Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica

Charles Donahue Jr.
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I. A MEDIEVAL LEX MERCATORIA?

It has been too confidently assumed by most writers that the law merchant\(^1\) arose in Italy in the central part of the Middle Ages, was chiefly founded on Roman law, and was carried by the traders of that country . . . into every country which they penetrated. That the law merchant was indeed the law of the merchants is true enough, and so is the assertion that it was applied to all transactions of a mercantile character between merchants, particularly at the great international fairs . . . . But the assumption that the law originated with the Italian merchants is more than disputable. International trade is in some measure a constant thing. Although a great revival took place after the new contact with the East which was made by the Crusades, commerce at that time simply changed hands, leaving the Arabs, who had dominated the Mediterranean for about two hundred years, and being undertaken by the Italians and to some extent by the French, and later by British and Norwegian merchants . . . . But before the Arabs came the Romans, and before the Romans the Greeks, and before the Greeks the Phoenicians . . . . But even these probably did not originate all which may at first sight appear to be their work . . . . We read of travelling merchants from the times of Jacob and Isaac, of the kings of Arabia, and of the wealthy Queen of Sheba in the days of King Solomon, and of the trade with Dedan, Aden and Saba when Tyre was at its greatest and nearing its doom.\(^2\)

\(^1\) The text reads “merchants.”

\(^2\) Wyndham Anstis Bewes, The Romance of the Law Merchant 1–2, 4 (Sweet & Maxwell 1923, reprint Rothman 1986). The Biblical references are to: Gn 10:7 (Dedan); Gn 25:3 (Dedan); Jer 49:7–8
The author of this quotation is Wyndham Anstis Bewes (1857–1942), barrister of Lincoln’s Inn, secretary of the Grotius Society and International Law Association, and author of a number of works on international and commercial law, including, probably his best-known, and from which this quotation is taken, *The Romance of the Law Merchant* (London 1923).³

Bewes’s was not a legal mind of the first rank. He does not appear in Simpson’s *Biographical Dictionary of the Common Law*. His work, however, nicely illustrates a debate that has been going on for centuries: What is the relationship between mercantile law, sometimes called “the law merchant,” and the English common law? Bewes’s answer is that mercantile law is utterly other from the common law. It is a transnational body of law that, to use an example from another author in this tradition, goes back to Abraham’s purchase of a field from the Hittites in the twenty-third chapter of *Genesis*.⁴ It was developed by the Phoenicians, the Greeks, and the Romans, then by the Arabs, and finally by the Italian merchants of the Middle Ages. From there it passed to all countries of the west through the great international fairs, not only Saint Denis and Champagne on the Continent, but also St. Ives and Winchester.

The historian can ask a number of questions of Bewes’s account. In the first place, is it supported by the evidence? Whether it is depends on what you mean by “supported.” That the twenty-third chapter of *Genesis* tells a story of Abraham buying a plot of land from the Hittites is undeniable. Whether the author of *Genesis* is describing with any accuracy an historical event is at best questionable. Even if he is, what the Hittites thought they were selling and what Abraham thought he was buying is probably unrecoverable. Even more questionable is the line that Bewes draws from the undeniable facts of trading in the Ancient Near East and of trading in the Middle Ages to the development of a modern body of law that governed that trading.

The historian might also ask why anybody would be telling this questionable story in 1923. A hint as to the answer to that question is given in the foreword to the book by Lord Justice Atkin, one of the most distinguished appellate judges of his day, and a former commercial law barrister.⁵ The book, he said, “will . . . not only create an interest in the past, but give a vision of the

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romance that attends the commerce of the present.”⁶ Even after the Great War, the social position of the man of commerce was insecure; he had to be endowed with romance, given a history to match that of the lord or the knight or the country gentleman. Justice Atkin offered another lesson from the book: “It is, perhaps, fortunate that the law-makers of former days took little interest in the rules of commerce . . . . As a result, traders made their own rules and administered them summarily in their own courts, with the tacit or express approval of the Sovereign. Such rules have in the course of ages crystallised into law . . . .”⁷

This tendentious use of the history of the “law merchant” is with us to this day. A group of authors, including a Nobel laureate in economics, solemnly assure us: “[B]y the end of the 11th century, the Law Merchant came to govern most commercial transactions in Europe, providing a uniform set of standards across large numbers of locations . . . . It thereby provided a means of reducing the uncertainty associated with variations in local practices and limited the ability of localities to discriminate against alien merchants . . . .”⁸

There is a third approach that an historian might take to Bewes’s text. Originality was not the man’s forte. By the time he wrote, the trope of tracing the history of the law merchant back to the Hebrew Bible had a long and respectable history. The first example in English may be Gerard Malynes’s Consuetudo, vel, Lex mercatoria, first published in 1622. Malynes was a merchant, not a lawyer. He sought to have mercantile cases treated independently of the common law. In order to make his argument he had to confront the argument of some of the common lawyers that the common law was of venerable antiquity. It had been the law of England, they argued, since the time of Julius Caesar, perhaps before. There were two answers to this argument. The first,

⁷ Id at iii.
proposed somewhat later by the doctors of civil law, who sought commercial cases for their courts, was that the law merchant was of equal antiquity, being derived from Roman law in which they were specialists. Malynes does not make that argument, though he is perfectly willing to draw on Continental material. He distances himself from the civilians, however, by arguing that the law merchant is the creation of merchants and, indeed, of greater antiquity even than Roman law. It goes back to Abraham, or, at least, to the sale of Joseph to Potiphar by the Midianite traders.

Our second quotation takes a different approach:

What then is this law merchant which opposes itself to the common law and dominates it? and whence does it come? As a matter of fact, and not merely of phrase, may we not even ask whether there is a law of merchants, in any other sense than there is a law of financiers or a law of tailors? Frequent use of the word has almost produced the impression that as there was a civil law and a canon law, so also there was somewhere a “law merchant,” of very peculiar authority and sanctity; about which, however, it is now quite futile to inquire and presumptuous to argue.

If the custom of merchants as to bills of exchange was recognized by the courts, so also has the custom of financiers as to the “negotiability” of bonds and scrips been recognized; but no one would think of referring to the “law financier” in speaking of that “negotiability.” The custom of financiers, as of social clubs or other organizations or coteries, is observed and enforced by the law; not because the financiers or clubs enacted or had power to enact laws, but because it is with reference to those customs that the parties have acted or contracted; and it is with reference to them, therefore, that rights and liabilities ought to be adjusted. When these or any other customs obtain general acceptance by the community they then pass into and for the first time become laws.

. . . Judge-made law (not merchant-made), with Lord Mansfield as chief builder, is what we have here.

The author of this quotation is John Skirving Ewart (1849–1933). Ewart was associated with the University of Manitoba in Winnipeg. He too was interested in international law, but he published on a wide variety of topics. The quotation is from his chief claim to legal fame, An Exposition of the Principles of Estoppel by Misrepresentation (Chicago/Toronto 1900), a 548-page treatise that never saw a second edition.

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10 Malynes, Consuetudo at 2 (cited in note 4).
12 There is, for example, a J.S. Ewart Scholarship in the Linguistics Department at the University, see <http://www.umanitoba.ca/linguistics/gradnews.shtml> (visited Mar 1, 2004).
Ewart’s answer to the type of argument that we find in Bewes is less dependent on history and more on jurisprudential assumptions. There is, however, some history in what he argues. Mercantile law, he tells us, is not like civil law or canon law, a system of law that can be determined from a body of legal literature. If we have his jurisprudential assumptions right, however, that fact (the factual nature of which is controversial but probably accurate) makes no difference. Even if there were a body of legal literature that outlined a systematic law merchant, it still would not be law until it became the command of a sovereign; until then, it was a body of rules, but it was not law.

Ewart’s positivism has some late nineteenth-century overlays. In the Anglo-American legal system, the way rules become commands of the sovereign is not normally by legislation, but by elaboration by judges in common-law courts. And in private law, judges do not determine what might be a good principle or a good policy to apply to the situation at hand; rather, they implement the will of the parties. In the case of bills of exchange, the parties had obviously contracted with reference to the custom of merchants. When the courts accepted these customs and enforced them, they became law. According to Ewart, this happened under Lord Mansfield.

This last historical statement is not correct. The acceptance by the common-law courts of what was called the custom of merchants with regard to bills of exchange occurred earlier than Lord Mansfield, in the second half of the seventeenth century. Nor is there any evidence that the courts that accepted this custom of merchants employed the justification that they were simply enforcing the terms by which the parties had contracted. Ewart’s thumbnail sketch, however, of a process by which the courts first inquired into custom and then accepted those customs as law is confirmed by the most recent study of the topic. That same study also seems to accept Ewart’s Austinian assumptions: until the courts did this, the author argues, there was no law; there was just mercantile practice.

Before we get into the question of who was right and who was wrong, we must ask at whom Ewart’s diatribe was directed. The late nineteenth century saw an explosion of interest in lex mercatoria. As the revival of romantic mercantilism spread from Germany to France to England to the United States, it was used for different purposes—purposes that reflected what was important at the time in the countries in question. If the issues in Germany were legal nationalism,

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commercialization, and the role of the Volk in the process, and in France a broadening out of legal thought after a stifling century of the école de l'exigise, in England they were codification of portions of the commercial law and the proposal to establish a separate commercial court. In the United States, the status of mercantile law was raised in the context of an effort by the Association of American Law Schools to establish the proposition that law was a learned profession and that academic training was the only way to achieve that learning.  

As we have seen, the use of lex mercatoria for tendentious purposes goes a long way back. The same seventeenth century that saw the acceptance of mercantile custom with regard to bills of exchange as part of the common law was also a century in which the status of the law merchant with regard to the common law was controversial. For whatever reason (and the reasons varied considerably), a wide variety of common lawyers, civilians, and merchants thought that there was something called lex mercatoria, and that view is important not only for the political discourse of the period, but also, it would seem, for the way in which the common lawyers viewed what they were doing when they pleaded according to mercantile custom and called in mercantile jurors to find out what the rules were. It also, one must imagine, affected what the merchants thought they were doing when they served on such juries.

What if we go back to the period with which Bewes was most concerned, the Middle Ages? There, if our reading of an anonymous late thirteenth-century English treatise called Lex mercatoria is correct, the relationship between common law and mercantile law was also controversial. But the terms of the controversy were different. We do not find anyone in the Middle Ages arguing that lex mercatoria is part of a transnational body of law, though the fact that alien merchants would agree to abide by it suggests that there was at least some legal lingua franca by which overseas trade was conducted. Nor do we find, until the end of the Middle Ages, anyone arguing that mercantile law is derived from Roman law, or the law of nature, or the law of nations. What we do find is someone arguing that mercantile law is at once part of the common law and independent of it. Mercantile law, the author of our treatise tells us, is the daughter of the common law, but she has been endowed by her mother and is quite capable of managing on her own. He also says in another place that mercantile law arises out of the market, like the morning mist in the Smithfield horse market. Though more down-to-earth than Wyndham Bewes, our

16 Id at 123–62.
18 Id ch 9 at 18.
19 Id ch 1 at 1.
thirteenth-century author seems at times to have been affected by the romance of the law merchant. We are less well informed about what the argument on the other side of the debate was like in the thirteenth century. It seems unlikely that Austinian positivism was the counterargument. It probably was based on the perceived limits on the franchises by which the mercantile courts were held.²⁰

So how should we think about this debate that now seems to be at least seven hundred years old? Should we ask, as Lex Mercatoria and Legal Pluralism tries to ask, how differences in context over the course of time made a debate, which frequently uses the same terms, quite a different debate in each period—one in which to the extent that history was employed it must necessarily be employed anachronistically? Or should we, as we tried to do in the conclusion to that book, seek to escape from the terms of the debate by turning to legal anthropology?²¹ Or should we focus, as do a number of modern historians, on who was right?

I am not sure that I have anything to add to what we said about the first and second questions in the book. I would like to devote the rest of this paper to the third question: Was there a lex mercatoria in the medieval and early modern periods? My answer to that question is “no,” at least not in the sense that that term is normally used, and my attempt to prove this involves the probatio diabolica of my title. The non-existence of something cannot be proved.

The question, as we already have seen, raises large issues of definition. If we ask simply whether the phrase lex mercatoria would have been comprehensible in the medieval or early modern periods, our answer must be “yes,” at least in northern Europe. The phrase was in quite frequent use there from as early as the thirteenth century.²² In southern Europe, however, the phrase was not nearly so common. I will not say that it does not appear in Benvenuto Stracca’s De mercatura (1st ed 1553),²³ generally thought to be the first comprehensive treatise on mercantile law, but a reasonably careful reading of that sprawling work has failed to disclose it. Nor has an examination of a number, though by no means all, of Stracca’s sources revealed that the phrase is found in the writers of ius commune—the common law of Europe that was based on university teaching of both Roman and canon law. This is true without regard to whether these authors

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²¹ See, generally, id at 181–88.

²² Hence, it is unlike “feudalism,” another term that has proved controversial in our time. The fact, however, that it is lex mercatoria rather than ius mercatorium or mercatorum suggests an origin among those who were not totally familiar with the lex/ius distinction. Compare Johannes Marquardus [Johann Marquart], Tractatus politico-iuridicus de iure mercatorum et commerciorum singulari (Götzius 1662).

²³ Benvenutus Stracca [Benvenuto Stracca], De mercatura seu mercatore tractatus (Venice 1553). There is no attribution to a printer on the first edition, but the title-page contains the printer’s mark of the Aldine Press. There are reasons to doubt that it is really the work of that press.
are writing in the tradition of the commentators or in that of the humanists. This fact should give us pause, for all the standard accounts assign a particular place of prominence to the late medieval and early modern Italians in the development of *lex mercatoria*.

Another absence should be recorded at the outset. No general collection of customs of merchants survives from the medieval or early modern periods. In this regard *lex mercatoria* stands in marked contrast to the *ius maritimum* that was collected in such works as the Rhodian sea law (Byzantine and probably from the early middle ages), the *Llibre del Consolat de mar*, (published in the fifteenth century but clearly containing much older elements), or the compilations of maritime law from the Atlantic and Baltic coasts, of various dates, some of which go back at least to the thirteenth century. While the provisions in these collections vary considerably among themselves, even within a given maritime area, there are common elements in them that allow us to say that they probably reflect a body of customary usages that spread across given maritime areas, with each area, at times, influencing, and borrowing from, the others. Much needs to be done with the history of maritime law, but we have the material with which to conduct the study.

I am not sure that the same can be said of *lex mercatoria*, which I will here define as the legal rules that govern the conduct and financing of commerce, independent of the carriage of goods by sea. What survives from the middle ages by way of customals are a few from specific courts and one that purports to describe the procedures in all of the mercantile courts of England. Beyond that there are quite a few records of court proceedings, contentious matters such as are found in the rolls of the fair court of St. Ives, or registrations of transactions, such as are found in the *Schuldbuch* of the mercantile court of Hamburg. Beyond that still are innumerable records of transactions, most of which did not prove contentious.

Prior to Stracca’s *De mercatura*, there seems to be no attempt in the west to state generally the body of rules that apply to mercantile transactions. Many individual rules can be derived from the statutes of particular cities and towns;

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26 See, for example, the so-called “Rolls of Oleron,” the “Laws of Visby,” and the “Laws of Lübeck.” Convenient editions of these (of indifferent quality) may be found in Travers Twiss, ed, 3–4 *Monumenta Juridica: The Black Book of the Admiralty* ([55] Rolls Series, Longman 1874).
27 *Lex mercatoria* at 1–40 (cited in note 17).
29 A selection of these are conveniently gathered in Robert S. Lopez and Irving W. Raymond, eds, *Medieval Trade in the Mediterranean World* (Columbia 1955).
some can be derived from what is stated in passing in the custumals of courts; still others can be inferred from the results in litigated cases and from the records of transactions. But there is no book that begins, “These are the good constitutions and the good customs that concern matters of merchandise, which wise men who travelled over the world communicated to our predecessors who composed therewith books of the science of good customs.” This is the beginning, with the substitution of “sea” for “merchandise,” of the early printed edition of the *Llibre del Consolat de mar*.30

Negative evidence is dangerous. It is possible that there was a body of mercantile customary law as coherent as the maritime law found in the *Llibre del Consolat de mar* that was passed on orally from merchant to merchant or from mercantile judge to mercantile judge. There certainly must have been common understandings as to the effect of various kinds of transactions; otherwise, commerce could not have existed. It is striking, however, that in the period from 1100 to 1550, when so many other customs were written down, these, so far as we know, were not. Dare we apply the adage: De non apparentibus et non existentibus eadem est ratio?31

If such a body of law existed, it would have been in the nature of customary law, and customary law is a complex and difficult phenomenon. Many anthropologists would argue that once a body of customary law is written down, it is no longer customary law. True customary law, they would argue, is held in the memory, and the fact that it is held in the memory allows those who are subject to it to believe that it is unchanging while, at the same time, it is constantly being changed to meet new situations and to resolve new disputes.32 If this is right, then the redactions of customary law that occurred over the course of medieval and early modern periods transformed customary law into something else. We may accept this argument, but the point here is somewhat different: The fact that a body of customary law was redacted tells us something about the nature of the customary system that underlay the redacted custom. It was, we might argue, reasonably coherent and reasonably comprehensive. There was some underlying structure or system, however different that structure or system might be from that of the Roman institutional treatises. In short, a redactable customary law is one that could have been used, even before

30 Colon, 1 *Llibre del Consolat de mar* m. 46 at 44 (cited in note 25) (the custumal of the early printed edition is preceded by an ordo of the court in the manuscripts). The translation is borrowed (with alterations) from Twiss, 3 *Monumenta Juridica* at 51 (cited in note 26).

31 Editor’s note: “What does not appear might as well not exist.”

redaction, to resolve new issues and new disputes by whatever the underlying, and almost always unstated, rules of argument in the system might have been.

There is reason, we might argue, to believe that such a system of customary law underlay the rules that were redacted in the *Libre del Consolat de mar*, that such a system of customary law underlay the rules that were redacted in the innumerable customary jurisdictions of the northern two-thirds of France;\(^3\) and that such a system of customary law underlay—and this must be more controversial—the rules that we find expressed in the *Treatise on the Laws and Customs of the Realm of England* ascribed to Glanvill.\(^4\) But there is no evidence that such a system of customary law underlay *Lex mercatoria*, the anonymous treatise on proceedings in English mercantile courts discussed above. Rather, what we have in that treatise is a description of how to conduct a certain kind of court, a court that varies somewhat in its procedures from those of the central royal courts and the other secular local courts of the period. The variations are the product of particular mercantile customs. We need not argue here whether those customs were the creation of the merchants or of the judges of the courts, but they clearly responded to the perceived needs and desires of the merchants. Those customs, however, did not add up to a body of customary law. The default rules of proceeding in these courts (that is, the rules that were used when there was no specific rule covering the situation) were not provided by an accepted body of mercantile procedural rules, nor were procedural controversies resolved by arguing from one mercantile custom to another according to the rules of argument of mercantile customary law. The default rules of proceeding, the structure that made argument possible and the rules by which argument proceeded were all supplied by the common customary law of the realm of England, with some additions from the common elements in the procedure of local courts in the same country.\(^5\)

That proposition, for the demonstration of which I refer you to our book, immediately raises the question whether there might be something different about England. The precocious development of the English legal system in the twelfth and thirteenth centuries is well known.\(^6\) It could be that by the 1280s, when *Lex mercatoria* was written, the common law had already overwhelmed the customary law of merchants as it had, for a large part, overwhelmed the customary law that we suspect had previously existed in different regions of

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\(^5\) *Lex mercatoria* at 1–40 (cited in note 17).

England, and as it was in the process of overwhelming the customary law of particular localities. Perhaps if we looked to sources outside of England we would find evidence of a customary body of law of merchants, one that had already yielded in England to the greater force of the common law.

Such an undertaking is fraught with difficulty because of the intractable nature of the sources. For the high middle ages, the Continental sources are all local and particular. None of them attempts to cover the entire field of mercantile law, and none of them attempts a geographical reach as broad even as that of our thirteenth-century English treatise. Most, such as the records of court judgments or those of actual transactions, require that the researcher infer from the record what the underlying rules might have been. A careful comparison of this widely scattered material might reveal a common body of principles and rules peculiar to merchants that might be described as *lex mercatoria*, the transjurisdictional body of customary law of medieval merchants, though I must confess that I have serious doubts.

II. STRACCA’S *DE MERCATURA*

These doubts arise from an examination I undertook of Stracca’s *De mercatura*, in order to afford a comparison with our thirteenth-century English treatise. What I discovered is quite similar to what we discovered in our English treatise. Stracca describes a separate set of mercantile courts, courts that vary somewhat in their procedures from those that employ long-form Romano-canonical procedure. The variations are, in some cases, the product of statute, but in most cases, the product of juristic elaboration. Sometimes mercantile custom plays a role, though more often in the substantive than in the procedural realm. The statutory variations and the customs clearly responded to the desires and perceived needs of the merchants. But those variations and customs did not add up to a body of law. The default rules, the structure that made argument possible, and the rules by which argument proceeded were all supplied by the *ius commune*. For the details I am going to have to refer you to two forthcoming papers on Stracca’s work. All we have space for here are the conclusions.

Does Stracca’s work provide any evidence about the existence of a *lex mercatoria* in the sense of a body of customary law like that of the *Llibre del Consolat de mar*? The answer must be a rather emphatic “no.” Stracca’s world is

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37 In its final part, it suggests that a mercantile court in London can obtain a record of a judgment of a mercantile court in Paris. *Lex mercatoria* ch 21 at 38–40 (cited in note 17).

the world of the *ius commune*, overlaid with a rather thin veneer of humanism. Whatever question Stracca is posing, he usually begins with Roman law, and less frequently, though occasionally, with the canon law. Then he looks to the commentators. Frequently, we suspect, he looked to the commentators without looking at the primary texts. He is a Bartolist writing in the Bartolist tradition. He views the law through Bartolist lenses. His style of argumentation is that of the doctors of the *ius commune* of the fourteenth through the mid-sixteenth centuries. His principal tool of analysis is the multifarious uses of the term “equity.” He refers to local Italian statutes dealing with merchants and their courts relatively frequently, and he interprets these statutes, as was the practice, in the light of the *ius commune*. He refers to the customs of merchants relatively infrequently, and when these customs are examined, they turn out to be customs that vary slightly from the *ius commune* and can easily be accommodated within it. He never, so far as we can tell, uses the term *lex mercatoria* or *ius mercatorum*. If we puzzled over what the author of our anonymous late-thirteenth-century English treatise meant by *lex mercatoria*, we do not have to puzzle in the case of Stracca. So far as we can tell, the term meant nothing to him.

Perhaps no legal work is free of the tendentious, and Stracca’s bent is relatively easy to see. He thought that answers to the legal questions that were facing the merchants could be found in the *ius commune*, and he showed them, or their lawyers, where to find them. He thought that mercantile courts could, and should, be run by a variant of Romano-canonical summary procedure, and he spelled out how this was to be done. He quite obviously thought that mercantile courts were sometimes unprincipled, and he rather firmly said so. He called on the judges of those courts to do better, making use of those persuasive powers that he had. In doing this he quite explicitly appealed to religion, to canon law, and to Roman law.

Once we realize, however, that the world out there was not quite as Stracca would have liked it to be, is it possible that what was happening was that mercantile courts were, in fact, being run according to a body of customary law (call it *lex mercatoria* if you will), that Stracca sought to bring into line with the *ius commune*, as he understood it? It is possible, but what Stracca says does not

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39 See Donahue, *Benvenuto Stracca’s De Mercatura* § 3 (cited in note 38).
40 See id §§ 3–5.
41 See id § 3, and Donahue, *Equity in the Courts of Merchants* §§ 1, 6 (cited in note 38).
42 See Donahue, *Benvenuto Stracca’s De Mercatura* (cited in note 38) and Donahue, *Equity in the Courts of Merchants* (cited in note 38). The requirement that courts of merchants proceed according to equity was, it would seem in many instances, based on statute.
43 See note 48 for a good example.
44 Stracca, *De mercatura* ¶ 8.6, folio 284v-285r, no 1–3 (cited in note 23) is a good example of all these points.
suggest that that was the case. What Stracca criticizes is the attitude of the mercantile judges who say that they can decide cases according to equity without knowing what the law is. They are not saying, “we have our law, and it’s not yours.” They are saying, “we judge according to equity, and we don’t have to bother about the details.” Now it is possible that by the sixteenth century, Italian merchants and consules had been brainwashed into believing that the only law was what was contained in the two great corpora, but I doubt it. Sixteenth-century Italians, particularly sophisticated ones, were well aware of the multiplicity of laws. Every city worthy of the name had its iura propria. There were glossed versions of Lombard law and feudal law, and, in the case of the latter, contemporary commentaries. When the merchants did have a custom, as they did in the case of certain kinds of proof and the validity and effect of certain kinds of transactions, they did not hesitate to mention it. Frequently these customs could be accommodated into the ius commune. Sometimes the doctors argued that the custom was unsound, though in the one notable debate on this topic that I have examined in Stracca, he sides—with qualifications—with those who argued for the validity of the custom. What sixteenth-century Italian merchants did not have, at least so far as we can tell from Stracca, was a separate legal system. Their system, like that of the city-states in which they lived, was the ius commune, to which the statutes that applied to them and such customs as were accepted as valid provided exceptions.

We need not, moreover, rely solely on Stracca in our assertion that the Italian merchants in the period of the ius commune did not have a separate legal system. In the sources cited by Stracca, there are two pieces of evidence that the effective legal system for the Italian merchants was the ius commune. The first is the consilia, of which thousands have survived. The doctors rendered their opinions according to the ius commune, with some, but not many, qualifications when they were dealing with mercantile matters. The one thing that we can be sure of in the case of consilia is that they are not the maunderings of academics trying to devise an ideal system of law apart from the realities of the situation. People paid for consilia; they paid so much that many of the doctors grew rich because of them. It would, of course, be foolish to think that a consilium, once rendered, was invariably followed. The practice of obtaining multiple consilia

45 Id.
46 Bibliography in Helmut Coing, ed, 1 Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, 1 Mittelalter (1100–1500) at 573–86 (Beck 1973).
48 The question is how much probative weight is to be given to mercantile account books and the related question of proof of a merchant’s handwriting. Stracca, De mercatura ¶ 8.1, folio 253v–254r, no 37–36; ¶ 8.5, folio 282r, no 12 (cited in note 23).
49 See, for example, Donahue, Benvenuto Stracca’s De Mercatura at 3–5 (cited in note 38), and Donahue, Equity in the Courts of Merchants §§ 2–5 (cited in note 38).
shows that they were frequently weapons to be used in a continuing argument. If, however, the arguments of the doctors in consilia in mercantile cases were simply irrelevant to the law as the merchants understood it, it is hard to imagine that they would have paid good money for the consilia.

The second piece of evidence for the relevance of the ius commune to the world of the Italian merchants of the sixteenth century is the loving care with which the doctors elaborated a body of law concerning them. It is hard to imagine, for example, that the discussion of whether a creditor had to exhaust his remedies against the principal debtor before proceeding against a surety or the third-party owner of hypothecated property would have proceeded through the tortured twists that it did over the course of two centuries if the question were totally an academic one. A large number of courts, including, it would seem, all the courts of merchants, had the power to proceed de bono et aequo or according to some variant of that formula. It obviously made a considerable practical difference to the many personal sureties and holders of hypothecated property whether the creditor could proceed against them without first trying to collect from the principal debtor.\(^5\) The doctors struggled with the issue and ultimately came up with what looks like a workable practical solution, totally within the compass of the ius commune.

III. CONCLUSION

In conclusion, let me offer a couple of qualifications. It is well known that throughout the medieval and early modern period courts throughout Europe modified their procedures to accommodate merchants. These tribunals adapted their procedures to the perceived needs and desires of the merchants (1) by devising mechanisms whereby specific mercantile customs could be alleged before the court, (2) by speeding up the process of litigation and removing formalities, (3) by permitting proof of mercantile transactions different from the proof that they would allow for other kinds of transactions, and (4) by providing mechanisms for rapid execution of judgments.\(^5\) In short, jurists and legislators responded to the perceived desires and needs of merchants and thereby provided the legal infrastructure that even economists are now coming to realize is necessary for trade to flourish. This is an important historical phenomenon. It does not mean, however, that these jurists and legislators responded by incorporating into their own law some customary body of law called lex

\(^5\) See Donahue, *Equity in the Courts of Merchants* § 5 (cited in note 38); [Rotae Genuae] De mercatura decisiones dec 13, nu 19, p 64a; dec 78, nu 3–4, p 204a–b; dec 90, nu 4–5, 10, pp 218b, 219b; dec 91, nu 25, p 224 (Petrus Landry 1593).

mercatoria or ius mercatorum. Indeed, the very diversity of the mechanisms by which the different regions and ultimately different states achieved these common results would suggest that this was not the case.

More troubling for my thesis is the work of Professor Vito Piergiovanni.52 I take it that Professor Piergiovanni agrees with me that there is relatively little in Stracca’s work that is new. The Italian jurists had been adapting the ius commune to the needs and desires of the merchants since at least the time of Bartolo and Baldo. To put it bluntly, there is much in Stracca which, if written by a university student today, would find that student before a university tribunal answering charges of plagiarism.53

Where Professor Piergiovanni’s work is troubling for my thesis is in his suggestion that, prior to the time of Stracca, the mercantile tribunals in Italy had operated pretty much independently of the procedures of the ius commune. It was only, he suggests, in the sixteenth century—and perhaps as a result of Stracca’s work and that of the Genoese Rota—that they came to apply a modified version of Romano-canonical procedure. He relies on fifteenth-century consilia in support of this proposition, particularly those of Bartolomeo Bosco.54

It is always difficult to tell what kinds of procedures a court is following in the absence of records from the court itself. Bosco’s consilia do suggest that the mercantile tribunals in Genoa operated largely independently of the other tribunals and that they followed different procedures.55 How different is not easy to know, but I think that I can concede—at least for the sake of argument—that there were indeed mercantile tribunals in Italy that were operating, as late as the fifteenth century, with procedures that were quite different from those of the ius commune. But that tribunals that deal with merchants use a different procedure from the prevailing one in the area does not necessarily mean that there was a system of customary mercantile law. The tribunals in the city of London throughout the high medieval and well into the early modern periods operated with a procedural system and substantive rules that were quite different from those of the common law.56 The fair courts of Champagne operated with a

52 See, for example, Vito Piergiovanni, Statuti, diritto commune e processo mercantile, in Aquilino Iglesia Ferreirós, ed, El dret comú i Catalunya: Actes del VII Simposi Internacional, Barcelona, 23–24 de maig de 1997 at 137 (Fundació Noguera 1998); Vito Piergiovanni, Diritto e giustizia mercantile a Genova nel XV secolo: I consilia di Bartolomeo Bosco, in Ingrid Baumgartner, ed, Consilien im späten Mittelalter: zum historischen Aussagewert einer Quellengattung 65–78 (13 Schriftenreihe des Deutschen Studienzentrums in Venetia, Thorbecke 1995), both with references to previous work.
53 See Piergiovanni, Statuti (cited in note 52).
54 See Piergiovanni, Diritto e giustizia mercantile (cited in note 52).
55 See, for example, Bartolomeus de Bosco, Consilia, no 450 (Johannes Forbinus) at 705a–b (Franciscus Castellus 1620).
56 A comprehensive study of the work of this court is badly needed and has been undertaken by Penny Tucker. In the meantime, regesta of the surviving medieval records may be found in A.H.
procedure (I'm not sure that we can say much about the substance) that was quite different from that of the customary procedure of Champagne. There are some elements that these procedures have in common. There may have been more; we know relatively little about how contentious cases proceeded at Champagne. But the elements of commonality pale in comparison with the differences. London procedure and substance look much more like the English common law. Champagne procedure, to the extent that we know it, looks much more like French customary law. The decline of the fair courts of Champagne prevents our knowing what would have happened to this procedure as time went on; but in the case of London, generations of lawyers trained in the common law brought the London procedure and substance closer to that of the common law, the same phenomenon that is noted in the case of the mercantile courts in Genoa. These examples would suggest that what we note as different about the London courts—or the fair courts of Champagne, or the Genoese mercantile courts of the fifteenth century—is more likely to be the product of local custom and local creativity than it is to be product of some preexisting transnational system of mercantile customary law.

The law merchant, Levin Goldschmidt taught us more than century ago, was the creation of merchants, by merchants and for merchants. They ran their own courts, and it was their law. A century of research has shown that those statements were a considerable exaggeration. Yes, medieval merchants did participate in the operation of courts that dealt with mercantile matters, but they rarely, if ever, did it totally independently of local political power. So far as the law itself was concerned, there were probably some mercantile customs that made trading possible—some quite local and some of wider extent. These customs did not, however, add up to a mercantile legal system, for wherever we see such a system created it is the work of men who are imbued with a scheme of law that is not the creation of merchants but, in the case of England, of the customary courts of the realm, or, in the case of Italy, of the doctors of the ius commune.


Does this mean that there is no room for romance in the history of trade? Of course not. At approximately the same time as Bewes was romanticizing the law merchant, John Masefield wrote:

Quinquireme of Nineveh from distant Ophir,
Rowing home to haven in sunny Palestine,
With a cargo of ivory,
And apes and peacocks,
Sandalwood, cedarwood, and sweet white wine.

Stately Spanish galleon coming from the Isthmus,
Dipping through the Tropics by the palmgreen shores,
With a cargo of diamonds,
Emeralds, amethysts,
Topazes, and cinnamon, and gold moidores.

Dirty British coaster with a salt-caked smoke stack,
Butting through the Channel in the mad March days,
With a cargo of Tyne coal,
Road-rails, pig-lead,
Firewood, iron-ware, and cheap tin trays.

There is plenty of room for romance in the history of trade; let us just not extend it to the history of the law concerning trade.

59 John Masefield, Cargoes, in Salt-Water Poems and Ballads 124 (MacMillan 1916), and many times reprinted.
60 I'm afraid I'm just not a romantic. While it is possible that one could have gotten a quinquireme from Ninevah, on the Tigris, to Ophir, probably on the southern coast of the Arabian peninsula, via the Persian Gulf, there is no way that one could, then or now, have gotten it back to Ninevah by way of Palestine. Indeed, there was no way, prior to the digging of the Suez canal, that one could have gotten it from Ophir to Palestine without going around the Cape.
61 A former Portuguese coin.