* Cf. p 213 (of 1326) which relaxed this. See also n 307.

- It provided that recognizances in *the nature of* the statute staple might be taken by the Chief Justices of the King's Bench and Common Pleas (or, if out of term, by the mayor of the staple at Westminster or the Recorder of London);<sup>509</sup>
- This system of registration became redundant by the 17<sup>th</sup> century<sup>510</sup> through the use by merchants (and others) of simpler forms of debt such as bills of exchange and promissory notes.

#### **(d) Decline of the Staple & Speedy Staple Courts**

One problem of the staple was that native merchants - while they could sell staple goods at the staple - could not export them. This was the monopoly of foreign merchants.<sup>511</sup>

- Another problem was the loss of Calais. A staple had been established there from 1348 and it was the main foreign staple after 1363. Calais fell to the French in 1558;
- Yet - even prior to this time - the Crown's monopoly of the staple was in decline, by evasion of it and a decline in the export of wool.<sup>512</sup> The emphasis, increasingly, was on the export of the finished product, cloth, which was more profitable;<sup>513</sup>

By 1617, the staple - together with the court of the staple<sup>514</sup> - was, effectively, spent with the export of wool being prohibited.<sup>515</sup> The Statute of the Staple 1353 was not repealed until 1863,<sup>516</sup> long after it was obsolete. Gross provided its epitaph:

The increase of home manufactures and the corresponding diminution in the export of wool sapped the foundations of the staple system. The prohibition of the export of wool in 1660 must have given a finishing blow to the staple as an active organism.<sup>517</sup>

Even prior to 1660 it is likely that staple courts were not much utilized since the foreign merchant could also choose to sue in chancery or in the common law courts.<sup>518</sup>

#### **(e) Conclusion**

The Staple was a specialized market dealing in certain commodities, the purpose of which was to regulate their export. The ability of staplers (those trafficking in wool in designated market towns) to proceed by way of the law merchant - as with markets and fairs in general - reflected the need for celerity in solving disputes. However, one suspects that - in practice - resort to the common law by merchants often occurred.<sup>519</sup>

<sup>509</sup> 23 Hen 8 c 6 (rep 1863). See ss 1, 5 & 6. JH Baker, *The Oxford History of the Laws of England 1483-1558* (OUP, 2003), vol 6, p 707 noted 'These recognizances were to be available to *'every of the king's subjects'*, but only, in reality, in the metropolis, because they had to be registered before the chief justices of the two benches or the mayor of the staple of Westminster and the recorder of London.'

<sup>510</sup> Baker, n 52, p 312 'Statutes and recognizances were still used in the eighteenth century, but had become obsolete before they were abolished in 1863.' Hall (ed), SS, vol 49, pp xxvii-iii thought the decline was already present within 100 years of the Statute of the Staple 1353. For examples, in 1615, of the forms of statute merchant and statute staple, see Holdsworth, n 26, vol 3, pp 672-3.

<sup>511</sup> *Ibid*, s 3 (merchants native and alien may buy wools and bring them to the staple and aliens may export them). See generally, Jenckes, n 474, ch 3.

<sup>512</sup> *Ibid*, p 105. See also Thornley, n 32, pp 15-7. Sanborn, n 35, p 397 thought that the staple system began to disintegrate in the reign of Henry IV (1399-1413).

<sup>513</sup> Green, n 320, vol 1, p 51 'the great revolution in trade...by which England was turned from being a country whose chief business was exporting wool into a country whose chief business was exporting cloth.'

<sup>514</sup> Kiralfy, n 208, p 106 'These courts [courts of the staple] vanished as the staple system was discontinued in favour of other economic arrangements.' For the locations of the Staple in 1617, see Jenckes, n 474, pp 51 & 55. Writing in 1669, Prynne, n 347, p 175, said that the court of the staple was *'now expired'*. Pritchard, n 218, p 36 (*Hale, Treatise on Admiralty* c. 1676) 'These Staples, and the exercise of their staple jurisdiction in suits is long since antiquated.' Also, p 46 'the Staples being now in effect abolished.' See also Burdick, n 28, p 479. Malynes (3<sup>rd</sup> ed, 1686), n 22, vol 1, p 155 'our staple of wools... is now out of use, and staple towns are all as it were incorporated into London.' Cited by Holdsworth, n 26, vol 1, p 570.

<sup>515</sup> By 1621, the Staplers were limited to the export of wool, woolfells and leather. However, in 1626, 1630, 1632 and 1660 laws were passed prohibiting the export of wool. Jenckes, n 474, p 57 'The last act was not repealed until early in the nineteenth century and it was a blow to the Company of the Staple from which it never recovered. After this it ceased to play any part in the economic welfare of England...'

<sup>516</sup> 5 & 6 Will IV c 76, s 14.

<sup>517</sup> Gross I, n 24, vol 1, p 147. Cf. Brodhurst, n 474, 32 'the [staple system] system had by this time outlived the purposes of its creation' (by mid-16<sup>th</sup> century). See also Holden, n 375, p 16.

<sup>518</sup> Thornely, n 32, p 13 'The foreign merchant could not be compelled to sue in the local [i.e. staple] court, for it was open to him to sue in chancery, or the common law courts, while an appeal lay to the king in Chancery from the decision of the local court.'

<sup>519</sup> Also, local merchants were not compelled to bring their wool to the staples, to sell there. 27 Edw III stat 2 s 3 'may freely bring their own wools *etc.*...to the staple to sell there.'



***In conclusion, the Statute of the Staple 1353 - and the staple courts - were an example of the law merchant. By 1660 they were redundant, although the Act was not repealed until 1863.***

[*To be continued*]

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