



Notes on the History of Commerce and Commercial Law. 2. The Middle Ages

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NOTES ON THE HISTORY OF COMMERCE AND COMMERCIAL LAW. 2. THE MIDDLE AGES.

Three prime requisites of commerce are: (1) means of transport; (2) freedom of labor and exchange; (3) security. In antiquity to obtain these conditions the struggle was a hopeless one, though there were periods when they were more or less assured. Commercial colonies were founded in Spain by the Phœnicians in the beginnings of history;¹ the Rhodian fleet was a merchant marine; Athens acquired her great naval strength by a conscious political policy; military Rome played the equivocal role of destroyer,² pacifier and law-giver.

Commerce is a complementary expression of the other material activities of society. The commerce of antiquity, relatively speaking, flourished at periods not because of the state of society and government but in spite of certain of their dominant characters.

Means of transport were rudimentary. By land it was more perilous and burdensome than by sea. The transport of any considerable volume over long distances was impossible. Trans-shipment was always frequent. By water, the routes followed rivers and coasts. Without the compass the mariner did not dare to venture far beyond the sight of land and rarely left the enclosed seas.

Freedom of labor and exchange existed only to a very limited degree. According to the theory of the ancient state the governed owed their rights to the state; the state did not owe its powers to the willingness of the governed. The liberty, industry and property of the individual were at the disposal of the state.

Security was conspicuously lacking. The ancient state regarded the foreigner as an enemy. Besides the material difficulties of transportation there were the added perils of highwaymen and pirates. Commercial supremacy was believed to depend upon

¹ Cadiz, Malaga, Sevilla, Cordoba. The Carthaginians, following the Phœnicians, founded Barcelona and Cartagena and occupied Cadiz.

² For example the destruction of Carthage, Corinth and Palmyra.

monopoly won by the destruction of all rivals. Little sanctity was accorded the right of property. Commerce had to arm itself and so dissipate its forces in antagonistic fields. Insurance was unknown. The Roman jurisconsult gave but relatively scant attention to the field now known as commercial law. Under such conditions mutual confidence and credit could scarcely exist.³

The fall of the Western Empire (476 A. D.) may be taken as a convenient date to terminate the history of antiquity. The ancient civilization continued in the Greek Empire though the importance of this was for the time obscured by the transforming events that were succeeding one another in the rest of Europe and isolating the two parts of the continent.

The thirteen hundred years that transpired between the fall of Rome and the French Revolution may be divided into two periods: the first extended to the XVIth century, the period of the world discoveries, and constitutes the Middle Ages; the second extended from the XVIth century to the French Revolution and is the period of the birth of modern national commerce and national commercial law. The three elements: means of transport, freedom of labor and exchange, and security, became so far a realized fact in the first half of the XIXth century that the unparalleled commercial development of the second half was a natural consequence.

The period of the Middle Ages divides itself into two epochs: first, that of almost complete prostration of commerce; the second, that of the revival, ushered in in the XIth century by the Crusades.

Bridging over these years of transformation in the west the Greek Empire successfully fought off the Barbarians from the north to fall in the year 1453 before the Mahometans from the south. But the paralysis of commerce over the rest of Europe could not but be felt in Constantinople. Besides, like Rome, Constantinople was principally a center of consumption and distribution. Trade still continued between Constantinople and Asia Minor and Egypt and the importance of the capital as a distributing center for eastern goods increased after the reestablishment of relations between the orient and western Europe that followed the Crusades. The advance of the Mahometans gave the

³ Encyc. Brit. Vol. 6, "Commerce."

commercial predominance to Venice and finally became one of the causes of the latter's decline.⁴

Two great collections of laws, that of the Emperors Justinian and Basil, appeared in Constantinople after the fall of the Western Empire, but as they were the products of the ancient civilization and not of the new that was in the making in Western Europe, they must be considered as belonging to antiquity.⁵

In the west, during the period of prostration, Marseilles and Venice, no doubt, maintained some trade by sea. Under Charlemagne the southwestern German cities showed some commercial activity. The invasions of the Normans, destructive as they were, disseminated a knowledge of northern geography and of the art of navigation.⁶

The invasions had an immediately destructive effect upon the commerce of western Europe. The needs of the invaders were so primitive that they were easily satisfied by the locality. Trade all but ceased except within limited areas. A vast amount of wealth disappeared. At first the invaders respected the institutions of the conquered and the confused period of personal law ensued during which the individual may be said to have carried his law on his back. Finally the organization of society was completely altered by feudalism.⁷

The feudal system, by which a military chief parcelled out the conquered land to his generals in return for services, who, in turn, divided it similarly amongst their subordinates, created a military society obviously unfavorable to commerce. Real estate

⁴ Manzano, *Curso de Derecho Mercantil*, Vol. I, p. 190.

⁵ The task of compilation was intrusted in 528 by Justinian to Tribonian. In 529 appeared the Code, a collection of the texts of all documents issuing from the Emperors during the five preceding centuries, creating, declaring or modifying the law. The Digests appeared in 533, a collection of the writings of the greatest of the Roman jurists. In the same year the Institutes were published, an elementary text book on Roman Law. In 534, a new edition of the Code appeared and later the Novels or legislation of Justinian posterior to the Code. The Basilica, compiled by the Emperor Basil in 877 and continued by the Emperor Leo in 886 and by Constantine in 910 superseded the Justinian collection in the Greek Empire.

⁶ Scherer, *Histoire du Commerce*; French translation by Richelot and Vogel (1857), Vol. I, p. 150.

⁷ *Id.*, p. 142; Manzano, *Ob. cit.* Vol. I, p. 192.

was enhanced in value at the expense of personal, which is the medium of commerce. The individual, who in antiquity had belonged to the state, now virtually belonged to his overlord. Feudalism meant a division of the sovereign authority amongst the land barons and consequently petty conflicts and despotism.

But while the invasions caused immediate material destruction and superposed a polity actively opposed to commerce, they were also a regenerating influence to society. In the general disorder the need of mutual protection gave rise to the new agent of association, which, at first, helping to neutralize the prejudicial effects of oppression and despotism, later proved its independent value as an instrument for overcoming certain of the natural obstacles to commerce.

In the Germanic tribes the Church found a fertile field to plant the christian principles of peace, mutual respect, individual liberty, dignity of labor and education, all principles obviously helpful to commerce.⁸

The breakup of the Roman Empire put an end to a system of exploitation and to the deadening effects of centralization. The various impulses of the races that made up the Empire were liberated and henceforward followed their natural courses.⁹

The Crusades,¹⁰ by re-establishing relations between the orient and western Europe, had as profound an influence upon the economic history of the XIIth century as did the world discoveries upon that of the XVIth.

The feudal landlords, in order to raise the necessary money to undertake such stupendous military expeditions, were obliged to sell or borrow on their lands and to make terms with the merchants of the cities. In this way there was a levelling between the feudal barons and the city merchants to the advantage of the latter, and between landed estate and personal estate. Again, the loss thus suffered by the nobles generally redounded to the gain of the crown, since the lands frequently returned to the crown while the leadership of the crusades, being nominally or in fact in the kings, strengthened their prestige and authority.

⁸ Manzano, *Ob. cit.* Vol. I, p. 204-209.

⁹ Scherer, *Ob. cit.* Vol. I, pp. 141.

¹⁰ Dates of the Crusades: I. 1096-1099; II. 1147-1149; III. 1189-1192; IV. 1200-1204; V. 1217-1221; VI. 1228-1229; VII. 1248-1254; VIII. 1270.

The Crusades furnished influences more directly favorable to commerce. The Italian cities and Constantinople supplied transport and munitions to the crusading armies. These returning from the east, introduced into Europe taste for articles of eastern civilization. All parts of Europe and Asia Minor became mutually acquainted. Impetus was given to ship building, processes in fabric and metal working were introduced from the east, and useful plants such as corn. The growth of the commerce of the Italian Republics was due to the impulse imparted by the Crusades. Afterwards they continued to act as intermediaries between the east and the west.¹¹

Feudalism was characterized by small despotisms. There was but one way for the lower units of society to meet the oppression from above and that was by association. The towns became the focus of associated resistance and profiting by the absence of the feudal lords on the Crusades, they declared themselves self-governing communes. The sovereigns, often over-shadowed by their liege barons, were not unwilling to second the efforts of the cities. The revolution of the communes¹² was a movement in opposition to feudalism and favorable to centralized authority and as such was helpful to commerce. The citizen of the commune was freed from his feudal obligations. The newly acquired autonomy was a stimulus to self-development and the most natural means of self-development of the municipality was industry. Thus in the cities grew up the Third Estate.¹³

The religious festivals attracted great numbers of visitors to the cities and offered special opportunities to the merchants to dispose of their goods. In this way originated the mediæval fairs. Numerous measures were taken to encourage them and they naturally became most important centers of development of commercial custom, notably in respect to bills of exchange and the sanction attaching to contracts.¹⁴

To protect the degree of independence which they had won, and to secure an outlet for their industry by rendering travel safer

¹¹ Manzano, *Ob. cit.* Vol. I, p. 211.

¹² From the VIIIth to the XIIth century.

¹³ Manzano, *Ob. cit.* Vol. I, p. 209.

¹⁴ *Id.* p. 207; Scherer, *Ob. cit.* Vol. I, p. 148; Lyon-Caen et Renault, *Traite de Droit Commercial*, 4th Ed. Vol. I, §20 and authorities cited.

and by assuring greater respect for the life and property of their citizens abroad, the merchants of a town who carried on the same trade organized into corporations. Similarly groups of cities having common interests organized into leagues.

During the Middle Ages the Jews were the most active, ingenious and numerous of the merchant class. Driven from Jerusalem by successive conquests, they penetrated every country. Personal property was the only form of wealth which they were permitted to acquire and they turned to trade as the only occupation left open to them.¹⁵ The canon law rule forbidding christians to exact interest did not apply to them.¹⁶ Their dispersion all over Europe and the close racial ties they maintained gave them a knowledge of georgaphy and a mutual support not possessed by others and made them ideal intermediaries. The danger to which they were continually subjected of having their property confiscated led them to reduce their wealth to the most transmissible form possible and to take advantage of such means as the bill of exchange.¹⁷

Having glanced at the main influences that were affecting commerce the task is now to examine the working out of those influences in the four spheres of activity in which commerce awakened, namely (1) the Italian cities; (2) the Hanseatic League; (3) Marseilles and France; (4) Barcelona and Spain.

On the fall of Rome communication between the orient and western Europe ceased. As a policy of protection the Greek Empire isolated itself and it was the Crusades that re-established the old relations. To this is due the revival of western Europe and for several reasons Italy was the first to experience the change. Above all her geographical position placed her in the natural path of the crusaders, and of trade between occidental Europe, Constantinople (to which flowed the products of Asia Minor and the countries bordering the Black Sea) and Alexandria (the western terminal of the route to India via the Nile and the Red Sea). Her cities,

¹⁵ The pre-christian history of the Jews shows them to be an agricultural and theocratic people little given to commerce, *Encyc. Brit.*, Vol. 6, "Commerce."

¹⁶ Scherer, *Ob. cit.* Vol. I, p. 181.

¹⁷ Lyon-Caen et Renault, *Ob. cit.* Vol. I, §21.

mostly of Roman origin, maintained the traditions and germs of Roman municipal government which early gave to the citizens the ambition and the power to emancipate themselves from feudalism. Their liberty led them to turn to prosperous account their naturally industrious traits and the salubrious climate and productive soil of their country.

When the first Crusade moved towards Jerusalem, Venice and Genoa, along with Constantinople, were the only cities which could furnish the needed transport and supplies. Venice was particularly favorably conditioned. Founded in the Vth century on a group of islands in the Adriatic Sea as a refuge from the barbarians, her security from attack procured her a continuity of development. It is probable that even during the darkest years Venice traded with Egypt and the Greek cities. By the XIth century she was already strong and had little to oppose her outside of Italy. Spain was engaged with the Moors, France had not yet awakened, the beginnings of the Hanseatic League were confined to the northern waters, the Dutch and English power were still centuries off. The assistance rendered by Venice to the crusaders in the capture of Constantinople in 1204, assured her the monopoly of the eastern trade; in the XVth century she had reached the apogee of her career and had crushed her rivals, Genoa and Pisa.¹⁸

But the great object of the Crusades failed of consummation. The christian kingdom of Jerusalem proved transitory and the Christian zeal was more than matched by that of the Mahometans. Mediæval commerce was one of give and take between orient and occident. Through Asia Minor or Egypt lay the route to India and both countries were a rich source of products. The advance of the Mahometan conquests brought the Venetians and other Italian cities into conflict with them. As the Moors, Algerians and Turks swarmed about the Mediterranean, communication with the near and far east became more and more difficult and costly. In 1453 Constantinople fell. Meanwhile the compass had appeared and the kingdoms of Portugal and Spain facing the mysteries of the Atlantic had launched the voyages of discovery that proved the final blow to Italian supremacy.¹⁹ In the two years,

¹⁸ Manzano, *Ob. cit.* Vol. I, p. 194 *et seq.*, Scherer, *Ob. cit.* Vol. I, p. 156.

¹⁹ Schrader, *Geographie historique*, Carte 26, note by Blondel.

1497 and 1498, Vasco de Gama reached India by the Cape of Good Hope, Columbus discovered South America and Cabot North America. So long as commerce was restricted to the Mediterranean Venice was in a position to remain the mistress. When the ocean routes were discovered her natural advantages vanished.

In the northwest of Germany, and along the Rhine, Charlemagne had contrived to stimulate an interior commerce. Genoa and Venice, using the old Roman roads across the Alps, commenced to traffic with these cities, eventually reaching northern France, Flanders, northern Germany and England. In the markets of Antwerp and Bruges, the Italians laid the basis for the mercantile prosperity of the Low Countries, which were as favorably situated in the north as Venice and Genoa in the southern waters.²⁰

The Hanseatic League distributed the products of Russia, Scandinavia, Germany, Flanders and England throughout Europe.

The term "hanse" is gothic and means a religious and military association. The Hanseatic League was a loose association of cities of different and widely scattered nationalities. The purpose of the League was to provide a defense against the pirates of the northern seas and to establish foreign markets. Such a German association had been established as early as the Xth century in London and developed under favor of the English kings. In 1153, Henry II accorded privileges to the German merchants. In London, the seat of the association, was the Guild hall which later became the nucleus of the Steel Yard. To that of London were closely allied similar associations of German traders in Lyn, Boston, York, Bristol, Ipswich, Norwich, Yarmouth and Hull. In the Baltic Sea, Wisby, on the island of Gothland, became a great center for the distribution of goods. The Hanseatic merchants penetrated to Novgorod in Russia and in 1158 they founded Riga. From 1226, Lubeck became the leading city of the Hanse. The most important cities were those along the coast of the North and Baltic seas. They extended besides to Saxony, Westphalia, Brandenburg and Thuringia. Their fleets cleared the northern seas of the Viking pirates and secured a monopoly of the Baltic, trade. The members of the League enjoyed exemptions from tolls

²⁰ Scherer, *Ob. cit.* Vol. I, p. 158.

rights of escort and privileges of jurisdiction. Their principal activity was the establishment of foreign markets for the display of their wares. A distinct part of the town was frequently given over exclusively to their stores. An officer of the League was in charge and acted as intermediary between the merchants and the municipal authorities.²¹ Such were the Hanseatic markets of Bergen in Norway, Breslau in Silesia, Cracow in Poland and Bruges in Flanders. So important was that of Bruges that it was divided into three sections representing geographical divisions of the League. By sea and land they acted as a sort of mutual protection society and throughout Germany they strove to maintain peace.

The League early came into conflict with the established governments and the final defeat of the King of Denmark at the end of the XIVth century brought it to the height of its power both politically and commercially.

Its form of government was dual. The central authority was never strong. While the individual cities retained a large degree of independence and issued regulations and laws of their own known as statutes, a central diet met at Lubeck periodically after 1260, whose laws bound the League as a whole and added immensely to its political authority.

The commercial activities of the Hanse merchants were surprisingly wide and varied. From the Scandinavian countries came hemp, pitch, fish products, salt, grains, hides, furs and lumber; from Riga and Novgorod the merchants pushed to the northern limits of Russia and Siberia in search of furs and even brought spices from China which was reached by way of Siberia; from England came such raw materials as wools, lead, tin, iron, coal and lumber; the fabrics of Flanders were distributed all over Europe; from Bordeaux and La Rochelle came French wines, while Lisbon was a tap to India after the discovery of the sea route. Canals were built in Germany; fairs were established; processes were discovered for preserving meat which made its transportation possible.

The XVth century saw the League already on the decline. Its composition was too heterogeneous and could not be held together in the face of the growing sentiment of nationalism. Once

²¹ Lyon-Caen et Renault, *Ob. cit.*, Vol. I, § 19.

the central authorities were better able to supply the necessary protection to trade the great motive for association disappeared.²²

The renaissance moved north and west from Italy and reached England late. Norman feudalism though it created a more refined and fastidious society retarded industry in England. The Italian and Hanseatic fleets had already grown to be too formidable competitors when English commercial activity did commence. The discoveries of the ocean routes and a new hemisphere caused at once the decadence of the Hanse and Italy and the rise of England.²³

Southern France and northern Spain woke to commercial activity shortly after the Italian revival.

During the Middle Ages, French commerce never attained the importance of the Hanseatic or Italian commerce. It was too shackled by feudalism until liberated by Louis XIth. The Crusades offered Marseilles the opportunity to become a self-governing municipality and during her years of independence she rose to great commercial prosperity. When Charles of Anjou, King of Naples, deprived her of her independence, western Mediterranean supremacy passed to Genoa and even the trade of Montpeelier, Aigues Mortes and Avignon surpassed that of Marseilles.²⁴

Special influences were at work in Spain to make her history during the Middle Ages unique.

Following the Suevi, Vandals and Allains, the Visigoths in 416 founded a monarchy upon the highly developed Roman civilization. With the conversion of the Gothic King Ricaredo to Christianity a close union was founded between the Church and the State which endures today. In the VIIth century the Moors invaded Spain²⁵ and those Christians who continued to offer resistance were driven back to the northernmost parts of Spain where the kingdoms of Leon, Navarre, Castille and Aragon gradually evolved. For seven centuries the war of reconquest was waged until Granada fell before the united crowns of Aragon and Castille. Even in Moorish Spain there was no long period of absolute tranquillity because of the wars between pretending caliphs.

²² Manzano, *Ob. cit.* Vol. I, p. 199; Schrader, *Ob. cit.* Carte 26, note by Blondel; Sartorius, *Histoire des Villes Hanseatiques*, Vol. I; Worms, *Histoire commerciale de la Ligue Hanseatique*.

²³ Scherer, *Ob. cit.* Vol. I, pp. 167-169.

²⁴ Manzano, *Ob. cit.* Vol. I, p. 201; Scherer, *Ob. cit.* Vol. I, p. 163.

²⁵ Battle of Jerez, 711.

While there was a certain parallel between the invasions of the Germanic and Slavic tribes of the north and of the Arabs of the south, one vast difference made the results of the two movements distinct. When the northern barbarians invaded Spain they destroyed a Roman civilization of six centuries duration; when the Moors entered Spain they erected upon the inferior Gothic civilization one of a much higher order. Under Abderrahman III, Spain supported agriculturally and industrially a greater population than at any time since, while the arts and sciences flourished as in no other part of Europe.

The development of the sciences by the Moors, the early centralization of power in the Christian Kings as a result of the reconquest and the geographical position of the Peninsula, particularly of Portugal which was unfavorably placed for Mediterranean trade, all contributed to the impulse towards the world discoveries.

The conquest and reconquest of Spain kept her from participating to any large degree in the Crusades and their influence was less felt there than in the rest of Europe. The continual state of war in the interior of the Peninsula was injurious to commercial development. The spirit of decentralization²⁶ reached its height before the tide had turned in favor of the Christian reconquest. A common military and religious fervor then worked to weld the elements together. When the reconquest was complete the authority of the crown was already too absolute either for feudalism to flourish or for the municipalities to emancipate themselves.²⁷ But the great catholic kings that followed attempted, as it were, to run the ship of state at high speed on dead steam. When the Moors and Jews were driven from Spain the strength of the agricultural, industrial and trading elements was broken and the gold and silver from South America could not save her.

The Moors were never great navigators and in the southern ports of Almeria, Málaga, Seville and Cádiz, the ships of Christian Spain, from Barcelona and Tarragona on the east and Bilbao on the west were often seen trading with the Barbary States.²⁸

²⁶ Martin Hume, *Hist. of the Spanish People*, Chap. I, attributes this spirit of decentralization which has played so important a part in the history of Spain, to ethnic causes.

²⁷ Manzano, *Ob. cit.* Vol. I, p. 264*et seq.*

²⁸ Scherer, *Ob. cit.* Vol. I, p.

Seville became a center of immense commercial activity and when the city was captured by the Christians her commerce ramified throughout the whole peninsula.

In the north the interior commerce centered about Burgos and the fairs of Medino del Campo and Santiago de Compostella. The arms of Toledo and the linen fabrics of Segovia became famous.

In the east Barcelona, Tarragona, Tortosa, Valencia and the Balearic Islands were the centers of the commercial revival. In this Barcelona easily excelled. Here originated the greatest of the mediæval maritime codes, known as the Consulate of the Sea.²⁹

In the northwest the cities of Balbao and San Sabastian carried on a thriving fishing and mineral trade with Bordeaux, Nantes and La Rochelle.

Before considering the production of commercial law during this period, that is from the fall of the Roman Empire to the world discoveries, it will be well to make a resumé of the main influences upon and movements of commerce.

The Greek empire lasted long enough to preserve the spark of the revival of western Europe which had felt the obliterating effects of the barbarian migrations. In the chaotic state of feudal warfare that followed commerce came almost to a complete standstill save for necessary local trade and some activity in Venice, Marseilles and the German cities. The interrupted relations between the orient and western Europe were resumed through the crusades. A sense of nationality had not yet awakened and when the intellectual revival of the XIth century was reflected in an energetic trade revival in the XIIth it is found to be regional and racial rather than national. The Italian merchants put Europe into communication with the near and far east; the Hanseatic League were the northern traders; the Provençaux, Catalans, Cantabrians and Moors were the merchants of southwestern Europe; the Jews penetrated everywhere.

During the period of the prostration of commerce the activity of the law makers was directed to the codification of existing law. Such were the codes of Justinian and the Emperor Basil.

The Visigoths produced two codes: (1) the Breviary of Aleric, a codification of the Roman law of the period intended for the con-

²⁹ Id. p. 120; Manzano, *Ob. cit.* Vol. I, p. 202.

quered Roman inhabitants (under the system of personal law) and containing a bare reference to maritime law;³⁰ (2) the Code of Toulouse, of Visigothic Law, intended for the conquerors and containing no reference to commerce.³¹ But the personal system of law did not last and in the reign of Egica (d. 701) and Witza appeared the code known as the *Liber Judicium*, or more commonly the *Fuero Juzgo*,³² a uniform territorial law the foundation of Spanish national law.

The unsubdued Christians, taking refuge in northern Spain from the Moors, formed into separate kingdoms and the reconquest had the double effect of winning back and unifying Spain. While decentralization was strongest there developed what is known as the *sistema foral* by which the crown granted the privilege to a locality to be governed by its own ancient customs. Not only did each separate kingdom have its proper law (preserved today in the provincial *fueros*), but a large amount of autonomy was granted to the municipalities. The body of municipal concessions was known as the *Fuero municipal*. The first known is that of Leon, granted in the Xth century. They contain little private law and so far as commerce is concerned have little importance save in the regulations of the merchants and the fairs.

So much for the period of the prostration of commerce. The period beginning with the revival is more fruitful.

The obstacles to land commerce, as may easily be imagined, were yet very great. The scarcity and the condition of the roads forbade long or heavy hauls. They were infested with robbers who not infrequently were the feudal lords themselves. The feudal system had so parcelled out the territory that one might pass through several sovereign authorities in a day's journey, each one exacting ruinous tolls.

It is not surprising, then, that the most important trade routes of the Middle Ages were by the then known seas. The Mediterranean and Hanseatic navies drove the pirates to the remoter parts. By sea carriage was not only speedier and cheaper, but the ship-

³⁰ Los Codigos Españoles (1847), Vol. I, Introduction, p. XV. The maritime law was the Rhodian law as introduced into the Roman Law.

³¹ Manzano, Ob. cit., Vol. I, p. 273.

³² Codigos Españoles, Vol. I, Introduc. p. XXXIX. Text of Fuero Juzgo, p. 97.

ment of bulk was possible and trans-shipment less often necessary. Commercial law, the reflection of commerce itself, received its first great stimulus in the domain of admiralty. To Italy, where the revival first manifested itself, we must turn to examine the origins of commercial law.

The deficiencies of the existing Roman law were being constantly filled by a growing mass of customs. With the appearance of new forms of contracts such as negotiable instruments and insurance these customs became more than supplementary to the common or civil law. They were often in derogation of it.³³ Meanwhile the course of Roman law was becoming unfavorable to commerce.³⁴ The Germanic feudal law was equally so and the canon law prohibiting the exaction of interest was another impediment.

In Italy particularly the city's prosperity was one with its commercial supremacy. When the merchants succeeded in winning recognition as a professional class they were in a stronger position to force the government to yield them more and more autonomy. Moreover the state of society and of government in the XIIth century was favorable to the rise of a special law. The country was divided into small independent units and society into well defined classes. Nothing was more natural than that a special class of society should appear entitled to a special law.³⁵

The merchants that practiced the same trade organized for purpose of mutual protection into corporations. The organization of the corporation was modelled after that of the municipality. At the head stood one or more consuls who, upon entering office, published an edict containing the industrial and judicial regulations

³³ Manzano, *Ob. cit.* Vol. I, p. 217.

³⁴ For example: (a) The *Lex Anastasiana* (*Codex*, 4, 35; Girard, *Droit Romain*, 4th Ed., p. 734) prevented the assignee of a contract right from recovering more from the debtor than he had paid the assignor. (b) A purchase could be rescinded for *lesio enormis*; (c) The joint debtor had a right to force a division of the debt amongst the joint debtors (*Novels* 99; Girard, *Ob. cit.* p. 741, note 2); (d) The co-surety had the right to divide the joint debt among the sureties surviving when the debt fell due whether or no they were solvent (*Gaius*, 3, 121; Girard, *Ob. cit.* p. 749, note 2 and p. 755; *Weakening of the probative force of written admissions of loans.*)

³⁵ Cossack, *Traite de Droit Commercial*, French trans. from the German, Vol. I, p. 11; Mitchell, *Essay on the Early Hist. of the Law Merchant*, 1904, p. 55.

to be enforced during their term of office. The corporation was otherwise governed by a council elected by a general assembly. The oaths of office, the edicts of the consuls, the acts of the council and general assembly and the decisions of the consular courts were entered in books, called statutes,³⁶ by special officers called *statutori* or *emendatori*. At first all this material was simply entered chronologically. As reference to precedents thus became possible, it was natural that they should be gradually subjected to greater scientific discipline and order.

The courts of the corporations were formed of the consul, a juris-consult and two merchants. The procedure was summary. Parties were not permitted to be represented by counsel. In general, there was no appeal, except in the more serious cases, where it was granted to a court known as the *Sopraconsuli*, who were drawn by lot from a list of merchants (*matriculati*). In case the first decision was reversed a second appeal was had to the council of the corporation whose functions were limited to deciding which of the two opposing previous decisions should stand.

The consuls and *sopranconsuli* were merchants who decided the cases in accordance with the statutes and their own experience as merchants. The *emendatori* were merchants as were the members of the general assembly which approved the statutes and gave them sanction. The new law, consequently, rapidly reflected the advance of commerce.

In the consular courts the authority of the statutes was higher than that of the civil law. When the statutes were silent recourse was had to mercantile custom and then in turn to the civil law, civil custom and equitable principles.

As a general rule the authority of the consular jurisdiction did not extend beyond those merchants inscribed on the rolls of the corporation. Jurisdiction was based upon the mercantile status of the litigant and not upon the nature of the act. But the corporations became powerful enough to usurp the functions of the civil authorities. The special aptitude of the commercial judges gave them a reputation which induced even those who were not

³⁶ Manzano, *Ob. cit.* Vol. I, p. 218; Lattes, *Studi di diritto statutario*, Milan 1887; *Id.*, *Il diritto commerciale nella legislazione statutaria della citta italiane*, §1 et seq., Milan, 1814; Goldschmidt, *Universalgesch.* §7.

under the authority of the corporation to voluntarily submit their differences to them. The clergy, nobles and foreigners who were engaged in commerce, but could not be enrolled as merchants of the corporations, deemed it advantageous to submit their causes to the special courts. When this stage was reached commercial law passed from its first stage, or purely subjective period, that is to say when jurisdiction depended solely upon the profession of the litigant, to the objective period when the act was separated from the actor and afforded jurisdiction by virtue of its own inherent character. By the middle of the XVth century the city government recognized the commercial jurisdiction, giving it official character and sanction.³⁷

It was inevitable that the authority of the state should eventually extend to the consular courts. The taking over of this jurisdiction, however, did not occur till the Middle Ages were passed.

So arose the dual jurisdiction.

Similar association arose in cities where the foreign merchants of one nationality were sufficiently numerous to organize and procure treaties by which the protection of their interests was intrusted to an officer known, by analogy, as consul. Sometimes he was named by the home city, sometimes by the foreign resident merchants themselves. In this way originated the consular service.³⁸

The organization of the corporations of merchants laid the foundation of the law of associations; the bill of exchange appeared solving the problem of the transport of money;³⁹ banks of discount and deposit shortly followed; the relations of employer to employee were regulated and the latter were forbidden to carry on trade on their own account; book-keeping was made obligatory upon merchants and the book entries were given particular probative force; the public debt was made transferable; finance rose to a science.⁴⁰

³⁷ Vivanti, *Traite de Droit Commercial*, French Translation from the Italian, Vol. I, p. 4 et seq.; Cossack, *Id. cit.* Vol. I, p. 13; Mitchell, *Ob. cit.* pp. 28 and 40; Manzano, *Ob. cit.* Vol. I, p. 218, and the numerous authorities cited in all these.

³⁸ Noel, *Hist. du Commerce*, Vol. I, p. 161; Dalloz, *Repertoire*, Vol. 12, p. 253 et seq.

³⁹ The bill of exchange having been evolved to avoid the transport of money, which was both difficult and dangerous at this period, for a long while it could not be drawn and made payable in the same place. By the new Art. 110 of the French Commercial Code this was made possible in France in 1894.

⁴⁰ Cossack, *Ob. cit.* Vol. I, p. 14; *Encyc. Brit.*, Vol. 6, "Commerce."

The statutes of Marseilles are one of the principal sources of the history of French commercial law and particularly of French maritime law.⁴¹

From the XIIth to the XIVth century, especially in France, the fairs were a most fertile source of commercial custom. They stand out as administrative and judicial units in the troubled Middle Ages.⁴² The feudal lords named the officials (*maitres des foires, custodes nundinarum*) and frequently clothed them with full judicial authority over all questions arising in the fair. In France, Germany, England and Italy, the commercial jurisdiction of the fairs was established by the XIIIth century and the special nature of the jurisdiction had its due effect upon the special nature of the law. They were centers where periodically came vendors and purchasers from all parts of Europe and the form and interpretation of their contracts became commercial custom. Bills of exchange were discounted and money exchanged; merchants settled their accounts and the assignment of contract rights received attention; procedure was so summary as to be known as *de hora in horam*; bankruptcy was regarded as one of the ways by which the state of being a merchant might be extinguished by law; agency was being slowly worked out;⁴³ the law of bailment, carriers, surety and association were developing, but above all the law of sales.

In the Hanseatic cities the customs of each city were being reduced to written statutes. The first were those of Lubeck (1158). Of almost equal importance were those of Hamburg, Bremen and Riga. Their merit was such that they came to be accepted by the other cities of the League.⁴⁴

By the XIIIth century, the time had come when the multiplication of local statutes was such that greater unity, order and certainty became the needs of commerce. Besides the countless number of statutes of the corporations there were the statutes of each municipality, characterized by local prejudices and generally

⁴¹ The earliest known of the statutes of Marseilles is that of 1253, which, however, is a revision of an earlier. Desjardins, *Introd. hist. a l'etude du droit com. maritime*, p. 49.

⁴² Because of the absence of postal facilities and of a law applying to and protecting foreigners, the merchant either traveled himself with his goods or established permanent houses abroad. Scherer, *Ob. cit.* Vol. I, p. 155.

⁴⁴ Manzano, *Ob. cit.* Vol. I, p. 224, and authorities cited there.

written in Latin. Maritime law had always been looked upon as a special field distinct from that of the civil law. Merchants trading by sea from different countries came into mutual contact without having the advantage of an accepted and unified jurisdiction such as the fair supplied. The need of a unified law was first felt upon the sea.⁴⁵

Three codes of maritime law appeared during the Middle Ages and they form the pedestal of the modern law. In none of them was there any evidence of scientific treatment. Little regard was paid to logical development or grouping of ideas. Provisions, while of merit, followed one another more or less at haphazard. However, the soundness of the law and the security obtained by the unification of a multitude of local statutes were so obvious that they were rapidly accepted over large areas, though more often than not they had no political sanction. Their acceptance was another evidence of the regional and racial character of commerce in the Middle Ages. There were in fact no great states which could give sanction to laws over wide areas. The initiative of the merchant had not only to meet the problem of his commerce, but also those of his regulation and protection.

The precise dates and the manner of confection of these codes remain in doubt.

The *Consulate of the Sea*, as was called the most important of these codes, appeared in the Catalan language in Barcelona probably in the XIII century and not later than the second half of the XIVth. As to its author, different historians have surmised that it was ordered by the King of Aragon,⁴⁶ or that it was the work of several jurists,⁴⁷ or that it was the product of one mind.⁴⁸ Of the 334 articles which compose it, 252 relate to substantive maritime law and the remainder are provisions of public law and procedure. The *Consulate of the Sea* was accepted as the common law of the whole Mediterranean and received early translations into Spanish, Italian, French, Dutch and German.

⁴⁵ Lyon-Caéd et Renault, *Ob. cit.* Vol. I, §22; Manzano, *Ob. cit.* Vol. I, p. 233.

⁴⁶ Emerigon, *Traite des assurances*, p. VI.

⁴⁷ Manzano, *Ob. cit.* Vol. I, p. 240.

⁴⁸ Pardessus, *Us et coutumes de la mer*, Vol. II, p. 19; for the text of the Code p. 361 to 368.

The *Rolls* or *Judgments of Oleron* were law on the Atlantic coast. They are not supposed to be earlier than the XIIth century nor later than 1263, the date of the *Siete Partidas* of Alfonso X, of Spain, which seems to make mention of them.⁴⁹ They were written in French and from their name are believed to have originated on the island of Oleron, which lies off the west coast of France between La Rochelle and the mouth of the Gironde. The word *rolls* meant a parchment record of a judgment of a court. It is therefore believed that the code was simply a collection of precedents, made by an unknown hand. They were accepted as law in England, Aquitania, Brittany and Normandy and are important as a source of French maritime law. No logical order appears in the 25 original articles nor in the 55 which are published in the later editions.⁵⁰ Two important Dutch translations of the *Judgments of Oleron* were known as the *Judgments of Dam* and the *Laws of Westchapel*.

The third of the codes was called the *Laws of Wisby*⁵¹ and was probably compiled towards the end of the XVth century at Wisby on the island of Gothland in the Baltic Sea. It is doubtful what original authority the code had beyond general acceptance by the merchants. It contained little new material, the 72 articles being compiled from the *Statutes of Lubeck*, the *Judgments of Oleron* and the *Maritime Uses of the Northern Low Countries* which in their turn were virtual translations of the *Judgments of Oleron*. The *Laws of Wisby* were of great importance in the Scandinavian countries and the Hanseatic League. They were first published in German, but passed through numerous editions and translations.

In Spain, during the Middle Ages, we have already seen that special influences were at work making her political and industrial history markedly different from the rest of Europe. The *Consulate*

⁴⁹ Manzano, *Ob. cit.* Vol. I, p. 246; Pardessus, *Ob. cit.* Vol. I, p. 301, dates them anterior to 1152 when by the marriage of Eleanor of Guienne to Henry II of England, Aquitaine passed to England. For text see the same author, *Lyon-Caen et Renault*, *Ob. cit.* Vol. I, §24.

⁵⁰ *Id.* p. 252. Of the later editions, eight articles are supposed to be of English origin. The first known manuscript editions are those of Oxford and of London.

⁵¹ Pardessus, *Ob. cit.* Vol. I, pp. 443-444; Manzano, *Ob. cit.*, Vol. I, p. 254; *Lyon-Caen*, *Ob. cit.*, Vol. I, p. 24.

of the Sea was the most important body of codified law belonging to the Middle Ages; an edict of Barcelona of 1394 contains the first mention of bills of exchange in Spain; an ordinance of the same city in 1435 mentions bottomry and in the same year the first mention is made of insurance, neither subject having been regulated in the *Consulate of the Sea*; in 1226, King James I, of Aragon, granted privileges to the city of Barcelona regarding the naming and the functions of the consular judges; in 1283, Peter III established the consular jurisdiction in Valencia; from 1336 to 1348 was regulated the procedure to be followed in the consular courts of Barcelona, Valencia, Palma de Mallorca and Perpignan.⁵²

In the interior the *fueros* had reached extravagant importance and with the termination of the reconquest and the political unification of the Peninsula efforts were made by the sovereigns to unify the law. King Alfonso X, of Castille (1252-1284), issued two codes: (1) the *Fuero real*,⁵³ reflecting closely the national law, and (2) the more famous *Siete Partidas*,⁵⁴ which borrowed generously from foreign and Roman law. From the point of view of commercial law, the latter code is the more important.

In the northwest the *Rolls of Oleron* were in force and in 1459, appeared the first of the *Ordenanzas de Bilbao* in which brokerage is minutely regulated.⁵⁵

SUMMARY OF COMMERCIAL LAW IN THE MIDDLE AGES.

"The *Law Merchant* was a body of rules and principles relating to merchants and mercantile transactions, distinct from the ordinary law of the land. Possessed of a certain uniformity in its essential features, it yet differed on minor points from place to place."⁵⁶

Its principal characteristics were that it was customary, summary, equitable and international.

⁵² Manzano, *Ob. cit.* Vol. I, p. 276.

⁵³ *Codigos Españoles*, Vol. I, p. 349.

⁵⁴ *Id.*, Vol. 2.

⁵⁵ Manzano, *Ob. cit.*, Vol. I, p. 281.

⁵⁶ Mitchell, *Ob. cit.* p. 10.

The customs of the commercial classes, preserved in the statutes of the corporations of merchants and of the municipalities, had authority over very limited territories and were so numerous as to be confusing. The great maritime codes brought some order out of the chaos in their particular field, though their authority was probably simply public acceptance. The hostile occupation of the African and Asiatic shores of the Mediterranean by the Arabs obstructed the route to India and, with the advent of the compass, led to the discovery of the ocean route to India and a new hemisphere and the decline of Italian and German commerce. In the period to the French Revolution commercial supremacy passed to new nations more favorably situated to carry on a world trade. National consciousness and national law were born.

Layton B. Register.

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