Lex Mercatoria

A STUDENT'S COURSE ON LEGAL HISTORY

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Section II

HISTORY OF THE LAW MERCHANT

THE LAW MERCHANT or LEX MERCATORIA

[certain clarifications by a commentator retained in brackets]

Common Law

The expression "Common Law" has several meanings. First it is used to distinguish law as practiced in the common law courts from equity. Second, it is used to distinguish the so-called unwritten law, that is, traditional law, law which from custom has become the law of the land, from the statute law or law declared by parliament. Third, it is used to distinguish this law which is the law of England, from the civil law which is the law of those countries who have founded their system upon Roman Law.

There is also another distinction. In examining the reports of the 17th century, hardly any commercial cases will be found. For example, under charter parties and bills of lading, there are very few cases concerning merchants and ships despite the fact that these matters have always been productive of litigation, the reason being that the common law did not govern these types of cases; they were left to be governed by the law merchant, a branch of the law of nations. Commercial matters were dealt with by special courts in and under a special law which was at that time a well established law and largely based on mercantile customs.

The Law Merchant

The history of the law merchant or Lex Mercatoria is therefore really the history of private international law which grew in great degree out of the transactions between different nations. And at one time, without doubt, it was the law of England simply because it was the law of other nations.

Its Origin

The exact place and time of its origin is uncertain. Many writers have stated that it began in Italy in the central part of the Middle Ages. But investigation of early documents show that it goes back much further. For instance, to the time when the Arabs (1) dominated the Mediterranean. But they invented little and many of the terms which they used came from the Romans, Greeks and Phoenicians, who for many hundreds of years monopolized the sea commerce.

Magnitude of Trade of Arabs

The magnitude of the trade of the Arabs between the time of Mohammed and the Crusades was great. They made voyages to China and to India where they established colonies. This trade was temporarily interrupted by the Chinese insurrection of 875 A.D., but the intermediate commerce was not disturbed and trade with Indo China, East Persia and India continued. By land there was a great deal of traffic with Persia, India, Bokhara and Samarkand. Until the 11th century both their caravans and vessels carried their merchandise along the North Coast of Africa while traders from Arabic Spain and Sicily trafficked to Egypt and the intervening ports.

At the time of the Crusades, the Arabs had an immensely heavy trade. This is attested by the fact that in 1191 during the Third Crusade, Richard, Coeur De Lion, captured one of Saladin's caravans, rashly traveling west of the Jordon and became possessed of "very rich spoil of spices, gold, silver, silks, robes, arms of every kind, together with 4700 camels, besides asses and mules without number". This recip-rocal trade was almost entirely between those of the same religion. When the Arab fleets went elsewhere, they sailed not for trade, but for rapine and conquest. But the intercourse between the Christians and the Saracens of South Italy and Sicily was not always hostile. Frederic II was especially friendly to the latter, and there were many treaties of peace and commerce between Aragon and El Mogreb.

It was into this rich eastern trade that the Italians and others came to share; the first Genoese fleet bringing supplies arriving in 1198, followed by the Pisans and Venetians and the men of Amalfi. Each nation seemed to have had its viscount with consuls in several cities for the purpose of self government and protection, observing their own laws and customs. Whether before this time they had adopted the sea law of the East or not, it is clear that it soon became part of the law of the Western Mediterranean. Venice, as the chief distributing mart of the Middle Ages, became in the 14th century the southern terminus of a great land trade route.

First Treatise on Merchant Law in England - 1622

The first work on merchant law in England was written by Gerard Malynes published in 1622, entitled "Consultudo Vel Lex Mercatoria" or the Ancient Law Merchant. In his preface to this work, he stated that he had entitled it Lex Mercatoria instead of Jus Mercatorum because it is customary law provided by the authority of all kingdoms and Commonweals, and not a law established by the sovereignty of any prince. Blackstone

stated that the affairs of commerce were regulated by a law of their own called the Law Merchant or Lex Mercatoria "which all nations agree in and take notice of and it is particularly held to be part of the law of England which justifies the causes of merchants and the general rules which obtain in all commercial countries." Still later, Lord Mansfield stated that "Mercantile law is not the law of a particular country but the law of all nations".

On What Law Merchant Based

The Lex Mercatoria would seem to be in part based on Roman law, in part maritime custom, in part the law of the Medieval European fairs, and to a great extent upon the last.

Here we have coupled together Roman Law (the State is God), maritime law (international law of war and commerce) and Merchant Law which is the present-day law of national and international banking.

Contents of Lex Mercatoria

There is some obscurity as to what constituted the substance of the Lex Mercatoria, but it is definitely defined as the law administered as between merchants and the consular or commercial courts, some of it being substantive law and some rules of evidence and procedure.

Distinctive Elements in the Law Merchant

In every land during the 12th and following centuries, the towns began to record their laws and customs, which everywhere contain legal rules for commerce that differ from the common law of the land. In most of the Italian cities, commercial law is to be found mainly in the Statutes of the Merchant Guilds. These once confirmed, tacitly or expressly, had all the authority of state law, binding on all who traded within the city. As heads of the Guild, the consules mercatorum administered the law, but the city magistrates were under a strict obligation to which they had to swear on entering upon their office, to aid if necessary, the Guild Consuls with all the powers of the state in securing the execution of their judicial sentences.

Effect of the Law Merchant on Common & Statute Law

Many of the rules of the Law Merchant were directed to evade inconvenient rules of the common law. For example, one of the first rules of the common law is that a man cannot give what he himself has not. Hence, a man who has no title to goods cannot give title. Consequently, when you buy a thing, if you are to be sure that you have title to it, you must inquire into the title of that thing back to its remote possessors, to make sure that no one in the chain of title stole it or obtained it by fraud. Whereas, the merchant said that commercial business "cannot be carried on if we have to inquire into the title of everybody who comes to us with documents of title."

Lord Justice Bowen in Sanders v. McKlean, 11 Q.B.D. page 343 said, "The practice of merchants is not based on the supposition of possible fraud. The object of mercantile usage is to prevent the risk of insolvency, not of fraud; and anyone who attempts to follow and understand the Law Merchant will soon find himself lost, if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. The contra is the case. Credit, not distrust, is the basis of commercial dealings. Mercantile genius consists principally in knowing whom to trust and with whom to deal . . ."

The Law Merchant dealt with many choses in action, and it would have been very inconvenient, for example, when a man took a bill of exchange, if he were not able to sue on it in his own name or would have to inquire into the title of all previous endorsers.

[It is a uniform practice of banks, when processing checks, to stamp their endorsement on the back with the note "P.E.G.", which stands for "Prior Endorsement Guaranteed."]

Hence, the Law Merchant established certain documents or choses in action which were transferable by delivery and endorsement, or by delivery, so that the holder could sue in his own name and which passed good title to the transferee who took them in good faith, notwithstanding the transferor had no title. They could be sued on by the holder in his own name and were not affected by previous lack of title. This instrument was the original negotiable instrument. Hence, the law of negotiable instruments, with a few exceptions, is founded entirely upon the customs of merchants.

[The law of negotiable instruments is known today as the Uniform Commercial Code and is a part of every State's law by adoption.]

The Fairs of the Middle Ages

A fair was an imposing assemblage occurring as rule once a year, attended by merchants who traveled from far distant countries, bringing wares from perhaps even more distant countries. It would be conducted for a consecutive period of several weeks, would cover large space of ground on which would be erected temporary buildings and streets for the booths, etc., the sale of things in the different streets being carried on in the different booths and offered every conceivable commodity which could be made and sold. To regulate the currency and secure the country against the loss of specie, as well as to prevent importation of spurious or debased coin, the officer of the King's Exchange examined into the mercantile transactions of the foreign traders.

Consuls and Consulados

It is impossible to fix with certainty the origin of the institution of consuls, but it certainly goes back to the ancient Greeks, since the proxenia of ancient Greeks corresponds to the modern consular system. The proxenoi, like the consul, supplied information to the government that appointed them, and also furnished advice and assistance to the citizens who were subjects of that government while residing temporarily in the territory of another country. The more modern institution of consuls is probably more of Italian growth. The duties of these consuls at first was merely to attending the traveling merchants to the fairs, represent them generally in all matters connected with the fairs, with jurisdiction to settle all fair disputes which might arise between members of the same nationality.

Hanseatic League 1241 - 1269

This was a combination of merchants which provided rules and regulations for their conduct and which was to protect them when the law did not protect or recognize the rights of the traders. It was a merchant guild formed in Germany in 1241 to protect the merchants. It came to control all the trade of Northern Europe and included eighty-five leading cities, among which was London. At its height it had considerable power; it maintained an army and a navy, guarded roads from city to city, kept a

fortress and a storehouse in each city, waged war, enforced the merchant's laws at the various fairs. Its last general assembly is said to have been held about 1669.

Fairs in England

It is probable that the Romans introduced fairs into England as they did into so many other places. Alfred directed alien merchants to come only to the four fairs of London, York, Bristol and Winchester and to their remaining at each fair not more than 40 days. Athelred II proclaimed peace for ships of merchants, even though they be enemies, coming with goods into any port. Henry II granted to the citizens of London freedom from lestage, a due for leave to sell at fairs and from other tolls.

Bills of Exchange

The earliest form of negotiable instrument was the Bill of Exchange. Blackstone (2 Com. 467) says in regard to their origin, "This method (bills of exchange) is said to have been brought into general use by the Jews and Lombards (3) when banished for their usury and their vices, in order to more easily draw their finances out of France and England into those countries in which they had chosen to reside." But the invention of it was earlier, for the Jews were banished from England in 1290, and in 1236 the use of paper credit was introduced into the Mogul Empire in China. Daniels, in his work on Negotiable Instruments states that "There is reason to believe that bills of exchange were known in England as early as 1307 at least since in that year King Edward I ordered certain money collected in England for the Pope and it was to be remitted to him not by way of coin or bullion, but by way of exchange." The Jewish Encyclopedia suggests a much more probable origin of bills of exchange, viz: "The practice seems to have begun among the Arab traders of the Levant in the 8th century and from them passed to the Italian traders who followed the Crusades."

Obviously, it was impossible for caravan commerce to be carried on after the age of barter (sic) had passed, without some form of documentary credits, the distances to be traveled and the dangers traveled and the dangers of the routes making bills of some sort imperative. The relics which have come down to us, however, are few since every great commercial center of the east has been thoroughly destroyed more than once. But there are some instances of certain forms of bills of exchange at very early dates.

Five tablets (4) were some time ago dug up in one of the ancient Assyrian capitals, the first of which expresses a certain simple obligation by debtor to creditor, which was duly signed and witnessed and payable with interest; the second in which was an obligation payable at short maturity with a penalty clause; third was an obligation secured by a credit on a third person, who was to pay in case the debtor did not; fourth, reciting that signer had delegated to third person the right to recover the debt; and fifth, was a fully developed bill of exchange drawn up by one person at one place on another at another place and containing the name of the payee, date when payment was to be made, the bill being signed and witnessed. These clay documents were evidently issued before the use of coins. There are other examples extant of Babylonian letters of credit or bills of exchange in other tablets dating from 677 to 179 B.C.

Second Instrument to be made Negotiable

The Promissory Note was the next document which obtained the feature of negotiability. The first case in which a promissory note was recognized by the courts of England as negotiable instruments was that of Sheldon v.

Hently, 2 Showers 160, decided in 1680, in which case the court held a promissory note to be a negotiable instrument expressly stating ". . it was the custom of merchants that made them good."

Bank Notes become Negotiable

The next instruments to become negotiable were the promissory notes payable on demand issued by bankers, that is, bank notes. To this again, the custom of merchants very speedily gave negotiability, and in the leading case of Miller v. Race, Lord Mansfield decided that bank notes also were negotiable instruments, holding that it was necessary for the purposes of commerce that their currency be established and secured. Next, the banks besides issuing their promissory notes payable on demand, accepted and honored bills of exchange drawn on them by their customers payable on demand, that is, the check came into existence, and the practice of merchants made it negotiable.

Conclusion

The influence of the fairs on the public law and their influence on the relationship of international law was great. The term fair was practically equivalent to the term peace. The reaction against the principals of primitive hostility was working under the influence of commercial needs. Thanks to the progress of the peace of the fairs and their safe conducts, the communications of foreigner with foreigner became more certain; international relations multiplied; transactions were surrounded by guarantees, and the idea of good faith and of the loyalty which should preside over commerce were more and more developed. Means of transport were perfected. Men, hitherto thrown back upon themselves in a family group came into contact with each other; original mistrust was weakening. Little by little the last vestiges of primitive hostility disappeared. They are the first places where the exchanges for value were able to develop; the law of supply and demand, the law of the balance of trade, find there their first application. It was at the fairs and markets that money ceased to be mere objects of consumption, and became capital. Due to them, traffic was regularized and submitted to the great law of competition..