March 1981

Legal Ideology and Incorporation II: Sir Thomas Ridley, Charles Molloy, and the Literary Battle for the Law Merchant, 1607-1676

Daniel R. Coquillette

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LEGAL IDEOLOGY AND INCORPORATION II: SIR THOMAS RIDLEY, CHARLES MOLLOY, AND THE LITERARY BATTLE FOR THE LAW MERCHANT, 1607-1676†

Daniel R. Coquillette*

"[A]lthough I am a professor of the common law, yet am I so much a lover of truth and of learning, and of my native country, that I do heartily persuade that the professors of that law, called civilians, because the civil law is their guide, should not be discountenanced nor discouraged: else whenever we shall have ought to do with any foreign king or state, we shall be at a miserable loss . . . ."¹

Francis Bacon

"We have all of us been nationalists of late. Cosmopolitanism can afford to await its turn."²

Frederick William Maitland

This Article is the second in a three-part series entitled Legal Ideology and Incorporation. In this series, Mr. Coquillette demonstrates that although England has fostered a strong common law system, significant intellectual work was done in England during the sixteenth and seventeenth centuries by students of the civil law systems dominant on the Continent. Mr. Coquillette traces the development of the juristic works of these English civilians, and examines the civilians' intellectual influence on the English common law. It is his central thesis that the English civilian jurists never intended to achieve a direct "incorporation" of civil law doctrines into the common law. Rather,

† © 1980, by Daniel R. Coquillette. Earlier versions of this Article were presented on October 4, 1977, to a Cornell Law School faculty symposium and on December 18, 1979, to the Faculty Legal History Dinner at the Harvard Law School. I am particularly grateful to Professor Harold Berman of the Harvard Law School for his encouragement of the first version of this paper, and to Professor John P. Dawson of the Harvard Law School and the Boston University School of Law, Professor John Leubsdorf of the Boston University School of Law, and Professor Charles Donahue of the Harvard Law School, for their invaluable assistance. Remaining errors are my own.


² F. MAITLAND, ENGLISH LAW AND THE RENAISSANCE, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 168, 176 (1907).

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their lasting achievement has been the significant influence that their ideas about law—their "legal ideology"—have exercised on leading common lawyers.

Mr. Coquillette divides the development of English civilian jurisprudence into three periods. The first period includes the years from the publication of Christopher St. German's seminal Doctor and Student in 1523 to the storm of protest from common lawyers following the publication of John Cowell's highly controversial The Interpreter in 1607. During this significant period, English civilian writing tended to promote synthesis and accommodation with the common law, and formed a pioneering venture in comparative law, a remarkable ideological effort that rewards study for its own sake. This period was discussed in the first Article in this series, The Early Civilian Writers, 1523-1607, which appeared in the January 1981 issue of the Boston University Law Review.

This Article discusses the second period of English civilian juristic development. This period includes the years from the publication of the civilian Sir Thomas Ridley's major work, A View of the Ecclesiastical and Civile Law in 1607 to the publication of the common lawyer Charles Molloy's great Treatise of Affairs Maritime and of Commerce in 1676. During this period, the common lawyers, initially led by Coke, mounted increasing jurisdictional and political attacks on the civilians and at the same time attempted to co-opt civilian methodology in those vital, growing fields in which the civilians had exhibited particular expertise, most notably the law merchant. In response, the civilians became defensive in their juristic attitudes. Instead of continuing previous attempts to synthesize civil and common law, they began to try to isolate and maintain whatever pockets of influence they had already established. The critical struggle was in important part literary and intellectual, and it centered on the traditional civilian strongholds of the international law merchant and the Admiralty jurisdiction.

The forthcoming third Article in this series, The Restoration Civilians and Their Influence, 1629-1685, discusses the third period of English civilian juristic development. This period essentially includes the years during and after the Commonwealth. By then, the common lawyers were succeeding in their attacks, leaving civilian scholars, such as Godolphin, Duck, Wiseman, Zouche, Exton, and Leoline Jenkins, with what could have been an increasingly narrow and specialized role in the English legal system. Mr. Coquillette argues that although the doctrinal work of these later English civilian writers may be relatively better known than the work of their intellectual forebears, the most important contribution of these and earlier civilian writers to Anglo-American law lies in their influence, direct and indirect, on such leading common lawyers as Bacon, Selden, Hale, Holt, Mansfield, and Bentham.
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I. INTRODUCTION: "DOCTORS AND STUDENTS"

Sir Thomas Ridley and Charles Molloy were legal writers who represented
ably, even eloquently, two opposing historical perspectives on legal doc-
trine. Ridley was a civilian and a cosmopolitan in outlook; Molloy was a
common lawyer and a nationalist. Their differences were deep, and of
significance for their time and ours.

The history of Anglo-American law has seen other examples of doctrinal
tension between self-styled legal "nationalists" and spokesmen for more
cosmopolitan learning. This tension was an important factor in the great
rivalry between Edward Coke and Francis Bacon, and was acknowledged by
them both. But even the contrast between Coke and Bacon was not without
precedent. The narrow focus of the indigenous land law of Littleton's Ten-
ures was, in the early sixteenth century, met by the cosmopolitanism of St.
German, the philosopher, theologian, and common lawyer. Indeed, the

3 See F. BACON, Maxims of the Law, in 7 THE WORKS OF FRANCIS BACON 307, 321
   (J. Spedding, R. Ellis & D. Heath eds. new ed. London 1872); Coke, Introduction to 4
4 T. LITTLETON, TENORES NOVELLI (London c. 1481).
5 See 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 279-80 (3d ed. 1945); 5 id.
   266-69; T.F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 270 (5th ed.
   1959); Vinogradoff, Reason and Conscience in 16th Century Jurisprudence, 24 LAW
   Q. REV. 374 (1980).
central metaphor of St. German's great book, *Doctor and Student*, represented the tension between an indigenous, professionalized and nationalistic common law, symbolized by the "Student of the Common Law," and a broader, international learning, represented by the "Doctor of Divinity." It is significant that the first section of *Doctor and Student* was originally published in the cosmopolitan Latin, which Francis Bacon so admired, whereas Littleton's *Tenures* and Coke's *Reports* were first printed in the provincial jargon of the Law French.

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8 See F. Bacon, *supra* note 3, at 322. Bacon stated that in writing the "Maxims" he put the rules themselves... in Latin (not purified further than the propriety of terms of law would permit; but Latin); which language I chose, as the briefest to contrive the rules compendiously, the aptest for memory, and of the greatest authority and majesty to be vouched and alleged in argument: and for the expositions and distinctions, I have retained the peculiar language of our law, because it should not be singular among the books of the same science, and because it is most familiar to the students and professors thereof, and besides that it is most significant to express conceits of law; and to conclude, it is a language wherein a man shall not be enticed to hunt after words but matter. *Id.*


11 That this choice of language reflected a deliberate, symbolic allegiance to intellectual schools was made explicit by at least Coke and St. German. C. St. German, *Doctor and Student* xxi, 7 (Selden Soc'y Pub. No. 91, T. Plucknett & J. Barton eds. 1974) (1st eds. London 1523 (Dialogue I), 1530 (Dialogue II)); Coke, *To the Reader*, in 3 Coke Rep. (15th page, unpaginated) (London 1602); see P. Winfield, *supra* note 9, at 7-15. Coke's preface defending the use of law French is written, ironically, in English and Latin. Coke is wrong that St. German first wrote in English, as the first two editions of the first dialogue, in 1523 and 1528, were in Latin. 5 W. Holdsworth, *supra* note 5, at 267. Coke was, himself, fluent in Latin.

Bacon was always attracted to the use of Latin, despite his intense patriotism for English institutions. See F. Bacon, *supra* note 3, at 313-23. Of course, love of one's own legal institutions and love of cosmopolitan learning are not incompatible. John Adams and Alexander Hamilton, for example, both knew some civil law. See 1 J. Adams, *Diary and Autobiography of John Adams* 44-45 (L. Butterfield ed. 1964); J. Adams, *The Earliest Diary* 10-11, 55-59, 100-01 (L. Butterfield ed. 1966); 1 J. Adams, *Legal Papers of John Adams* 2-3, 228 (L. Wroth & H. Zobel eds. 1965); 2 id. at 257-60; 3 id. at 182, 191, 203, 207, 278, 285, 286-87, 311, 313, 346, 350; 1 The Law Practice of Alexander Hamilton 6-7 (J. Goebel ed. 1964); 2 id. at 48-231 (J. Goebel ed. 1969).
Later on, Blackstone's arch-enemy, Bentham, would also look to "universal jurisprudence" to counter a narrow nationalistic outlook.\textsuperscript{12} Seeing himself, like Montesquieu, as "occupied in bringing rude establishments to the test of polished reason,"\textsuperscript{13} Bentham would contrast the "provincial barbarism" of "expositors" such as Blackstone and the English bar—in Bentham's words, "that . . . enervated breed"\textsuperscript{14—with the universal rationality of Beccaria, Montesquieu, and, to a lesser extent, Grotius and Pufendorf.\textsuperscript{15}

Sir Thomas Ridley and Charles Molloy provided a striking example of this dialectic. If the two men can hardly be described as being of the same stature as the other great contrasting figures, it is not because they lacked importance to their legal contemporaries, nor because the contrast between their respective lives and works lacked vividness. Instead, literally nothing has been written about either Ridley or Molloy,\textsuperscript{16} probably because of subsequent ignorance as to the nature and far-reaching effects of the struggle that they, to a unique degree, represented: the so-called "incorporation" of civil law ideas and methodology into the English common law, particularly in the context of mercantile law.

The preeminence of common law courts in mercantile matters did not occur by a magic wave of Lord Mansfield's hand. Rather, it was the result of centuries of doctrinal development, debate, advocacy, and jurisdictional conflict.\textsuperscript{17} Modern texts give the content and style of this debate remarkably short shrift, as if the debate were somehow destined to a foregone conclu-
sion, or empty of issues relevant to modern thought. But a growing awareness in the field of international trade that nationalist doctrines have obstructed the development of mercantile law and hardened the arteries of commerce may lead to new interest in how this situation came about. More important, the contrasting perspective of a cosmopolitan rather than a national focus, a perspective central to this as well as to other great doctrinal disputes of English law, may again seize the attention of jurists and practicing lawyers alike. The debate of the “Doctor and Student” is both ancient and continuing.

This Article is an attempt to describe the key literature of this debate, from the origins and background of Ridley’s great little book, A View of the Civile and Ecclesiastical Law, published in 1607, through the practical law merchant jurisprudence of Gerard Malynes and his followers, to the critical publication of Charles Molloy’s immensely popular Treatise of Affairs Maritime and of Commerce in 1676. The thesis of the Article is that Ridley’s brilliant concept of a specialized law merchant bar, built around the civilian strongholds of the Admiralty and Doctors’ Commons, was ultimately overtaken and frustrated by the “professionalization” of mercantile custom—the adaptation of the law merchant for use by the common lawyers as professionals. This was achieved by common law jurists, particularly Molloy, long before the great decisions of Lord Mansfield that allegedly “incorporated” the law merchant into the common law.

II. SIR THOMAS RIDLEY (C. 1549-1629) AND THE NEW CIVILIAN SPECIALIZATION

The leading English civilian writers before Sir Thomas Ridley, such as Thomas Smith, Alberico Gentili, William Fulbecke, and John Cowell, all sought to use the civilian experience to give a new perspective to common

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19 By the end of the nineteenth century, the conception of comity and later proposals to establish an international basis for conflicts law, looking “towards the establishment of a general system of international jurisprudence” that Story had hoped for, had been eclipsed by positivism, importing an exclusive and nationalistic emphasis...


20 T. Ridley, A View of the Civile and Ecclesiastical Law (London 1607).

21 C. Molloy, Treatise of Affairs Maritime and of Commerce (London 1676).
law institutions. Ironically, only a common lawyer, St. German, was particularly successful, and John Cowell's final attempt, his famous law dictionary, *The Interpreter*, was suppressed by a Royal Proclamation after a major outcry in the Commons about his absolutism and foreign ideas. Confronted with this failure—or at the most very limited success—later English civilians began to write very differently from their intellectual forebears about the application of civilian ideas in England.

This change of focus in English civilian writing involved several factors. The Bartolist school of Roman law study, which encouraged a direct synthesis of Roman ideas and national customary law, had great influence on Gentili and Fulbecke. By the end of the sixteenth century, however, Bartolism was increasingly challenged by the “new humanism” on the Continent. The new humanists, who had something close to a modern historian's sense of chronology, linguistics, and scientific analysis, damaged Bartolist confidence in synthesis by relentlessly exposing the great differences between classical Roman law and the *ius commune* of renaissance Europe.

In addition, although common law hostility to civilians has been overestimated, common lawyers did not embrace Fulbecke’s ingenious dialogues or Cowell’s strenuous attempts to fit the common law into the framework of Justinian’s *Institutes*. To the contrary, the central common law courts and their nurseries, the Inns of Court, were showing a good deal of insularity and vigor by 1607. This insular strength was assisted in no small degree by Sir Edward Coke’s attempts to collect and strengthen the common law authority, first by his *Reports* (initially published between 1602 and 1614) and later by his *Institutes* (Part I was initially published in 1628, Parts II, III, and IV, posthumously, in 1642, 1644, and 1644 respectively).

Furthermore, the time for calm discourse on legal theory was growing short as James I took the throne. Catholic influence in England was growing,
fed by the militant reform of the Douai school, just across the narrow channel in the Spanish Netherlands. Particularly at Oxford, “idealistic students heard whispers of the exciting new ideas spreading from Rome. Some among them were so fired with curiosity that they traveled to the Catholic continent to learn more.” Meanwhile King James, a man of no little intellectual fervor himself, was writing and talking about government in a way that the earlier Tudor monarchs would have considered politically unwise, if not actually wrong. Continental learning, foreign travel, and belief in executive lawmaking—all civilian trademarks—were becoming seriously unfashionable among some English. The taint of political and religious prejudice was there to be used, fairly or not, by the rival of the civilian influence.

The final factor was jurisdictional conflict. Under the leadership of Edward Coke, the common lawyers had sought to consolidate and expand the jurisdictional powers of the central common law courts. There is no evi-

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34 Id. at xv.

35 See G. Davies, The Early Stuarts, 1603-1600, at 15-32 (1959); The Political Works of James I, at 326-35 (McIlwain ed. 1916); D. Willson, King James VI and I, at 243-70 (1956).

36 See Coquillette, supra note 6, at 4-5 & n.7, 76-85. Note that the literal definition of lex regia in id. at 77-78 n.406, referring to Bracton, should more properly read "empowers" rather than "binds."

37 It must be remembered, however, that "Coke's reputation as the prohibiting judge is exaggerated, largely because he was the leader of the common law forces the policies of the courts in administering the writ were attacked politically." Gray, The Boundaries of the Equitable Function, 20 AM. J. LEGAL HIST., 192, 225 (1976). The common lawyers began to exert pressure on all the civil law jurisdictions before Coke became prominent, and continued after his departure. “[T]he encroachments of the common lawyers did not necessarily begin with Sir Edward Coke.” Barton, Nullity of Marriage and Illegitimacy in the England of the Middle Ages, in LEGAL HISTORY STUDIES 1972, at 28, 47 (1975) (context of ecclesiastical jurisdiction). Coke himself demonstrated the truth of this with regard to the Admiralty by carefully listing all of the early prohibitions against that court in the “Admiralty” chapters of his Fourth Institutes. E. Coke, The Fourth Part of the Institutes of the Laws of England * 137-42. See also Marsden, Introduction to 1 Select Pleas in the Court of Admiralty lxxiii-lxxviii (Selden Soc’y Pub. No. 6, R. Marsden ed. 1892). Whether Coke was “a revolutionist and dictatorial in his methods,” Mathiasen, Some Problems of Admiralty Jurisdiction in the 17th Century, 2 AM. J. LEGAL HIST. 215, 236 (1958), remains a subject of some debate. Compare id. with S. White, Sir Edward Coke and “The Grievances of the Commonwealth,” 1621-1628, at 21 (1979) (as a result of Coke’s “continuing faith in English institutions and his failure to develop a coherent critique of them, he was not inclined to propose fundamental reform in English law”). Still, Coke’s ideas could be characterized as “excessively nationalist.” Mathiasen, supra, at 236.
dence that this expansion was particularly directed at the civilians. The central common law courts were quite capable of devouring their own children, turning on small common law jurisdictions such as the Marshalsea, or on other customary local jurisdictions that were unrelated to Doctors' Commons. Uninhibited in their use of nontransversible fictions to gain jurisdiction, and vigorous in the use of the potent writ of prohibition to protect these gains, the common law central courts made steady progress on all these fronts. And, of course, when they could, they pressured the Chancery as well. But the common law central courts' jurisdictional incursions represented a serious challenge to civilian influence.

A. The Struggles for Jurisdiction

By 1607, all of the civilian judicial strongholds—the ecclesiastical courts, the Court of Requests, the High Court of Chivalry, and the Admiralty—felt the pressure of the common law central courts' incursions on their jurisdiction. But the chief target was the Admiralty and its critical asset, the international law of merchants and sailors. Coke, at least, jealously recognized the fertility of the lex mercatoria in the emerging areas of insurance,
charter parties, negotiable instruments, bills of exchange, bailments, and contract law. Here was a prize that would ensure continued vitality for the common law!

The reaction of English civilian writers was to focus, for the first time, on the jurisdiction of English civilian courts. This was a substantial new development. There had been very little jurisdictional analysis in the works of the early civilian writers, and almost none in the writings of St. German, Smith, Fulbeche, Gentili, and Cowell. The concern of these authors had been the affinity and rivalry of juristic principles. To Bartolists, isolating legal principles by jurisdiction would have violated a commitment to synthesis and comparative analysis. Such juristic isolation would have an air of defensiveness about it. It was incompatible with the Bartolists' intellectual confidence and progressive faith. Thus, the first serious civilian consideration of the ideological problems posed by jurisdictional issues came around the turn of the seventeenth century from Sir Julius Caesar, Master of Requests.

1. Sir Julius Caesar (1558-1636) and the Court of Requests

In 1591, in Locke v. Parsons, the Common Pleas issued the first in a series of prohibitions against the Court of Requests. This peculiar court was not technically a civilian jurisdiction. Although civilians had always been active in the court, they had no monopoly, and common lawyers were at least as prominent. The Court of Requests had extremely early antecedents, although in its mature form it dated from Henry VII's efforts after 1485. Its

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41 See Thorne, Courts of Record and Sir Edward Coke, 2 U. TORONTO L.J. 24, 47-49 (1937). Coke had important experience as an economic administrator and arbitrator in economic disputes. See S. WHITE, supra note 37, at 284-90.

42 See Coquillette, supra note 6, at 35-37.

43 See generally id. at 31-35.


46 Hill, supra note 45, at xxxviii.
initial function, as a lesser court of Chancery, was to provide efficient, responsive justice for the poor.\textsuperscript{47} By Elizabethan times, however, the court was popular primarily for its convenient process, and rich as well as poor were using it—often in open cooperation with common law courts, which used its flexibility to supplement common law process and remedies.\textsuperscript{48} This cooperation was not to last. The Requests, like the Marshalsea, began to find its jurisdiction attacked by writs of prohibitions from the common law courts as the seventeenth century approached, and the common law courts became more jealous of their competition.

It was, therefore, a critical appointment in 1591 that named Sir Julius Caesar (1558-1636), a devoted civilian with a D.C.L. from Paris, as a Master of Requests.\textsuperscript{49} Caesar's legal philosophy was close to that of Cowell and Fulbecke. He was not only a member of the College of Advocates, Doctors' Commons, but also was admitted to the common lawyers' Inner Temple, and was, in 1590, a Bencher of that Inn, thus sitting with Edward Coke.\textsuperscript{50} Not surprisingly, Caesar saw no conflict between the civilian learning and the common law, which he regarded as informed by civilian principles.\textsuperscript{51}

Caesar's reaction to the prohibitions against the Requests was to publish a short book, The Ancient State, Authoritie, and Proceedings of the Court of Requests,\textsuperscript{52} in 1795. His posture was to meet the common lawyers on exactly their ground, accepting all of their basic assumptions.\textsuperscript{53} Thus, he attempted to establish that the court was justified by "its existence time out of mind of man" as part of the royal council, with massive historical precedents entirely within the common law framework.\textsuperscript{54} As L.M. Hill observed, "How little his technique, both in respect of the citation of precedent and the use of analogy, differed from the common lawyers!"\textsuperscript{55}

Indeed, Caesar at no point went beyond common law precedent to justify the Court of Requests and its peculiarly efficient process and equitable remedies, and did not appeal to the apposite civilian principles of ratio naturalis and aequitas mercatoria, or to policy arguments.\textsuperscript{56} Apparently unimpressed by their own style of analysis, even as employed by a distinguished civilian like Caesar, the common law judges effectively castrated the Requests by

\textsuperscript{47} Id. at xxxviii-xxxix.
\textsuperscript{48} See id. at xxiv-xxx.
\textsuperscript{49} See B. Levack, supra note 16, at 216-17; Hill, supra note 45, at xxii.
\textsuperscript{50} B. Levack, supra note 16, at 216-17.
\textsuperscript{51} See Hill, supra note 45, at xxvii-xxviii.
\textsuperscript{52} J. Caesar, The Ancient State, Authority, and Proceedings of the Court of Requests (London 1597).
\textsuperscript{53} Hill, supra note 45, at xviii, xxvii.
\textsuperscript{54} Id. at xviii.
\textsuperscript{55} Id.
\textsuperscript{56} For a discussion of these civilian principles, see Coquillette, supra note 6, at 23-25.
hundreds of prohibitions. In 1606, Caesar was named Chancellor of the Exchequer and, apparently, gave up the fight.

Still, the Requests was in essence a limited, domestic court, and not a special civilian preserve. The civilians of Doctors’ Commons could regard its troubles with the same equanimity as those of the beleaguered Marshalsea. But the Admiralty jurisdiction was a different matter altogether.

2. The Attacks on the Admiralty

There had long been trouble between civilian practitioners in the Admiralty and the common lawyers. In 1575 the civilians and common lawyers reached a major agreement, but their accord was to be short-lived. This agreement, signed by the Lord Chief Justice, the Justices of the Queen’s Bench, and the Judge of the Admiralty, provided for a concurrent jurisdiction over foreign mercantile contracts in both common law and in the

57 Prynne, writing in 1669, stated: "This Upstart Court [Requests] was in very great request . . . extending its jurisdiction to all causes in Equity, equal with the Chancery, without any legal foundation or authority . . . yet it is since grown quite out of request, and totally discontinued, and if not finally abolished by the Statute of 17 Caroli I c.10." W. Prynne, Brief Animadversions on, Amendments of, and Additional Explanatory Records to, the Fourth Part of the Institutes of the Lawes of England; concerning The Jurisdiction of Courts 52 (London 1669). See generally Gray, supra note 37, at 197; Hill, supra note 45, at xli-xliii.

58 The Admiralty jurisdiction was not limited to the London court that first met in St. Margaret’s, Southwark, and then in Doctors’ Commons hall itself. There was an inactive Admiralty Court of York that dealt with ships, coastal shipping, prizes, and overseas trade—"especially the trade with the Baltic and tobacco trade with Virginia." J. Purvis, The Records of the Admiralty Court of York 8-9 (1962). Expanding trade and complex diplomacy—which often manifested themselves in cases of privateers, prizes, and seized goods—thrust both admiralty courts increasingly into a spotlight. See V. Ponko, The Privy Council and the Spirit of Elizabethan Economic Management, 1558-1603, at 33, 40-44, 55 (1968). "It was through the facilities of the Admiralty Court that such matters as the impressment of ships and mariners, embargo, reprisals, preservation of wrecks, repression of privacy and of convoy were heard and determined. Extensive use was made of arbitration and negotiation processes . . . ." Id. at 55 (footnote omitted).


60 It has been contended that the judges of the common law courts never signed the Agreement. Marsden, Introduction to 2 Select Pleas in the Court of Admiralty xiv (Selden Soc’Y Pub. No. 11, R. Marsden ed. 1897). On the other hand, Zouch and Prynne’s printed texts indicated signatures by the common lawyers. W. Prynne, supra note 57, at 99-100; R. Zouch, supra note 59, at 121-22.
Admiralty, with a strict limitation on prohibitions. There was a certain amount of sense to this arrangement. Litigants could choose the most convenient forum and law—a sort of free competition of available law—without running the danger of being whiplashed between two courts. The hope was that this would put a stop to the increasing Admiralty monopolies of the earlier Tudor period, and also protect the Admiralty’s identity and quiet the constant jurisdictional skiriming in the law merchant. The only

61 W. Prynn, supra note 57, at 98-101; R. Zouch, supra note 59, at 121-22.
62 Later attempts at a “solution,” including the Agreement of 1633, the Ordinance of 1648, and even the appeals of Sir Leoline Jenkins to the Parliament in 1662, focused on the same natural modus vivendi. See Jenkins, Argument, in Behalf of a Bill to ascertain the Jurisdiction of the Admiralty, in the House of Lords, in 1 W. Wynne, The Life of Sir Leoline Jenkins lxxvi-lxxxv (London 1724). As Jenkins argued:

[We] of the Admiralty are content, that Suitors may have their Option of the court they would sue in: If Mariners will go for their Wages, Owners for their Freight, Merchants for their Damages, Material Men for their Money, to the Common Law, we shall not in the least regret it: But if they choose rather to come to the Admiralty, (as certainly they will not, unless they find the Dispatch quicker, the Proceedings less chargeable, and the Methods of Judgment and Execution more suitable to their Business) we desire leave to receive them, and do them Justice, without the danger of a penal Statute, and without the interruption of Prohibition when once we are possessed of the cause. And this is all we desire.

Id. at lxxxv; see Steckley, Merchants and the Admiralty Court During English Revolution, 22 Am. J. Legal Hist. 137, 166-67 (1978); Yale, A View of the Admiralty Jurisdiction: Sir Mathew Hale and the Civilians, in Legal History Studies 1972, at 87, 93-95 (1975).

Again, the essence of the Admiralty’s superior efficiency was its cosmopolitan expertise:

All Merchants Abroad make their Contracts according to the marine or civil Law, the Differences therefore upon those contracts, should not judged by a Law that hath nothing in it, either provisional or decisive in such Cases. And pardon me, My Lords, if I say the Judges of the Common Law cannot so easily and naturally take Notice of the marine Law. There are so many terms and Clauses (which are vocabula Artis, & clausula Juris) in every Contract, that it is very hard to make an English jury to understand them . . . .

Jenkins, supra, at lxxxii. As Marsden and Holdsworth noted, this same argument was made as early as 1584 by Walsingham, who wrote to the Chief Justice of the King’s Bench warning him against prohibitions to the Admiralty in these mercantile cases because “of these marine and foraine causes [the common law] is thought not soe properly and aptly to take knowledge.” 5 W. Holdsworth, supra note 5, at 138 n.5; see 1 Select Pleas in the Court of Admiralty, supra note 37, at 231-32.

Coke’s response to this kind of argument was simply that, if a question of civil law arose in handling “causes transitory,” the common law judge could consult with the civilians. 1 W. Holdsworth, A History of English Law 323 n.2 (7th ed. 1956). This advice was later followed, at least in spirit, by Lord Mansfield. See 2 Brownlow Rep. 17 (London 1654) (collecting relevant cases); E. Heward, Lord Mansfield 173-75 (1979); notes 213-14 infra.
strict Admiralty monopoly that remained was over cases pertaining to contracts entered into and to be performed on the high seas, and certain narrow prize and maritime specialties.63

The story of how this agreement was subverted has been told many times.64 The essence of the subversion was the continuing use by the common law courts of nontransversible fictions—fictions which could be pleaded by parties in favor of common law jurisdiction, and not "transversed," i.e., denied on the basis of fact. These fictions could only be invoked to establish common law jurisdiction, never to deny it. Such practices, along with a revival of prohibitions against the Admiralty, occurred even well before Coke.65 The most critical cases often did not involve the

63 This was, arguably, the extent of exclusive Admiralty Jurisdiction after 1575. The permissive jurisdiction was, of course, far wider:

All contracts made abroad, bills of exchange (which at this period were for the most part drawn or payable abroad), commercial agencies abroad, chart-parties, insurance, average, freight, non-delivery of, or damage to, cargo, negligent navigation by masters, mariners, or pilots, breach of warranty of seaworthiness, and other provisions contained in charter parties; in short, every kind of shipping business was dealt with by the Admiralty Court.

Marsden, supra note 37, at lxvii. "In addition, the Court exercised jurisdiction over various torts committed on the sea, and in public rivers, over cases of collision, salvage, fishermen, harbours and rivers, and occasionally over matters transacted abroad, not otherwise outside the scope of Admiralty jurisdiction." 1 W. HOLDSWORTH, supra note 62, at 321. "[E]ven marriage contracts and wills made abroad are occasionally met with as the subject of suit in Admiralty [in the 16th century]." Id. at 321 n.6, quoting Marsden, supra note 37, at lxx. See generally Runyan, The Rolls of Oleron and the Admiralty Court in Fourteenth Century England, 19 AM. J. LEGAL HIST. 95, 104-11 (1975); Senior, Early Writers on Maritime Law, 37 LAW Q. REV. 323, 325-28 (1921) (scope of early Admiralty activity). Prior to the 1575 Agreement, the criminal and civil jurisdiction of the Admiralty had been expanded by statute, 28 Hen. 8, c. 15 (1536) (criminal jurisdiction); 32 Hen. 8, c. 14 (1540) (civil jurisdiction).

64 The classic accounts are in 1 W. HOLDSWORTH, supra note 62, at 322; T.F.T. PLUCKNETT, supra note 5, at 662-64; Mears, The History of the Admiralty Jurisdiction, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 353 (1908). For two excellent recent perspectives on the later aspects of this struggle, see Steckley, supra note 62; Yale, supra note 62.

65 For an extensive list of such fictions, commencing as early as 1375, see Sack, Conflicts of Laws in the History of the English Law, in 3 LAW: A CENTURY OF PROGRESS 1835-1935, at 356-60 (1937). Coke's first well-known "attacks" on the Admiralty were in 1588 in Sir Thomas Bacon's Case, 74 Eng. Rep. 394 (K.B. 1588), (revocation of patents of vice-admirals determinable at common law) and in 1601 in Sir Henry Constable's Case, 77 Eng. Rep. 218 (K.B. 1601) (definition of "wreck" limited). But he was not alone. See, e.g., Bridgeman's Case, 80 Eng. Rep. 162 (C.P.1614) (Hobart, C.J.) (contracts made at sea where debts are to be paid on land must be sued at common law). "Coke may properly be classed as the chief antagonist of the Admiralty Jurisdiction, [but] the side of the common law was well represented both before and after his time by other men of great ability and dedication to victory
Admiralty at all, but the issue of when the Common Pleas could take jurisdiction over a purely "transitory" foreign matter.

One of the better illustrations was Dowdale's Case in 1606, a case that Coke reported. The case involved an action in debt against an executor. The executor pleaded that the estate had been "fully administered," but the jury found that there were assets in Ireland. The executor raised the defense that there was no common law jurisdiction and that it was improper to try the case to a jury outside of the locale. Coke's response indicated that changes in the role of the jury in common law trials had undermined this defense. By 1606 the function of a jury had increasingly become to derive evidence from witnesses, not from the jury's own knowledge, and the court accordingly held that "when the place is material, as when it is made parcel of the issue, there the Jurors cannot find the point in issue in any other place, ... [but] ... there is a difference, when the place is named but for conformity and necessity." In short, when the site of the transaction is irrelevant to the issue, it should not bar common law jurisdiction in London. Coke noted "that where as well the contract as the performance of it is wholly made, or to be done beyond the sea, and it so appears, there it is not triable in our law; but here the promise was made here in London ...".

The critical word "appears" refers to the long-established practice of nontransversible pleading of fake locations when the location was not in issue. These fake locations were always within the jurisdiction of common

in a struggle which, at times, took on some of the aspects of a holy war." F. Wiswall, The Development of Admiralty Jurisdiction and Practice Since 1800, at 6 (1970).


68 Id. at 324.

69 Id.

70 Id. at 325 (emphasis supplied). "[F]or many Merchants and other Men, who have stocks and goods to a great value beyond Sea, are indebted here England [sic], And God forbid, that those goods should not be liable to their debts; for otherwise there should be great defect in the law." Id. Cf. Protector v. Ashfield, 145 Eng. Rep. 381 (Ex. 1656) (since power of bishops to grant certificates of conformity had been abrogated, conformity of recusants must be tried by common law courts to avoid failure of justice), cited by Sack, supra note 65, at 410 n.65.

As Holdsworth noted, Dowdale's Case achieved by a fiction what had been attempted, unsuccessfully, by legislation. "[I]n 1539 a bill [Lord's Journals, i 112], which was apparently intended to give the common law courts jurisdiction over contracts made abroad, was rejected by the House of Lords. But in the latter half of the century the power which the legislature refused to give was secured by the adoption of this fiction. In Dowdale's Case (1606) its legality was finally upheld ..." 5 W. Holdsworth, supra note 5, at 142 (footnotes omitted).

71 "[B]y the aid of this fiction is never 'so appeared'; cf. Robert v. Harnage, (1704) 2 Ld. Raym. 1043, where by the inadvertence of the pleader in omitting to insert the
law courts, even when the actual loci of the transactions at issue were not. In this way, the common law courts were given jurisdiction over cases normally outside their sphere. Thus, in Prynne's words:

[S]ome Common Lawyers and Courts, to enlarge their Jurisdiction beyond its ancient limits, and diminish the Admirals, have by a new strange poetical fiction, . . . or false, contrary, impossible, fraudulent, illegal suggestion, prejudicial to Merchants and Mariners, especially foreigners . . . surmised that Contracts, Bargains, Obligations, Charter-parties . . . [were] made and done at such a place of that name in the Parish of Bow in Cheapside, . . . or in the Parish of Hackney. . . .

[T]hese fictions are meerly intended to deprive Merchants, Mariners, and others, of their ordinary speedy, legal Suits, remedies for such Foreign Contracts, [and] Bargains made, and things done beyond the Seas, in the Admirals Court . . . .

As Holdsworth observed, "[t]he result was that the common law courts, instead of being the least open of all courts to foreign actions, became the most open, provided that the cause of action was transitory."73 One merely had to plead that a contract was arrived at "Amsterdam . . . viz apud London in Parochiis Sanctae Mariae de Arcubus in wardis de cheap . . . . [at Amsterdam . . . near London in the Parish of St. Mary le Bow in the Ward of Cheap . . . .]."74

words 'to wit, at London, etc.,' it did so appear, and the writ abated." 5 W. HOLDSWORTH, supra note 5, at 140 n.5.

72 W. PRYNNE, supra note 57, at 95-96. Prynne, whose bizarre background as a radical Puritan would give him no particular civilian sympathies, still abhorred the invasion of the Admiralty jurisdiction by the use of legal fictions. This not only offended his considerable talents as a legal historian, but resulted in wasteful jurisdictional conflicts, which Prynne particularly disliked. "Above all, I shall exhort them [lawyers] to put to their helping hands to settle the clashing Jurisdictions of all publike Courts . . . which have brought a scandal on the Law it self . . . ." W. PRYNNE, To all Ingenuous Readers, especially the generous students and Professors of the Common Lawes of England, in W. PRYNNE, supra note 57, at fol. a2(b).

73 5 W. HOLDSWORTH, supra note 5, at 142.

74 In other words, Amsterdam, Holland, was pleaded as being located in the business district of London. This combination of words was held adequate to bestow jurisdiction on the English common law courts as late as 1795, in The Dutch West India Co. v. Jacob van Moses, 93 Eng. Rep. 733 (C.B. 1795). Adding words could be dangerous, however, as the pleader discovered in Davis v. Yale, 125 Eng. Rep. 528 (C.P. 1699). In that case, assault and false imprisonment of the plaintiff was pleaded at "Fort St. George, in the East Indies, in parts beyond the seas, viz. at London, in the parish of St. Mary le Bow, in the Ward of Cheap." Id. at 529, translated by Sack, supra note 65, at 432 n.229. This declaration was held as "repugnant and absurd" not because of the fiction—but because the words "in parts beyond the seas" contradicted the fiction! Id. at 530, translated by Sack, supra note 65, at 432 n.229.

This fiction attracted comment from three great judges: Coke, Ellesmere, and Mansfield. Coke stated:
Fictional pleading of venue was a very old tradition at common law. As early as 1375, action was brought on a deed made at Harfleur, Normandy, as

An Obligation made beyond the Seas may bee sued here in England in what place the Plaintiff will. What then if it beare date at Burdeaux in France: where shall it be sued? And answere is made, that it may be alleged to be made In quodam loco vacat' Burdeaux in France, in Islington in the Countie of Middlesex, and there it shall be tried, for whether there be such a place in Islington or no, it not traunders in that case. These points are necessary to bee knowne in respect of the varietie of opinions in our Bookes.

E. Coke, The First Part of the Institutes of the Lawes of England * fol. 261(b) (citing, inter alia, Dowdale's Case).

Ellesmere's discussion was, not surprisingly, more critical than Coke's:

For the Court of ye Admiraltie, the Prohibitions bee for the most part graunted vpon suggestion, that the suite in that Court, is for some matter done, or happening within the Body of the Sheires, and not vpon ye sea or beyond the seas; wherefore it were requisite, that hee that sueth for a Prohibition vpon such a suggestion, should eyther make oath that his suggestion (or att least that part of it) is true; or else utter into Bond with suretyes to proue the same to bee true. And the Court may in discretion cause the partyes to take such an Oath, as in the Exchequer they doe sometymes cause ye Informers vpon some penall statutes to doe. [Plowden fol. I]

And soe on the other side, it were meete, that hee that libelleth in the Admirall Court for any matter done vpon ye sea, or beyond the seas, or otherwyse, within ye Admirall Jurisdiction should make the like oath, that his libell is in that point true, or else enter into Bond with suretyes to proue ye same true. But suites for matters properly determinable in the Admirall Court, are withdrawn from that Court, to the Courts of the Common Lawe (specially to ye Kings Bench) by an other late Deuise, more Common and worse then the Prohibitions; That is, by Actions vpon ye Case grounded vpon a false suggestion, and vaine fiction of a Trouer.

Supposing in some Cases, that some Goods or Marchandizes, that indeed never were in England; and in some cases, that a Shipp itselfe was lost in Cheapside in London, or in some other place in Middlesex, and there found by the Defendant, and converted to his vse. And soe that matter, which naturally, and properly ought to bee decided in the Admirall Court, for that the grounds and Cause of the suite is matter happening on ye sea, or beyond ye seas, is indirectly, by an vntrue and vnlawfull fiction, drawne to bee tried by a lay Iurie of London or Middlesex and iudged by the Common Lawe. This practise, is, lately grown too common, and as it is now put in use, it doth not only wrong the lawfull Jurisdiction of the Court of Admiraltie; but doth alsoe make a great Breach in a Principall Maxime of ye Common Lawe itselfe, which is, that all things (specially the right and Title of Lands) ought to bee tried in their owne proper Country. But by this shift, vpon a fiction, That Tinne, Leade, Coles, Corne, Hay, Timber, and such like whatsoever, that did growe and come out of ye Landes in Cornewall, Yorkshire, or Wales, were lost, and found in Cheapside or Middlesex; the verie right and Tiltes of the Land itselfe is brought in triall there. A matter full of inconuenuence and against the true Rules of ye Common Lawr, and therefore meete to bee reformed.

"Harfleur in the County of Kent." There are hundreds of examples. This

Lord Mansfield discussed the fiction at length in Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (C.P. 1774), and his comments reflected more of Coke than Ellesmere:

[All] actions of transitory nature that arise abroad may be laid as happening in an English country . . . . [T]he law has in that case invented a fiction; and has said, the party shall first set out the description truly, and then give a venue only for form, and for the sake of trial, by a velicet, in the county of Middlesex, or any other county. But no Judge ever thought that when the declaration said in Fort St. George, viz. in Cheapside, that the plaintiff meant it was in Cheapside. It is a fiction of form . . . . There are cases of offences on the high seas, where it is of necessity to lay in the declaration, that it was done upon the high seas; as the taking a ship . . . . It is necessary in such actions to state in the declaration, that the ship was taken, or seized on the high seas, velicet, in Cheapside. But it cannot be seriously contended that the Judge and jury who try the cause fancy the ship is sailing in Cheapside: no, the plain sense of it is, that . . . . Cheapside is named as a venue; which is saying no more, than that the party prays the action may be tried in London.

Id. at 1030-31. Mansfield admitted, however, that there were times when the fiction would not be given force:

[There] are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration states a specialty to have been made at Westminster in Middlesex, and upon producing the deed, it bears date at Bengal, the action is gone; because it is such a variance between the deed and the declaration as makes it appear to be a different instrument. There is some confusion in the books upon the Stat. 6 Ric. 2. But I do not put the objection upon the statute. I rest it singly upon this ground. If the true date or description of the bond is not stated, it is a variance.

Id. at 1030. Nonetheless, Mansfield’s conclusion in Mostyn was that an action of alleged trespass and false imprisonment by a native Minorcan against the Governor of Minorca in Minorca was maintainable in England, despite the defendant’s argument that "the cases where the Courts of Westminster have taken cognizance of transactions arising abroad, seem to be wholly on contracts, where the laws of the foreign country have agreed with the laws of England, and between English subjects . . . ." Id. at 1023. Mansfield claimed that there had been two unreported earlier cases in which he had entertained actions for damages to real estate in Nova Scotia and Labrador, where there were then no local courts. Id. at 1032. For an excellent discussion of the Mostyn case, see Sack, supra note 65, at 390-91 nn.225 & 227.

Mansfield’s role in the incorporation process has been widely noticed, but rarely analyzed. Such an analysis would be worth undertaking, particularly against the ideological background of the disputes between the civilian schools and the common lawyers. A rudimentary attempt will be made in the third Article in this series.

75 Y.B. Hil. 48 Edw. 3, pl. 6, fols. 2-3 (1375).

76 The form pleading for the fiction is in 1 R. BROOKE, GRAUNDE ABRIDGEMENT fol. 319(b) (London 1586) (plea 95). For more examples, see Sack, supra note 65, at 406-07 nn.50-51. At first, only occasional exceptions were made to the rule that foreign cases were not triable at common law. Id. at 344-46; see E. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND * fols. 260(b)-261(b) (reprinting and commenting on Littleton’s Tenures § 440).
type of fiction is not as outrageous as it might seem, for it essentially comports with the maxim that *fictio legis neminem laedit or fictio legis [non] inique operatur alicui damnun vel injuriam* ['a legal fiction does not properly work loss or injury'].\(^{77}\) Such fictional pleading could be viewed as a method for avoiding an obviously unjust and inappropriate application of a rigid rule—without the difficulty of reformulating the rule. As Coke said, "*In fictione juris semper aequitas existit* [Equity is the life of a legal fiction]."\(^{78}\)

Thus, at first glance, at least in a case like *Dowdale's Case*, fictional pleading

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It is often tyme argued in the lawes of Englande what maters ought to ryght to be determyned by the common lawe/and what by the admyralles courte or by the spyrytuall courte. And also if an oblygacyon bere date out of the realme/as in Spayne/Fraunce/or such other It is sayd in the law and trouthe it is that they be nat pledable at the common lawe.

C. St. German, *supra* note 11, at 180.


Maine described the "legal fiction" as a key instrumentality in legal development. "A general proposition of some value may be advanced with respect to the agencies by which law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fictions, Equity and Legislation." H. Maine, *supra*, at 23-24.

Maine, Fuller, and Frank all extended the term "legal fiction" beyond the old Roman law *fictio* (a nontraversable averment in a pleading) to include "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration . . . ." *Id.* at 25. As will be seen, civilians were familiar with the *fictio*, the fake averment to establish jurisdiction. *See* notes 111-15 and accompanying text infra. But the civilians would revolt at "legal fiction" in the latter, extended sense as a concealed, deceptive method of law reform. Among other things, "legal fictions" in the latter sense tended to endow the judiciary with *sub rosa* legislative powers.

Such "concealment," even if politic or psychologically reassuring, also offended the intellectual sensibilities of rationalists, from Bacon to Bentham. As Bacon said, "[A] general custom of simulation is a vice, rising either of a natural fakeness or fearfulness, or of a mind that hath some main faults." F. Bacon, *The Essays or Counsels, Civil and Moral*, in 6 *The Works of Francis Bacon* 365, 381 (J. Spedding, R. Ellis & D. Heath eds. new ed. London 1870).

Bentham was even less circumspect: "In English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness." J. Bentham, *The Elements of the Art of Packing*, in 5 *The Works of Jeremy Bentham* 92 (J. Bowring ed. 1843).

Frank argued that the opponents of the fiction, including Bentham, confused "fictions with statements intended to conform with reality." J. Frank, *supra*, at 339. The next Article in this series will argue that Frank is mistaken, at least as to the English civilians' opposition to the broad use of legal fictions. It will also attempt to demonstrate that both Bacon and Bentham owe major debts to the English civilian analysis.
was not unreasonable. "[T]he Jurors have found the substance of the issue, that is to say, Assets: and the finding that they are beyond the Sea is surplusage . . . ." Moreover, as Coke added in his personal note to his report of Dowdale's Case, the same rationale could be applied to charter parties governing ships in foreign ports, insurance policies for foreign ventures, and other Admiralty specialties.

Of course, this was no disaster for the Admiralty as long as the 1575 Agreement limiting prohibitions was observed. At worst, parties had a choice of venue. And Coke well understood the reason for the Agreement in the abstract; as he had said, "nemo debut bis vexari, sit constet curiae quod sit pro una & eadem causa [no man ought to be twice vexed, if it can be proved in Court to be for one and the same cause]." But by 1605, in Thomlinson's Case, the Common Pleas had already declared that, not only did they have a proper venue for foreign contracts, but also that the Admiralty did not. In other words, Admiralty had jurisdiction of things done entirely on the high seas (super altum mare), but no jurisdiction of things "on the shores" (super littora), or even in port (in portu maris). Furthermore, it was alleged that Admiralty was "no court of record" and accordingly could not fine.

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80 Id. at 325-26.
81 Id. at 325.
82 Id.
83 Sparry's Case, 79 Eng. Rep. 148, 148 (Ex. 1589). Sparry's Case involved two actions upon the case for trover and conversion concerning the same goods, brought by the same plaintiff against the same defendant. The first action was in the King's Bench and the second in the Exchequer. The Exchequer, with Coke's approval, abated the second bill. Coke observed:

But if a man bring an action of debt . . . in any Inferior Court, and afterwords brings an action of debt in the Common Pleas, this suit in the higher Court, which is brought pending the suit by bill in an Inferior Court, shall not abate . . . . And so note Reader, all the Books which prima facie seem to disagree, are on full and solid reason unanimously agreed and reconciled.

Id. at 149-50.
85 Id. at 1379.
87 Thomlinson's Case, 77 Eng. Rep. at 1379. "Some Courts cannot imprison, fine, nor amerce, as the Ecclesiastical Courts . . . who proceed according to the Canon or Civil Law." Godfrey's Case, 79 Eng. Rep. 1199, 1202 (1615); see E. Coke, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND * 135. "Coke's view [of record] was obviously designed to cripple these rival courts . . . ." 5 W. HOLDSWORTH, supra note 5, at 159. But see, Thorne, supra note 41, at 47-49 (excellent general discussion of Coke's use of the "court of record" idea to promote his own ends). It is Thorne's view that Coke's true concern centered more on the judicial power of Parliament than on the rivalry of the conciliar courts. Id. at 49.
In 1606, Coke became Chief Justice of the Common Pleas. He wasted little time in contemplating the Agreement of 1575, which he has been accused of "deliberately misconstruing." It soon became crystal clear that he would issue prohibitions against the Admiralty whenever "it can be made to appear to the court that it [the transaction] was done upon land [either foreign or English]." In addition, "If part of the matter be done upon the sea, and part in a county, . . . the common law shall have all jurisdiction." This attitude, combined with the principle of fictitious pleading in Dowdale's Case, meant that no party in Admiralty could be certain of not being "twice vexed" by common law interference. The only limit, in Coke's mind, was that a prohibition should not issue after an Admiralty sentence "when the court shall be advised that it is merely for vexation and shall be intended for delay." By Hawkeridge's Case in 1617, the Common Pleas would find an Admiralty return for habeas corpus insufficient in a clear-cut Admiralty prize case because the return simply stated that the matter was "maritime," when it should have said that the matter was "maritime" "super altum mare, infra jurisdictionem admiralli [on the high seas in the jurisdiction of the admiral]." The court's superbly legalistic rationale was that, as pleaded, the term "maritime" was too vague. It could be understood to include matters taking place "on the shores," (super littora), which the court regarded as outside the Admiralty jurisdiction, as well as matters

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88 In the view of Barbara Malament, Coke "deliberately misconstrued" the Agreement of 1575 and "stood alone" when he "persisted in attacking the Admiralty." Malament, The 'Economic Liberalism' of Sir Edward Coke, 76 Yale L.J. 1321, 1327 (1967) (an excellent analysis of Coke's economic views). As previously indicated, however, there is scholarly doubt as to whether the Agreement was actually executed by the purported common law signatories, and Coke definitely had allies in attacking the Admiralty. See notes 37 & 65 supra.

Coke's position, as reflected in the Fourth Institutes, was that any such "agreement" had no basis in the "three kinds of Authorities in Law. 1. By Acts of Parliament. 2. By Judgments and judicial proceedings: and lastly, by Book cases." E. Coke, The Fourth Part of the Institutes of the Laws of England * 134 (1681 ed.). Coke also alleged that the Agreement of 1575 was not signed:

The supposed agreement . . . hath not as yet been delivered unto us, but having heard the same read over before his Majesty (out of a paper not subscribed with the hand of any Judge) We answer, that for so much therefore as differeth from these answers, it is against the Laws and Statutes of this Realm: and therefore the Judges of the Kings Bench never assented thereunto, as is pretended, neither doth the phrase thereof agree with the terms of the Laws of the Realm. Id. at * 136. For the view that the Agreement was valid, see W. Prynne, supra note 57, at 98.


93 Id. at 1404.
taking place "on the seas," which were indisputably within that jurisdiction. The court also claimed that "maritime" could be understood to include matters in portu maris—taking place in port—which it also regarded as outside the Admiralty jurisdiction. No wonder the civilians were feeling harassed!

This, then, was the common lawyers' strategy: proceedings over transitory mercantile matters begun in the common law courts, utilizing non-transversible Dowdale-type venue allegations, would go peaceably to judgment. Similar matters, begun in the Admiralty, would always be vulnerable to writs of prohibition. Ultimately, if common law doctrines could be made acceptable to merchants, the preferable forum would always be a central common law court. All that was required to effectuate this strategy fully was an effort to "incorporate" some mercantile practices into the common law. This Coke was certainly prepared to do, arguing that the "law merchant"—and indeed the "civil law" of the Admiralty—was part of English national law. There was a sublety to this design not unlike stealing candy from small children.

B. Ridley's Response

At this last hour, Sir Thomas Ridley came into the lists as a true champion for the civilians. Only months after Dowdale's Case, Ridley published his short book, A View of the Civile and Ecclesiastical Law. Hard-hitting and
persuasive, this book captured the immediate attention of James I. So enthused was the King that, reportedly, "Sir Edward Coke undertook from thence to prophecy the decay of the common law." In the critical confrontation between bishops and the common lawyers over prohibition, which culminated in a "show down" before the King in 1610, "the Book which Dr. Ridley hath lately published" was cited as authority.

Ridley, more so than even Francis Bacon or St. German, was an ideal spokesman for cosmopolitan legal learning, a true "Doctor" in the symbolic dialogue with legal nationalism. For one thing, Ridley, unlike Bacon and St. German, was indeed a Doctor of Divinity, as well as a Doctor of Civil Laws. In addition, although Ridley was active as a lawyer for a large portion of his life, he—unlike Bacon, Fulbeke, Gentili, Caesar, and St. German—never affiliated with the common lawyers in an Inn of Court. He was a member of the College of Advocates, Doctors' Commons, and a Master in Chancery—all good civilian "labels."

Ridley was a brilliant man. Second son of a humble Shropshire family, he graduated from Eton, earned a B.A., M.A., and D.D. at King's College, Cambridge, gained a fellowship at that college, and became Headmaster of

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99 The Case de Modo Decimandi, and of Prohibitions debated before the King’s Majesty, 77 Eng. Rep. 1448, 1449 (C.P. 1610):

Doctor Bennet, Judge of the Prerogative Court [the Archbishop’s provincial ecclesiastical judge—the Archbishop claimed jurisdiction "by way of special prerogative"] made a large Invective against Prohibitions in causis ecclesiasticis; and that both jurisdictions as well Ecclesiastical and temporal, were derived from the King: but all that which he spake out of the Book which Dr. Ridley hath lately published, I omit as impertinent . . .


101 Bacon was a member of Gray's Inn, as were Fulbecke and Gentili. Caesar and St. German were members of the Inner Temple. W. Fulbeke, The Pandectes of the Law of Nations fol. 56(b) (London 1602) (Fulbeke); 1 The Compact Edition of the Dictionary of National Biography 77 (Bacon), 285 (Caesar) (1975); 2 id. at 1841 (St. German); Nys, Introduction to A. Gentili, De Legationibus Libri Tres 28(a) (second volume of Carnegie Endowment edition) (J. Scott ed., J. Laing trans. 1924) (Gentili). But see Hogrefe, The Life of Christopher St. German, 13 Rev. Eng. Stud. 398, 402 (1937) (St. German may have belonged to Middle Temple).
Eton, all before he was thirty years old. This, however, was just the beginning of his career, which only at this point turned to law. In 1589, Ridley was admitted as an advocate at the Court of the Arches and in the Chancery. On June 7, 1598 he was incorporated as a D.C.L. at Oxford. The next year he was fully incorporated as a member in Doctors' Commons and became a Master in Chancery. During this time, he served as M.P. for Wye (1586-89) and Lymington (1601). At age fifty (1602) he was made Chancellor of Winchester and Vicar-General to the Archbishop of Canterbury, both fat livings.

Yet, Ridley’s influence on English legal history came not at all from this worldly success, but from *A View*, his only book. And it is ironic that it may have been Coke himself who was responsible for prodding Ridley into action in the critical year of 1607.

1. Ridley and the Jurisdictional Struggles

Ridley was deeply disturbed by the common law prohibition against the ecclesiastical courts which had led to the petition from the Convocation to the King in 1606. He was also incensed with the common law jurisdictional pleading fictions—and with the rationale in *Dowdale's Case*, decided in that same year of 1606. Thus, he wrote:

> [Contracts] as made by any person either in any forraign country, or any haven . . . of the Sea . . . or to any merchandize brought from beyond the Sea are and ought to be of the admirall cognizance . . . and yet the common lawyers (to defeate the Civile Law of the triall thereof) have devised sundry actions . . . whereby they faign that a ship arrived in Cheapside, or some other like place within the citie, and there the Plaintiff and Defendant meeting together bargained on some merchandize . . . by which fiction they pretend the bargaine now to be tryed in the common law.

Despite his vexation, Ridley never attacked Coke personally. *A View* was not a polemical tract, as was Richard Zouch’s *Jurisdiction of the Admiralty*.

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104 The years 1606-07 were certainly important for English civilian fortunes. These years saw not only the first publication of Ridley’s *A View*, but also of Cowell’s ill-fated *Interpreter*. See Coquillette, supra note 6, at 76-83. When Coke came to the Common Pleas in 1606, he allegedly “set himself to cripple the Court of Admiralty and to capture mercantile law for the common lawyers.” T.F.T. PLUCKNETT, supra note 5, at 663.
106 77 Eng. Rep. 323 (C.P. 1606); see notes 66-70 and accompanying text supra.
107 T. RIDLEY, supra note 105, at 172.
of England Asserted. Nor was it a professional analysis of a current legal problem, like Bacon’s Reading on the Statute of Uses. Ridley, in the best civilian tradition, was trying to write a universally valid book, both for his own time and the future. In the end, Ridley relied on the test of “reason.”

Ridley’s approach to the problems of Dowdale’s Case is a good example. Having stated the issues in broad fashion in the passage quoted above, Ridley ignored the political and historical context, and instead couched the issue in terms of the juristic concept of legal “fictions” and their inherent validity: “But that this fiction [nontransversible venue] or any other like qualified to this, should have any such force, as to work any effect in Law, I will shew it unreasonable first by the definition of a fiction, and then by those things that are necessarily attendant thereon.” Like the good civilian he was, Ridley then moved to Bartolus’ definition to argue that a legitimate fiction was an exception to the law allowed in order to provide for an equitable hearing, or to prevent impossibility of remedy. Yet, in Admi-
ralty cases neither of these problems appeared, for there was a responsive court of known jurisdiction ready to take the cause and do justice. Thus, the nontransversible pleading fiction was not “legitimate,” but was merely an arbitrary and inconsistent act by the Court of Common Pleas. As Ridley questioned provocatively:

What equity can it be to take away the triall of such business as belongeth to one Court . . . especially where as the Court from whence it is drawn is more fit for it both in respect of the fulness of knowledge that the Court hath to deal in such business, and also for of the competency of skill that is in the Judges . . . of those Courts.

Ridley relied on civil law authorities, such as Bartolus, to strengthen his arguments, but in the last analysis his test of legitimacy was “reason”: “And surely, as there is no equity in it, so there is no possibility such a fiction should be maintained by Law; for that it hath no ground of reason to rest his

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108 R. Zouch, supra note 59.
109 F. Bacon, Reading on the Statute of Uses, in 7 The Works of Francis Bacon 389 (J. Spedding, R. Ellis & D. Heath eds. new ed. London 1872). There were strong similarities between Ridley’s and Bacon’s approaches. For example, Ridley did not cite specific cases for direct authority—as St. German and Fortescue had not before him. In the Preface to Maxims of the Law, Bacon contrasts Littleton’s and Fitzherbert’s practice with that of Perkins and Standford, who did cite authorities extensively. Predictably, Bacon approves of the former practice. F. Bacon, supra note 3, at 322. Principled argumentation ensured universal and timeless validity in a way that recourse to case law could not. The works of Zouch and Bacon will be discussed in detail in the third Article in this series.
110 See generally Coquillette, supra note 6, at 4.
111 T. Ridley, supra note 105, at 173.
112 Id.
113 Id. at 175-76.
feet." Later, Ridley reemphasized this point in concluding the discussion, when he asserted that there "is no Action of things that neither Nature nor Reason will afford to be done . . . ."

Ridley's "reasonableness" test was not simplistic. It was argued in Dowdall's Case that the fact of location had no bearing on the substance of the law, which implied that the fiction was not unreasonable. But Ridley correctly isolated this argument as begging the question. Under Ridley's analysis, a fiction would be reasonable if it were not arbitrary and capricious, but rationally related to either a need for "equity" or a need for jurisdiction. Here there was no reasonable need for "equity." The law applied in the Common Pleas was, as Ridley demonstrated, no more equitable or suitable than that of the Admiralty, nor was it ever alleged to be more suitable. The Common Pleas did allege a need for jurisdiction. Was this "reasonable?" Not to Ridley, for the Common Pleas did not allege any reasons why justice could not be equally well done in the Admiralty, and there were good reasons why it could be done better there, such as the special training of the Admiralty judges.

Thus, Ridley concluded that the only explanation for the Common Pleas' behavior was the common lawyers' desire to seize jurisdiction for their own ulterior motives. This was not "reasonable"—it was not a function of doing justice under law, but an act, in Ridley's view, of arbitrary selfishness. A jurisdiction which grew by such devices would not be one promoted by its internal rationality or the need for justice, but by capricious political strength. "Matter enough would bee offered to one jurisdiction to devour up the other, and the law would be easily eluded . . . .," that is, "until one were totally triumphant."

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114 Id. at 177-78.
115 Id. at 178 (emphasis supplied).
117 See T. Ridley, supra note 105, at 179.
118 See id. at 179-80.
119 See id. at 179.
120 Id. at 176.
121 Id. at 179. Ridley also could not resist a parenthetical joke on the "law of Nature" involved in nontransversible venues, such as the "Cheapside" fiction: Either a ship may arrive at a place where no water is to carry it, or, if that it arrive according to the fiction, either the people, their houses, and their wealth shall be overwhelmed in the water, as the world was in Noah's Flood . . . and so nobody there shall be left alive to make any bargain or contract with the Mariners and Shipment that arrive there.
122 Id. at 178.
2. Ridley and the "Incorporation" of the Law Merchant

Ridley's arguments on jurisdictional fictions were impressive for their juristic precision, but it was his understanding of the function of the law merchant that was the most remarkable. In demonstrating why it was not "reasonable" for Common Pleas to have merchant jurisdiction, Ridley did not merely rely on the absence of good reason for change. Instead, he attempted to show that a special body of law for merchants was necessary for present and future needs, and that the "nationalization" of this law would be harmful.

According to the introduction to his book, Ridley had long been concerned by a growing failure to distinguish between those legal needs that were primarily domestic and those that could rationally be set apart from domestic needs. This failure was particularly telling in the field of foreign commerce. Anticipating Montesquieu, Ridley saw commerce and communications as forces for peace in opposition to shortsighted national interests, and he saw the civil law as being the body of law best suited to attaining this goal:

For the often commerce of Princes, with Princes, and the negotiation that one State hath with another, there is nothing more necessary than frequent Embassages, whereby intelligence may be had what danger one State undertaketh to another, and how the same may be made and maintained: I know not what Law serves better for all these ends and purposes than the Civile Law.

In Ridley's opinion, cases like Dowdale's Case should have been resolved in favor of civil law jurisdiction, because

[b]usinesse many times concerns not only our own countryment, but also strangers, who are parties to the suit, who are born, and doe live in countries ordered by the Civil Law, whereby they may bee presumed to have more skill and better liking of that Law, than they can bee thought to have of our Lawes, and our proceedings, and, therefore, it were no differency to call them from the triall of that Law, which they, in some part know, and is the Law of their country (as it is almost to all Christendome besides) to the triall of a Law which they know is no part, and is neer forain unto them.

Ridley pointed out that this inconvenience to foreign merchants had, since

122 Ridley's argument as to ecclesiastical law, not discussed in this paper, is also fascinating. It anticipated modern awareness of the need for a fundamental law separating the needs of religion from the needs of the State. *Id.* at 160-61.
123 *Id.* at 2.
125 T. Ridley, *supra* note 105, at 391.
126 *Id.* at 176-77.
ancient times, been considered contrary to the well-being of the State.\textsuperscript{127} Whereas the original reason for excepting merchants from the law of the realm by "specialty"\textsuperscript{128} may then have been to increase the Royal purse by revenues,\textsuperscript{129} Ridley had a more modern argument for the exception's retention. Trade maximized the productivity of the realm "either by importation of those things we want at home, or by exportation of those things we abound with."\textsuperscript{130} Efficient trade, like domestic production, worked to the common benefit, but trade and production had distinctive legal needs.\textsuperscript{131} Why hurt either with an incorporated legal system applicable to both when "neither . . . can be [fully] had or enjoyed without their proper Laws fit and appertaining to either policy?"\textsuperscript{132}

Decisions such as \textit{Dowdale's Case}, by creating uncertainty as to the boundaries between national and cosmopolitan legal interests, raised the possibility of three serious consequences, all closely related in Ridley's mind. First, as long as the common law and "special" jurisdictions were kept to some degree separate, the lack of reasonable jurisdictional distinctions would create confusion as to which rules applied and obstruct the certainty needed for trade, thereby causing "great injury to the subject [who,] after so much labor lost . . . [must] begin his suit anew again: which is like to Sisyphus's punishment . . . ."\textsuperscript{133} Second, if either jurisdiction finally prevailed, the inevitable result would be a law that would either be less responsive to the needs of commerce, or less responsive to domestic needs, than the law that would obtain in a well organized system of dual jurisdictions.\textsuperscript{134} Finally, if a national law and not a "special" law prevailed, there would be a gradual extinction of Englishmen with the knowledge of trade law and international usage so necessary for both prosperity and, ultimately, peace itself. In fact, one purpose of civil law training in the Universities was "to have young men trayned up there . . . that when they came abroad, they might be more ready in all matters of negotiation and commerce, that the Prince or state should have need of them to deal in with foreign Nations . . . ."\textsuperscript{135}

Indeed, the lack of such men was noted as early as 1549. The Lord Protector then stressed, "You do not know how necessary the study of the Civil Law is . . . and how few men there are in his Majesty's service who are

\textsuperscript{127} \textit{Id.} at 177.
\textsuperscript{128} See notes 153-55 and accompanying text \textit{infra}.
\textsuperscript{129} See \textit{I. F. Pollock \& F. Maitland, The History of English Law} 464-65 (2d ed. 1898).
\textsuperscript{130} T. Ridley, \textit{supra} note 105, at 390.
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.} at 177.
\textsuperscript{134} \textit{Id.} at 390.
\textsuperscript{135} \textit{Id.} at 118.
versed in this knowledge." Half a century later, Ridley would warn that the consequences of the loss of such expertise and the triumph of domestic and national interests would be more deleterious than a mere loss of trade:

And if the care of these things [Civil Law] be so great with them [Foreine Princes] the same ought not to be light with us . . . one kind of learning must serve both, for otherwise one Nation will not be convinced by the other what their capitulations are . . . but who, when he seeth a sword in its scabbard, knoweth whether it will cut or not, although the form be a presumption that it will, but, do but draw it out of the scabbard, and then shall you [and all] see the sharpness of it? I make no application hereof, for that its meaning by my words may be well enough known.

Ridley foresaw that the probable effect of the Common Pleas fictional pleading would be nationalization of the entire law merchant. He correctly predicted that the special responsiveness to merchant needs provided by a distinct doctrine for merchants would be lost after nationalization. He


137 T. Ridley, supra note 105, at 130-31; see id. at 396.

138 See, e.g., Edie v. East India Co., 97 Eng. Rep. 797 (K.B. 1761) (Mansfield, J.) (mercantile rule would not be enforced after a contrary rule had already been "incorporated" into the common law); cf. President and Directors of Manhattan Co. v. Morgan, 242 N.Y. 38, 49, 15 N.E. 594, 597 (1926) ("We do not now decide that . . . the creative force of the law merchant has been extinguished altogether."). For a discussion of problems still posed by common law incorporation of mercantile custom, see H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 427-57 (tent. ed. 1958).

I am indebted to Charles Donahue for the insight that there is always a tension between legal certainty (which requires "professionalization") and flexibility (which is necessary for the advancement of commerce). Although Ridley appealed to the need for the flexibility inherent in the customs and usages of trade, his final goal was to promote the need for civilian professional training in dealing with commercial problems. There was no small degree of tension between these two positions, but Ridley never frankly acknowledged this intellectual sleight-of-hand. Common lawyers like Molloy, on the other hand, openly pursued a doctrine of professional incorporation of mercantile usage into the common law, to the detriment of both the civilian training and the freedom of merchants to develop usages for themselves.

Had the English civilians prevailed, would their professional training have been more sensitive to the need for mercantile flexibility? Another Donahue insight suggests a clue. Donahue argues that "reception" of bodies of "foreign" legal doctrine, which could in England include civilian learning, were subject to forces that "undercut the received doctrine itself or blunt[ed] its effect." Donahue, Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned
warned against the dangers of the insularity and nationalism that would result from too much sacrifice of cosmopolitan principles, as well as from a lack of men trained in the skills of international negotiation and familiar with the mutual interests of international comity. For 1607, Ridley's foresight of modern needs was uncanny.

Perhaps understandably, Ridley's doctrine was misunderstood by both Coke and Blackstone. Coke, in the Preface to 10 Coke's Reports in 1614, had attacked civilian comment on common law decisions as a "desperate and dangerous matter." 139 It may have been, at least in part, Ridley's A View that so aroused Coke. 140 Yet, Coke never addressed himself directly to refuting Ridley's arguments.

Blackstone, however, did address Ridley's work directly, with unfortunate results. Blackstone, borrowing directly from Coke, argued that the general jurisdiction of the common law must be construed inclusively, and the special jurisdictions restrictively. 141 He then came to the fiction in Dowdale's Case. It is an interesting tribute to Ridley's prestige in the eighteenth century that Blackstone felt he had to answer Ridley's objections specifically:

This the civilians exclaim against loudly, as inequitable and absurd; and sir Thomas Ridley hath very gravely proved it to be impossible, for the ship in which such cause of action arises to be really at the royal exchange in Cornhill. But our lawyers justify this fiction, by alleging as before, that the locality of such contracts is not at all essential to the merits of them: and that the learned civilian himself seems to have forgotten how much such fictions are adopted and encouraged in the Roman law: that a son killed in battle is supposed to live for ever for the benefit of his parents; and that, by the fiction of postliminium and the lex cornelia, captives, when freed from bondage, were held to have never been prisoners . . . 142

Law, in Essays in Honor of Samuel E. Thorne 127, 158 (M. Arnold, S. Scully & T. White eds. 1981). Two such forces "of general importance" were "the desire of decision makers, particularly elite, professional decision makers, not to be bound too tightly to a body of rules, and the expectations of the society using the court." Id. at 158. English civilians were nothing if not a professional elite with specialized monopolies, but their authority as elite specialists would hardly have been served by their being slavishly bound to any particular civil law doctrines. Nor would this satisfy the expectations and needs of the ship owners and traders that were the civilians' Admiralty clients. It is at least arguable that had the civilians prevailed, they would have been more receptive than the common lawyers to the flexibility needed by trade and commerce.

140 See B. Levack, supra note 16, at 123; D. Lloyd, supra note 98, at 923.
142 Id. at * 107.
But Blackstone profoundly misunderstood Ridley. First, Blackstone took seriously a joke Ridley made about the literal implications of the jurisdictional fiction, and actually represented it to be the core of Ridley’s argument. Second, he completely failed to grasp Ridley’s fundamental distinction between “legitimate” legal fictions, as found in the Roman law and Bartolus’ gloss, and fictions which served no equitable or legitimate remedy functions, but were blinds for arbitrary power struggles. The examples Blackstone cited from the Institutes were Bartolus’ legitimate legal fictions, with which Ridley would have found no quarrel at all. Finally, Blackstone never mentioned Ridley’s response to the argument that the common law fictions were harmless as being “not essential to the merits,” the response which so eloquently delineated both the short-term and long-term disadvantages to merchants and to trade inherent in the common lawyer’s position. Thanks to Blackstone, generations of American lawyers read only a caricature of Ridley’s position.

Francis Bacon, on the other hand, read and appreciated Ridley. In a draft of a letter to Sir George Villiers (later the Duke of Buckingham) in 1614, Bacon stated that

although I am a professor of the common law, yet am I so much a lover of truth and learning . . . that I do heartily persuade that the professors called civilians, should not be discountenanced nor discouraged: else whenssoever we shall have ought to do with any foreign king or state, we shall be at a miserable loss . . . .

143 Id.; see note 121 supra.
144 T. RIDLEY, supra note 105, at 173-74.
145 Id. at 173.
146 See text accompanying notes 116-17 supra.
147 Second Version of Letter from Sir Francis Bacon to Sir George Villiers, later Duke of Buckingham, supra note 1, at 39. Bacon’s sympathy for civilians and their thought is also indicated by his observation that “the lawyers, they write according to the state where they live, what is received law, and not what ought to be law: for the wisdom of a lawmaker is one, and of a lawyer is another.” F. BACON, Of the Advancement of Learning, in 6 THE WORKS OF FRANCIS BACON 77, 389 (J. Spedding, R. Ellis & D. Heath eds. Boston 1863) (translation of De Augmentis) (emphasis supplied) (the London “new” edition of Bacon’s works, to which I cite elsewhere, contains a variant translation of this passage). Torn between his broad learning and his nationalistic pride, Bacon hoped to have the best of both worlds by reorganizing the English law on civilian lines, domestically. See F. BACON, A Proposition . . . touching the Compiling and Amendment of the Laws of England, in 13 THE WORKS OF FRANCIS BACON 61 (J. Spedding, R. Ellis & D. Heath eds. 1872) [hereinafter cited as F. BACON, A Proposition]. His ultimate ambition, never realized, was to write a true ‘Digest’ of the laws of England in civilian style. F. BACON, Advertisement Touching An Holy Warre, in 7 THE WORKS OF FRANCIS BACON 1, 14 (J. Spedding, R. Ellis & D. Heath eds. new ed. London 1872). See generally, Coquillette, supra note 6, at 9-10 n.16. Bacon’s relationship with the civilians, and the evidence of mutual influence, will be discussed fully in the third Article in this series.
This passage almost directly mirrors Ridley's concluding lines.\textsuperscript{148} Bacon would have wished Ridley's foresight for himself, for he envied bold positions clearly held, and "submitted only to the censure of the learned, and chiefly of time . . . ."\textsuperscript{149} Indeed, a good argument can be made that the eventual professionalization of law merchant jurisprudence by the common lawyers, and its results, have proved Ridley right.

III. Charles Molloy
AND THE PROFESSIONALIZATION OF LAW MERCHANT JURISPRUDENCE (1607-1690)

The "law merchant" in England initially consisted of diverse localized customs for regulating mercantile transactions. These "laws" were formulated and administered in local courts that were especially sympathetic to mercantile customs and problems. But as the national courts expanded their jurisdictions, they decided an increasingly large number of mercantile cases. Concurrently, the "mercantile custom" became "professionalized": it was expressed and formulated in ways that made it more readily understandable by and available to the common law bar. Rather than merchants' custom, the law merchant became lawyers' law.

Ironically, this process of "professionalization" was initiated by a spate of basic commercial law books that merchants wrote, but which lawyers found useful. The leading contributor, however, would be the lawyer Charles Molloy (1646-1690), author of the popular Treatise of Affairs Maritime and of Commerce.\textsuperscript{150}

A. The Origins of Law Merchant Jurisprudence in England

From very early times, English traders and sailors sought special assistance in the local mercantile courts of the key ports and trading centers.

\textsuperscript{148} [T]he use of them [civilians] is so necessary as that the common-wealth cannot want the service of them in matters of great import to the state . . . ." T. RIDLEY, supra note 105, at 396.

\textsuperscript{149} F. BACON, supra note 3, at 323. Bacon did not perceive, at least not as clearly as Ridley did, the full impact that nationalization would have on the law in England. Bacon's faith was in the use of comparative law analysis, an accommodating faith closely paralleling that held by the early English civilian writers. See Coquillette, supra note 6, at 36-37, 87-89. Thus, Bacon stated, "let it be my present objective to go to the fountains of justice . . . and endeavor with reference to the several provinces of law to exhibit a character and idea of justice, in general comparison with which the laws of particular states and kingdoms may be tested and amended." F. BACON, Of the Dignity and Advancement of Learning, in 5 THE WORKS OF FRANCIS BACON 1, 88 (J. Spedding, R. Ellis & D. Heath eds. new ed. London 1870) (translation of De Augmentis) (emphasis supplied). The parallels between Bacon's and civilian thought will be explored in the third Article in this series.

\textsuperscript{150} C. MOLLOY, supra note 21.
Whether under the local names of "fair," "market," "borough," "tolsey," or "piepoudre" courts, or under special statutory or royal grants, such as the "Courts of the Staple" or the courts of the "Cinque Ports," these courts were well established by the end of the thirteenth century.151

Later, scholars and judges would make "incorporation" of law merchant ideas retroactive by hindsight, and would describe the rudimentary customary doctrines of the mercantile courts as either the simple good sense any judge should use in applying the common law to the peculiar needs of a special class, or a modification of existing common law rules by "specialty."152 But the very existence of the special courts and their special customs, and the famed custom books of particular ports,153 points to the obvious—that these were special customs for special people.154 Indeed, the

151 See C. Fifoot, supra note 18, at 289-301; 1 W. Holdsworth, supra note 62, at 526-44; T.F.T. Plucknett, supra note 5, at 660-62. The name "Piepowder court" is said to come from "pedes pulverosi" or "pieds poudrés"—a reference to the dirty feet of the wayfaring merchants, "persons passing through who cannot make any stay there, such persons, that is to say, as are called pepoudrous." Liber Albus 59 (H. Riley ed. & trans. 1861), quoted in Carter, The Early History of the Law Merchant in England, 17 Law Q. Rev. 232, 236 (1901); see D. Walker, The Oxford Companion to Law 457 (1980); Burdick, What is the Law Merchant?, 2 Colum. L. Rev. 470, 471 (1902), reprinted as Contributions of the Law Merchant to the Common Law, in 3 Select Essays on Anglo-American Law 34, 35 (1909); Gross, The Court of Piepower, 20 Q.J. Econ. 231 (1906), reprinted in part as Gross, Introduction to 1 Select Cases Concerning the Law Merchant xii-xxxv (Selden Soc'Y Pub. No. 23, C. Gross ed. 1908). See also 1 E. Lipson, The Economic History of England 250-58 (12th ed. 1959). According to Blackstone, the Piepowder courts were "[t]he lowest, and at the same time the most expeditious, court of justice known to the law of England . . . so called from the dusty feet of the suitors: or according to Sir Edward Coke, because justice is there done as speedily as dust can fall from the foot." 3 W. Blackstone, Commentaries * 32 (referring to E. Coke, The Fourth Part of the Institutes of the Laws of England * 272).

152 See, e.g., Carter, supra note 151, at 236 n.3.


154 The Little Red Book of Bristol specifically laid out the "way the Law Merchant Differs from the Common Law," and noted distinctions of speed, procedure, and substantive rules. Teetor, supra note 153, at 182-83 (translating The Little Red Book of Bristol § 2 (n.p. c. 1280)). See generally C. Fifoot, supra note 18, at 293-307; T.F.T. Plucknett, supra note 5, at 657-70; Gross, supra note 151; Holdsworth, The Development of the Law Merchant and Its Courts, in 1 Select Essays in Anglo-American Legal History 289 (1907) (reprinting 1 W. Holdsworth, A History of English Law 300-37 (1st ed. 1903)). This is not to say, of course, that there was a single monolithic "law merchant" in medieval times, in the sense of a single, coherent body of doctrine. See Sutherland, The Law Merchant in the Seventeenth and Eighteenth Centuries, in 17 Transac-
medieval mind thought in terms of special "customary" laws for special groups, such as clergy, women, aliens, Jews, burghers, and others. It has been argued that the law merchant was no more than a "mere phrase." Certainly, it would be foolish to confuse mere "good sense" or discretion with a "special doctrine," but "nevertheless, even for medieval times" it was recognized that "the partnership of lawyer and merchant" contributed to the development of a substantive customary law. Furthermore, the slowly emerging law merchant differed in critical aspects from other medieval "special laws." Unlike most other "special laws," the law merchant was neither local, parochial, enacted, nor clerical.

To a surprising extent, even in the thirteenth and fourteenth centuries, merchants traveled freely between England and the Continent, visiting the great fairs that served as the international merchant banks and commodity exchanges of the day. The "law merchant" inevitably picked up aspects of the Royal Historical Society 149, 150-53 (4th ser. 1934). "To the mediaeval lawyer the jurisdiction of the merchant courts was little more than a limited devolution of authority made in the interest of speed and simplicity." Id. at 152. See also Baker, supra note 17, at 295-96, 299-306.

Burdick, supra note 151, at 470, reprinted in 3 Select Essays in Anglo-American Legal History, supra note 151, at 35. Burdick attempts to refute this view. Burdick, supra note 151, at 478-85, reprinted in 3 Select Essays on Anglo-American Legal History, supra note 151, at 43-50. For a complete modern account of the various scholarly views, see Baker, supra note 17, at 295-99. For a view of the English "Law Merchant of the seventeenth and eighteenth century" as "the body of theory and custom that forced its way into the law of the land," see Sutherland, supra note 154, at 150.

Jones, supra note 39, at 53-54; see Holdsworth, Introduction to F. Sanborn, Origins of Early English Maritime and Commercial Law x (1930).

The most dramatic development of commercial law doctrine was in the area of the law of sale and mistake. There was substantial Roman law influence—usually through civilian commentators—on the big borough and fair courts. See B. Nicholas, An Introduction to Roman Law 206-07 (1962). "[T]hough we are compelled by our sources to study the common law in isolation, we misunderstand its development as well as mistaking social facts if we imagine it as existing in isolation." Milsom, Sale of Goods in the Fifteenth Century, 77 Law Q. Rev. 257, 284 (1961); see 1 E. Lipson, supra note 151, at 258. By focusing solely on the common law courts, rather than these mercantile courts, some writers have created the strange illusion of a "modern" law of sales "erupting" in the nineteenth century. See, e.g., Llewellyn, supra note 18, at 740-46.

For a vivid picture of this remarkable foreign interchange, and the oft-forgotten sophistication of the English wool trade, see G. Holmes, The Later Middle Ages 152-56 (1962); P. Kendall, The Yorkist Age 281-327 (1970); 1 E. Lipson, supra note 151, at 221-63; 2 id. at 184-96.
of that cosmopolitanism that the medieval Roman law identified with the narrow \textit{ius gentium} of the \textit{praetor peregrinus}—that is, the universal custom of merchants in all lands.\footnote{See Coquillette, \textit{supra} note 6, at 24-25.}

But the process of development in England was slow. There was one critical and obvious factor. When Ridley wrote \textit{A View} in 1607, there were no printed English books on the "law merchant" at all.\footnote{Senior, \textit{supra} note 63, at 323; see 5 W. Holdsworth, \textit{supra} note 5, at 8-25, 130-35.} Existing contemporaneous reports of the Admiralty, Marshalsea ( Palace Court Plea Rolls), Chancery, Cinque Ports, and Staple Court of Bristol, and various "piepoudre" court records, show an almost exclusive reliance on the expertise and experience of the judges,\footnote{See C. Fifoot, \textit{supra} note 18, at 289, 293-301, 308-14; A. Kiralfy, \textit{A Source Book of English Law} 240-58 (1957); \textit{Records of the Bristol Staple Courts} 4-59, 61-63, 81-90 (E. Rich ed. 1934); \textit{1 Select Cases Concerning the Law Merchant} 122-35 (Selden Soc’y Pub. No. 23, C. Gross ed. 1908); \textit{2 Select Cases Concerning the Law Merchant} 106-62, 164 (Selden Soc’y Pub. No. 46, H. Hall ed. 1929); Hall, \textit{supra} note 155, at xv, xviii.} or on the ancient manuscript records of the courts such as the \textit{Black Book of the Admiralty}\footnote{See G. Gilmore & C. Black, \textit{The Law of Admiralty} 9 n.29 (2d ed. 1975); 5 W. Holdsworth, \textit{supra} note 5, at 125-27; A. Kiralfy, \textit{supra} note 161, at 349-50; T.F.T. Plucknett, \textit{supra} note 5, at 658; note 153 and accompanying text \textit{supra}.} and the \textit{Little Red Book of Bristol.}\footnote{See 5 W. Holdsworth, \textit{supra} note 5, at 106-07; \textit{Records of the Bristol Staple Courts}, \textit{supra} note 161, at 35, 54, 58, 80; note 153 and accompanying text \textit{supra}.} The earliest manuscript records of the law merchant include both maritime and commercial law, often, as in the \textit{Black Book}, mingled together.\footnote{1 W. Holdsworth, \textit{supra} note 62, at 301.}

Local courts, such as those of Bristol, London, and St. Ives, usually consisted of laymen, and applied the "law merchant" only in the loose sense of a customary local law of trade.\footnote{For material from the Fair Court of St. Ives, see \textit{1 Select Cases Concerning the Law Merchant}, \textit{supra} note 161, at 1-106. For an account of the Bristol Court, see \textit{Records of the Bristol Staple Courts}, \textit{supra} note 161. For cases in such local courts of London as the Corporation of London and Verge (Marshalsea) Courts, as well as some Westminster appeals, see C. Fifoot, \textit{supra} note 18, at 308-17; A. Kiralfy, \textit{supra} note 161, at 240-58; \textit{2 Select Cases Concerning the Law Merchant}, \textit{supra} note 161. See generally \textit{2 Borough Customs} (Selden Soc’y Pub. No. 21, M. Bateson ed. 1906).} The degree of sympathy to merchant "forraigners" and foreign modes of dealing appeared to vary according to the power of local Guilds. Such sympathy was strong in London, to the extent that "jury by the moiety" was used—a kind of "special" jury, consisting half of foreign merchants, for use in cases involving foreign...
merchants. In Preston, on the other hand, alien merchants were occasionally driven out by the local juries. "Staple" towns—towns whose economies were based on a "staple" product—fostered a pride in the special privileges and awareness of the economic interest in "the riches which follow the staple." Accordingly, these towns naturally tended toward toleration for merchants and a local concern for speedy process and fair dealing.

Most of the formal, international citations in the early court records were to the authority of the great sea codes. These codes were actually written into parts of the Black Book of the Admiralty, section by section. There were many references to the Laws of Oleron, but occasionally reference was also made to the Laws of Wisby, or of the Hansa Towns, and even to the Rhodian law itself. Citations to civil law sources outside of Digest 14.2 (The Rhodian Fragment) were extremely rare, and most likely limited to references to the Institutes of Justinian, Book III, Title XIII (De Obligationibus). Collections of the sea laws, published in Basle and in Frankfort, were in print on the Continent at a very early date. Perhaps copies of these books, and of the omnipresent annotated Institutes, were available to the English courts—but they were not mentioned.

It was, therefore, a step forward when a Scottish civilian, W. Welwod, published a rough collection of these laws in Sea Law of Scotland. When

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166 See C. FIFOOT, supra note 18, at 314-15 (reprinting Whittington v. Turnebonis (1421)) (citing CALENDAR OF PLEA AND MEMORANDA ROLLS, A.D. 1413-1437, at 91-93 (A. Thomas ed. 1943)).
167 See J. DAWSON, supra note 95, at 255; PRESTON COURT LEET RECORDS 10,13 (A. Hewitson ed. 1905).
168 This is the observation of Coke himself. E. COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND * 238. See also 1 W. HOLDSWORTH, supra note 62, at 311-13.
169 For a discussion of the Staple Towns, see 1 W. HOLDSWORTH, supra note 62, at 311-13.
170 See id. at 301-07. See generally Mears, supra note 64, at 312.
171 See A. KIRALFY, supra note 161, at 349-50.
172 See G. GILMORE & C. BLACK, supra note 162, at 6-7; Senior, supra note 63, at 332-33.
173 On the "Rhodian Fragment," see W. BUCKLAND, A TEXT BOOK OF ROMAN LAW 506 (rev. 3d. ed. 1966); 3 J. KENT, COMMENTARIES * 9-10. It is undoubtedly to books such as this that Ridley refers in 1607 as the "several tractales" and "sundry titles" in the civil law which have been of value in mercantile causes. T. RIDLEY, supra note 105, at 175. For the presence of the standard classical texts in the universities of Ridley's day, see Hunt, The Medieval Library, in NEW COLLEGE OXFORD, 1379-1979, at 317, 319, 322 (1979); Ker, Oxford College Libraries in 1556, at 46-49 (1956) (catalogue of Bodleian Library exhibition).
174 See 3 J. KENT, COMMENTARIES* 4.
175 See id.
176 W. WELVOD [sic], SEA LAWS OF SCOTLAND (Edinburgh 1590); see 5 W.
Ridley wrote his book, Welwod's *Sea Law* constituted the entire printed resources of the English law merchant beyond scattered references in the common law treatises—and Welwod's book was not English.

**B. Ridley's Contribution, and Its Contrast with the Common Lawyers**

Sir Thomas Ridley viewed the law merchant as a body of substantive law. But to him this law sat outside the common law, and existed instead as a set of transnational mercantile customs. Ridley's view of the law merchant would have allowed for international uniformity and predictability, as well as flexibility and innovation in the face of changing needs. Unfortunately, his view did not prevail.

It often has been argued that the paucity of early English literature on the law merchant was a direct result of the law merchant's emphasis on procedure. Ridley spoke of the "law merchant," however, as if it were a part of the substantive *ius civile*, and rarely referred to its procedural qualities. By "civil law," Ridley meant "the law, which the old Romans used, and is for the great wisdom and equitie thereof, at this day, as it were, the common

**HOLDSWORTH, supra** note 5, at 11, 134. This collection, judging by the books owned by Harvard Law School and examined by this writer, was often later bound with Malyne. *See, e.g.*, G. Malynes, *Consuetudo, vel Lex Mercatoria* (3d ed. London 1686) (1st ed. London 1622) (bound with Welwod). *See also* T.F.T. Plucknett, *supra* note 5, at 659. The "Scotland" in the title of Welwod's book was an obvious marketing "come on," as the book actually contained nothing that originated in Scotland. Of course, Scots prided themselves on their university tradition of Roman and European civil law and this tradition did influence Scottish national law. That sixteenth century Scottish law was more "Roman" than English law was hardly extraordinary; so was almost every other national law. There was, however, no great Scottish contribution to sea law or international law, not even to the extent of that made by England's Gentili, *see* Coquillette, *supra* note 6, at 54-63.

177 The English common law treatises, however, were not entirely barren. *See* notes 188-91 and accompanying text *infra*. But this writing was slighted by Holdsworth, who observed that, with only two exceptions, "nothing was written by common lawyers" on the law merchant from 1485-1676. 5 W. Holdsworth, *supra* note 5, at 130. If Holdsworth can be understood to refer to writings less than complete books, then his statement is hardly true. Common law writers did refer to the law merchant in the course of more general works. *See* notes 188-96 and accompanying text *infra*. And these early common law references to law merchant were important. They define what common lawyers felt that the "law merchant" was, and the sources of its validity. As will be seen, these terse and fragmentary observations contrasted sharply with Ridley's definition of "law merchant." *See* notes 179-206 and accompanying text *infra*.

178 In 1613, Welwod's *Abridgement of All the Sea Lawes* was printed in London. *W. Welwod, Abridgement of All the Sea Lawes* (London 1613). This book was a substantially expanded version of *Sea Laws of Scotland*. *See* 5 W. Holdsworth, *supra* note 5, at 11; Senior, *supra* note 63, at 323.

law of all well governed Nations, a very few onely excepted." Ridley carefully distinguished between this *ius civile* and canonical law. He also distinguished between *ius civile* and the *ius gentium*, i.e., the "law of nations." Unlike the *ius civile*, which is a set body of rules derived from the law of ancient Rome, the "law of nations" was "that which common reason hath established among men, and is observed alike in all Nations, as . . . contracts, obligations, successions, and the like." 183

Yet, Ridley's definitions were not strictly classical, and he tended to blur the line between the *ius civile*, which he defined as the Roman-based and widely shared common law of most countries, and the *ius gentium*, a law based on reason and theoretically observed by *all* nations. In fact, he pointed out that the same skills, taught by civilians, were useful in the practice and study of both types of law. What Ridley wished for England was a commercial law merchant, largely based on the principles of the *ius civile*, which was more than just a reflection of national custom, but a reflection of international practice and reasonable behavior.

But Ridley—in order to maintain legal flexibility in mercantile transactions, and perhaps to maintain an independent role for the civilians in the English legal system—did not wish to see the law merchant incorporated as a part of the common law in England. Thus, Ridley did not say that the law merchant was part of the *ius gentium* or "law of nations." If the law merchant were *ius gentium*, it would, by the civilians' own definition, "be observed alike" in all jurisdictions, including the common law courts. Instead, Ridley characterized the law merchant as "civil law." Yet, by "civil law" he did not mean just Roman law, but also other widely shared, transnational legal principles, based on civilian jurisprudence and tested by "wisdom and equitie." 187

Ridley's law merchant, therefore, was based neither on national custom nor entirely on Roman principles, but was really based on a limited "law of nations," "observed "alike in all nations," but only to the extent that transactions were between merchants, and grounded on a "common reason" in the form of "reasonable expectations" in mercantile dealings. Ridley's insistence on Roman law principles was simply an ingenious device to isolate the

180 Id. at 3.
183 Id.
184 Cf. *Institutes* 1.2.1-1.2.2 (Roman law carefully distinguished *ius civile* and *ius gentium*). By a correct use of the Roman term, the "civil" law of England would be the common law, not the "Law of the Romans."
185 T. Ridley, *supra* note 105, at 118.
186 Id.
187 Id. at 3.
cosmopolitan from the national, to keep the law merchant independent from
the common law. As it turned out, Coke would employ the \textit{ius gentium}
argument as the cornerstone of his rationale for common law incorporation
of the law merchant, ignoring Ridley’s objections that the law merchant and
the \textit{ius gentium} were not the same.\footnote{\textsuperscript{188}}

Ridley’s view of the law merchant was very different from that of the
common lawyers, even prior to Coke. The sixteenth century common law
sources, when they referred to “law merchant,” considered the validity of
such law as a question of appropriate custom, based on the great precept of
\textit{Littleton’s Tenures}, section 169: “For a custome used upon a certain
reasonable cause \textit{depriveth} [i.e., substitutes for] the common law.”\footnote{\textsuperscript{189}} This was
the view of \textit{Fitzherbert’s Natura Brevium},\footnote{\textsuperscript{190}} \textit{Perkins’ Profitable Book},\footnote{\textsuperscript{191}}
and St. German’s \textit{Doctor and Student}.\footnote{\textsuperscript{192}} Also, as St. German said, “Fyrst it
is to be vnderstand that contractes be grounded vpon a custome of the
realme and by the lawe that is called (Jus gencium) and not dyrectly by the
lawe of reason . . . .”\footnote{\textsuperscript{193}} What “‘deprived’” the common law, and substituted
in its place the special rules of the specialized law merchant, was the custom,
not any rule of reason.\footnote{\textsuperscript{194}} If ultimately Ridley, like Bentham, would appeal to
the “test of polished reason” to justify an independent law merchant,\footnote{\textsuperscript{195}} he
would find little sympathy among sixteenth century jurists. But these jurists
were not “incorporators.” As they saw it, the custom of merchants “de-
priveth” the common law, it did not become a part of it.\footnote{\textsuperscript{196}}

Edward Coke’s view of the law merchant differed radically from both his
common law predecessors’ and the civilians’. According to Coke, “[\textit{Legem

\footnote{\textsuperscript{188}} E. COKE, \textit{The First Part of the Institutes of the Lawes of England} *
ofl. 182(a).

\footnote{\textsuperscript{189}} T. LITTLETON, \textit{supra} note 4, c. 10, § 169, \textit{quoted in translation in E. COKE, The
First Part of the Institutes of the Lawes of England} * fol. 112(b). The
Company of Stationers’ edition of Littleton contains a mistranslation of this section
which would play right into the hands of incorporators, substituting “prooveth” for
“depriveth”. T. LITTLETON, \textit{Littleton’s Tenures in English Lately Perused

\footnote{\textsuperscript{190}} A. FITZHERBERT, \textit{Natura Brevium} fol. 172 (W. Rastall ed. 1666) (1st ed.
London 1534). As to the actual authorship and origin of \textit{Fitzherbert’s Natura Bre-
vium}, see Arnold, \textit{Introduction to \textit{The Old Tenures [and] The Old Natura
Brevium}} (9th-10th pages, unpaginated) (1974).

\footnote{\textsuperscript{191}} J. PERKINS, \textit{supra} note 116, § 129.

\footnote{\textsuperscript{192}} C. ST. GERMAN, \textit{supra} note 11, at 180-81, 228.

\footnote{\textsuperscript{193}} I. d. at 228 (footnote omitted). St. German’s use of the term “\textit{ius gentium}”
(“Jus gencium”) is more classical than Ridley’s. \textit{See} note 184 and accompanying text
\textit{supra}.

45, 47.

\footnote{\textsuperscript{195}} J. BENTHAM, \textit{supra} note 13, at 13.

\footnote{\textsuperscript{196}} Cf. note 189 \textit{supra} (\textit{Littleton’s Tenures} has been translated to say that custom
“prooveth,” not “depriveth,” the common law).
Mercatoriam] ... (as hath beene said) is part of the Lawes of this Realm for
the advancement and continuance of Commerce and Trade, which is pro
bono publico ...."197 In essence, under Coke's analysis a valid custom
"depriveth" the common law not at all. Instead, Coke argued that reason
should dictate when a custom should become part of the common law. If a
custom would enrich the substantive law, "reason" dictated incorporation.
It was Coke, not the early common lawyers, who first considered the law of
merchants a substantive law required by reason to be part of the domestic
law. Coke's view was exactly the position taken later by Charles Molloy:

Merchantize is so Universal and Extensive, that it is in a Manner
Impossible, that Municipal Laws of any one Realm should be sufficient
for the ordering of Affairs ... relating to Merchants. The Law concern-
ing Merchants is called the Law Merchant from its Universal concern,
whereof all Nations do take special knowledge, and the Common and
Statute Laws of England takes notice of the Law Merchant, and leaves
the causes of Merchants in many Instances to their own peculiar
Law.198

Blackstone concurred. "[Lex Mercatoria] however differed from the gen-
eral rules of the common law, is yet ingrafted into it, and made a part of it;
being allowed, for all benefit of trade, to be of the utmost validity in all
commercial transactions . . . ."199 Commenting on this passage, Professor
Christian, editor of an 1800 edition of Blackstone's Commentaries, said that
"Merchants ought to take their law from the courts, and not the courts from
the Merchants."200 Blackstone had certainly not meant to lead "merchants
to suppose, that all their crude and new-fangled fashions and devices . . .
become the law of the land."201

Coke's views, as expanded by Molloy and Blackstone, contained the
seeds of future common law rigidity. If a custom was substantive and
demanded by the requirements of a universal reason, its contents, once
determined, were determined forever, particularly within a common law
precedent system. As Baker has observed, "Lord Mansfield's law was
binding on his successors; and so, to the extent that it embodied mere
current usage, it froze the practice of Georgian merchants as the permanent
law of England."202 Change in the customs and needs of merchants could
not easily change the law merchant once it was so defined and incorporated.
As we shall see, that was precisely what happened in such English cases as

182(a).
198 C. MOLLOY, A TREATISE OF AFFAIRS MARITIME AND OF COMMERCE 458-59
199 1 W. BLACKSTONE, COMMENTARIES * 75 (emphasis supplied).
1800); see Baker, supra note 17, at 299 n.19.
201 1 W. BLACKSTONE, supra note 200, at 52 n.1.
202 Baker, supra note 17, at 299.


This was also precisely the reason why Ridley refused to consider the law merchant part of the "law of nations," but insisted that it was a special law for merchants instead.

Could this also be why the sixteenth century lawyers, although resting the law merchant on custom, appeared to give that custom a procedural and jurisdictional, rather than a substantive, basis? Indeed, leading scholars of the sixteenth century law merchant say that, in actual practice, the difference between mercantile custom and the common law was not so much a matter of the "different doctrines which they embodied, as in the different methods of proof which they allowed." Rich, Introduction to Records of the Bristol Staple Courts, supra note 161, at 32; see G. Cross & G. Hand, Radcliffe & Cross' The English Legal System 241-42 (5th ed. 1971); C. Fifoot, supra note 18, at 293-97, 298-301, 308-14; 1 W. Holdsworth, supra note 62, at 307-13; 1 F. Pollock & F. Maitland, supra note 129, at 464-67; 2 id. at 208-09, 215. For special rules of evidence and jury by the moiety in fifteenth century England, see C. Fifoot, supra note 18, at 314-15 (reprinting Whittington v. Turnebonis (1421)) (citing Calendar of Plea and Memoranda Rolls, A.D. 1413-1437, supra note 166, at 91-93). See also Burdick, supra note 151, at 485, reprinted in 3 Select Essays in Anglo-American Legal History, supra note 151, at 50.

The next most important factors were also completely procedural. "'The distinctive quality . . . was speed.'" C. Fifoot, supra note 18, at 294. Also important were the quick execution of remedies and the difficulty of appeal. See A. Kiralfy, Potter's Outlines of English Legal History 102-03 (5th ed. 1958); A. Kiralfy, supra note 161, at 251-58; Rich, supra, at 36-37. The Liber Albus White Book of London, quoted in C. Fifoot, supra note 18, at 294, and the Statute of Staples, 1353, 27 Edw. 3, stat. 2, reprinted in part in C. Fifoot, supra note 18, at 315-16, were both largely procedural in emphasis.

The law merchant courts may have been influenced by canon law. See J. Dawson, supra note 95, at 174 ("'How directly the procedure and the court structure of the Admiralty was actually copied from canonist models we shall not know until more evidence is assembled.'"); 5 W. Holdsworth, supra note 5, at 82-83 (on Saepe contingit and Italian law merchant); T.F.T. Plucknett, supra note 5, at 659 ("'[The] great reception of Roman law provided a scientific apparatus for the development of mercantile law, which, however, remained in substance deeply tinged with canonist doctrine.'"). See generally F. Maitland, Roman Canon Law in the Church of England (1896); 1 F. Pollock & F. Maitland, supra note 129, at 454-57; Plucknett, The Relations Between Roman Law and English Common Law Down to the Sixteenth Century: A General Survey, 3 U. Toronto L. J. 24, 44 (1939).

Thus, the law merchant was considered a custom which "depriveth" the common law of exercising its jurisdiction altogether, for its essence as a custom went to matters of court procedure, which demanded a separate court and a separate "law." Both Ridley and Coke, by giving the law merchant a substantive, doctrinal content,
C. Gerard Malynes (1586-1641) and His Followers

Against this background, it is striking that the next significant writer on law merchant after Ridley was not a lawyer of any kind, but a merchant, Gerard Malynes. Moreover, Malynes did not write primarily for lawyers, but for his fellow merchants. Yet, lawyers used Malynes’ book, and his and other similar mercantile works made the law merchant increasingly available to the common lawyers.

Malynes’ work reflected his life. Born in Belgium of English parents, he was the son of a mint-master. His father was an early example of a mobile man with transnational skills, who would return to England at the time of the restoration of the currency in 1561.\textsuperscript{207} Malynes’ upbringing undoubtedly led him to his two consuming interests, currency problems and the economic relationships between nations. His expertise on these matters was recognized by the Crown, which appointed him one of the commissioners of trade in the low countries in 1586, one of the commissioners for establishing the true par of exchange in 1600, and commissioner of mint affairs in 1609.\textsuperscript{208} He gave evidence before the House of Commons on the Merchants Assurance Bill in 1601, and was a sponsor of the “True Making of Woollen Cloth” Act of 1607.\textsuperscript{209}

As this background might indicate, Malynes’ original ideas were economic, not legal. Several of his grand administrative schemes were disastrous failures. The Harrington Farthing Patent Scheme of 1613 left him in Fleet Prison by 1619.\textsuperscript{210} But on the other hand, Malynes is still remembered for recognizing that “time, distance and the state of credit entered into the determination of the value of bills of exchange . . . .”\textsuperscript{211}

Still, Malynes was not an intellectual or commercial giant. He failed to recognize that trading countries had a mutual indebtedness which was also crucial to the value of bills of exchange,\textsuperscript{212} and he committed the cardinal sin

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\textsuperscript{209} 4 Jac. 1, c. 2 (1606).

\textsuperscript{210} There was a petition to the king for relief on 16 February 1619. 1 The Compact Edition of the Dictionary of National Biography 1307 (1975).

\textsuperscript{211} Id.; see G. Malynes, supra note 176, at 71-74.

\textsuperscript{212} See G. Malynes, supra note 176, at 266-72. See also W. Hewins, English Trade and Finance in the 17th Century xx-xxv, xxix (1892). On the general state of economic knowledge during Malynes’ time, see E. Misselden, The Centre of the Circle of Commerce (London 1623).
of mercantile practice—he failed to make money.\textsuperscript{213} One of his contemporaries, Edward Misselden, paid Malynes what must have been the ultimate insult for a merchant/intellectual: he said that Malynes' ideas were "as threadbare as his coat."\textsuperscript{214}

But Malynes' book on the law merchant, \textit{Consuetudo, vel, Lex Mercatoria},\textsuperscript{215} was a success in its own time,\textsuperscript{216} and an eventual classic in the literature.\textsuperscript{217} It was regarded as a primary authority by Kent,\textsuperscript{218} Story,\textsuperscript{219} and Mansfield.\textsuperscript{220} It contained precise expositions of mercantile custom, used extensive concrete examples, and had plain, nontechnical language. More important, \textit{Lex Mercatoria} was a pioneering attempt to set down the practice of English merchants, and appears designed to "prove" the custom of English merchants in the Admiralty, Chancery, and, perhaps, the common law courts as well.\textsuperscript{221}

But Malynes himself would not have considered his book's potential usefulness in court to be its most valuable attribute. He had a fear of lawyers. In \textit{Lex Mercatoria} he warned,

\begin{quote}
Doctors and [those] learned of the civil Law, have made many long discourses . . . of the questionable matters fallen out amongst Merchants . . . by the reading whereof, Merchants are like rather to Metamorphise their profession and become Lawyers, than truly to attain to the particular knowledge of the said Customs of Law-Merchant: For they [the Doctors] have armed questions and disputations full of quillets and distinctions over-curious and precise, and many of them to small purpose, full of Apicis juris, which themselves have noted to be subtlties . . . .\textsuperscript{222}
\end{quote}

Holdsworth has argued that such sentiment on Malynes' part would put him quite at odds with Ridley and his desire to make the law merchant a function of the \textit{ius civile}.\textsuperscript{223} This argument does not appear to be correct. Malynes' fear was not of the \textit{ius civile} as doctrine, but of the professionaliza-

\begin{footnotes}
\item[214] \textit{Id.} (quoting Edward Misselden).
\item[215] G. \textsc{Malynes, Consuetudo, vel, Lex Mercatoria} (London 1622).
\item[216] \textit{See 5 W. Holdsworth, supra} note 5, at 132-33.
\item[217] \textit{See id.} at 131-32; T.F.T. \textsc{Plucknett, supra} note 5, at 660.
\item[218] \textit{See 3 J. Kent, Commentaries *} 126-27.
\item[221] \textit{See 5 W. Holdsworth, supra} note 5, at 134-35.
\item[222] G. \textsc{Malynes, supra} note 176, at 3-4 (emphasis supplied).
\item[223] \textit{See 5 W. Holdsworth, supra} note 5, at 134-35.
\end{footnotes}
tion of the law merchant, the "metamorphosis into lawyers."\textsuperscript{224} This, Malynes correctly saw, would begin to separate legal theory from the "true" custom.\textsuperscript{225}

Hewins said of Malynes that he was "the first English writer in whose works we find the conception of Natural Law which was later to play such an important part in the development of economic sciences."\textsuperscript{226} This too is questionable, for Ridley anticipated Malynes' use of the universal reasonable needs of trade as the ultimate legitimizing principle of the law merchant. Neither Ridley nor Malynes would have called this principle the "law of nature" or \textit{ius naturale}; they both, unlike Hewins, used that term in its correct civilian classical sense of "that which nature hath taught every living creature."\textsuperscript{227} "[T]hat which common reason hath established among men, and is observed alike in all Nations" was the \textit{ius gentium},\textsuperscript{228} not the \textit{ius naturale}. The only difference between Ridley's and Malynes' treatment of the legal nature of the law merchant was that Malynes felt free to call the \textit{lex mercatoria} a part of the \textit{ius gentium}, while Ridley, to protect the law merchant from incorporation by common lawyers such as Coke, had to call the law merchant \textit{ius civile}, and then had to give \textit{ius civile} a wider cosmopolitan significance than it had in classical times.

Yet, even if Malynes unknowingly used terms like "law of nations" in a way that could be adopted by common lawyers to support their theoretical argument, he was a staunch foe of common law incorporation. He recommended that his merchant readers take their causes to the Admiralty or the Chancery, where civilians like Ridley were responsive to their customs and cosmopolitan in outlook.\textsuperscript{229} Typically, Malynes delved into theory primarily on economic matters and, as a layman, avoided juristic controversy. As a practical matter, Malynes warned against recourse to all law courts.\textsuperscript{230} It was, however, indicative of the mood of 1622 that, although Malynes made these warnings, the title page of the first edition of his book said that the book was "Necessary for All Statesmen, Judges, Magistrates, Temporal and Civile lawyers, Mint-men, Merchants, Marinners and all Others Negotiating in all Places of the World."\textsuperscript{231}

\textsuperscript{224} See G. Malynes, supra note 176, at 3-4, quoted in text accompanying note 222 supra.

\textsuperscript{225} Id. at 3-5.

\textsuperscript{226} W. Hewins, supra note 212, at xxi.

\textsuperscript{227} See \textit{Digest} 1.1.1.3; \textit{Institutes} 1.2pr.; G. Malynes, supra note 176, at 2; T. Ridley, supra note 105, at 3. Kiralfy avoids this error by using the term "natural justice" instead of "natural law": "the law merchant [was] ... based largely on natural justice, which is analogous to the \textit{ius gentium} that underlay the custom of merchants." A. Kiralfy, supra note 206, at 112.

\textsuperscript{228} T. Ridley, supra note 105, at 3.

\textsuperscript{229} G. Malynes, supra note 176, at 308-14.

\textsuperscript{230} Id. at 3-4.

\textsuperscript{231} G. Malynes, supra note 215, at title page (emphasis supplied).
Malynes' work dwarfed all other literature of the law merchant in the period between Ridley and Molloy. That literature consisted almost entirely of the most practical and concrete instruction in proper business techniques, using sample tables and drafts. Moreover, with one exception, it was never written by lawyers. The exception was William West's *Symbolaeographia* of 1590. West was a barrister of Inner Temple. His book was first published in 1590, and was revised in 1615 to add """"Instruments ... concerning Merchants' Affairs."""" These instruments, which included charter parties, bills of lading, and bills of exchange, were presented almost without comment, in the same form as *The Merchant's Mirrour*. It was significant, however, that by 1615 common lawyers were sufficiently interested in law merchant to have the law merchant forms added to a law book.

Another common book was John Marius' *Advice Concerning Bills of Exchange* of 1651, which had a lasting influence in the field of commercial law through its wealth of concrete examples and evidence of custom. In his pungent introductory section, Marius said that """"right dealing"""" merchants did not care """"how little"""" they had to do with the common law. Instead, Marius concentrated on prevalent and """"wise"""" usage, more """"esteemed"""" than """"law it self."""" He indicated that he """"warranted"""" his work to be """"good and justifiable by the Law of Merchants"""" because it accurately reflected the practice of the day. But Marius kept close to his notarial and accounting trade, and his book was distinct only in quality, not kind, from

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238 Kent, for example, praised Marius. 3 J. Kent, *Commentaries* *120-27*; see 5 W. Holdsworth, *supra* note 5, at 131.


240 Id.

241 Id.

242 For the role of notaries in England and their canonical connection, see 5 W. Holdsworth, *supra* note 5, at 78-79 & 114-15. William Prynne, the seventeenth century puritan and historical scholar, had a particular hatred for """"imperial notaries,"""" largely because of this canonical connection:

When the Popes Agents, with some of our Popish Prelats (to advance their usurped Authority and designs) had heretofore introduced a multitude not only of Papal, but Imperial Notaries into the Realm of England, who set up publike Offices to attest, register Obligations, Contracts, and some Instruments in our Kingdom, belonging only to our Kings and their Officers, . . . this [was a] dangerous Usurpation and Encroachment.
other purely commercial literature, such as Dafforne's *The Merchant's Mirror*,\textsuperscript{243} John Colling's *Introduction to Merchant's Accounts*,\textsuperscript{244} and Abram Liset's *Accountant's Closet*.\textsuperscript{245}

These commercial books were typically bound with copies of Malynes' *Lex Mercatoria*, particularly the 1656 and 1686 editions,\textsuperscript{246} and Malynes was their authors' conceptual spokesman. Their use as "law books" indicates that the courts still used direct factual evidence of mercantile custom. Such custom was specially pleaded in the common law courts as "fact" for general jury verdicts "on ... action[s] on the case on the custom of merchants,"\textsuperscript{247} or used as evidence of custom in the Chancery or Admiralty in mercantile cases.\textsuperscript{248} This literature was designed to be used by mercantile specialists and as proof to juries, rather than for the general education of lawyers in broad, professional theory.\textsuperscript{249} The title of Malynes' book vouches the universality of its usefulness, but its content was factual, specific, and concrete evidence of custom. Malynes certainly did not wish to provide a hornbook for merchants to "[m]etamorphize their profession and become lawyers."\textsuperscript{250}

The times, however, were changing. Even in Malynes' own book there was evidence of the increasing professionalization of the law merchant, for he rarely referred to the local courts where lay merchants had made the law for centuries. Much of the original local court work was now being done by the Admiralty.\textsuperscript{251} Even such borough courts as survived were becoming entirely administrative and were rapidly dying as judicial entities. Research has uncovered documentary evidence of increasing professionalization of advocates, starting around 1590, in those local courts, such as the Bristol Staple Court, which had once prohibited counsel and insisted on "proper personne" pleading only.\textsuperscript{252} The same Bristol advocates, after 1610, took appeals to the King's Bench in London with increasing frequency.\textsuperscript{253} The "Central Courts" were increasing their commercial work at all levels, par-

\begin{itemize}
  \item \textbf{W. PRYNNE, To His Sacred Majesty King Charles the II, in Brief Animadversions on, Amendments of, and Additional Explanatory Records to, the Fourth Part of the Institutes of the Lawes of England; concerning The Jurisdiction of Courts, supra note 57, at fols. A(a)-A(b).}
  \item \textbf{The Merchant's Mirror, supra note 236.}
  \item \textbf{J. COLLINGS, Introduction to Merchant's Accounts (London 1650).}
  \item \textbf{A. LISET, Accountant's Closet (London 1656).}
  \item \textbf{Such is the case with almost every one of the Harvard Law School's copies. See, e.g., G. MALYNES, supra note 176.}
  \item \textbf{See, e.g., Vanheath v. Turner, 124 Eng. Rep. 20 (C.P. 1621).}
  \item \textbf{See 5 W. HOLDSWORTH, supra note 5, at 138-39.}
  \item \textbf{See id. at 133-35.}
  \item \textbf{G. MALYNES, supra note 176, at 3-4, quoted in text accompanying note 222 supra.}
  \item \textbf{See 1 W. HOLDSWORTH, supra note 62, at 332-36; Hall, supra note 155, at xvii.}
  \item \textbf{Rich, supra note 206, at 88-89.}
  \item \textbf{Id. at 89-90.}
\end{itemize}
ticularly the Admiralty and the Chancery. This centralization and professionalization marked the beginning of the end for the "local" law merchant.

There is evidence that the unique commission of lay merchants and Admiralty judges established by the Marine Insurance Commission Act of 1601 marked the height of the isolated commercial law, and that by 1622 common law generalists were involved in an increasing number of cases.

Despite Prynne's devastating Animadversions on the Fourth Part of the Institutes, which clearly demonstrated that this was a jurisdictional break with the past, the common law participation grew. This Article has already touched on the common lawyers' "writs of prohibition" campaign against the Admiralty, and a detailed discussion of the battle with the Chancery, and the vast political ramifications of that battle, lies outside its scope. Suffice it to say that by 1662 Pepys could record in his Diary that he would overhear Admiralty judges debating "how to . . . spend time, there being only two businesses to do . . . ." Meanwhile, a growing number of merchants found themselves in insensitive common law surroundings. In Pepys' Diary there was also an account of a commercial action in the King's Bench in 1663. The court showed such ignorance of commercial terms governing a policy of marine insurance that "[t]o hear how sillily the counsel and the judge would speak as to the terms necessary in the matter, would make one laugh."

Charles Lamb, a merchant, wrote in 1658 of how even the Chancery's process had become so dilatory that it could not replace the Admiralty. Lamb and others, including the 1601 Commission on Insurance, requested a special court for

254 Hall, supra note 155, at xvii.
255 43 Eliz. 1, c. 62.
256 See, e.g., Pickering v. Barkley, 82 Eng. Rep. 587 (K.B. 1649); Vanheath v. Turner, 124 Eng. Rep. 20 (C.P. 1621). In both cases, the courts called in merchants to "know their custom," as the lawyers were ignorant.
257 W. Prynne, supra note 57. Prynne's peculiar contribution will be analyzed in the third Article in this series.
258 For such discussion, see 1 W. Holdsworth, supra note 62, at 317; Laing, Historic Origins of Admiralty Jurisdiction in England, 45 Mich. L. Rev. 163, 179 (1946); Mears, supra note 64, at 354.
259 1 W. Holdsworth, supra note 62, at 325-26 (quoting Pepys' Diary, March 17, 1662-63). See also G. Gilmore & C. Black, supra note 162, at 9-10.
262 See Marine Insurance Commission Act of 1601, 43 Eliz. 1, c. 62; text accompanying note 255 supra.
merchants.\textsuperscript{264} One observer noted "what a ridiculous thing is it that the Judges in Chancery must determine of Merchants Negotiations transacted in Foreign parts, which they understand no better then do their seats they sit on . . . ."\textsuperscript{265}

Yet, Leoline Jenkins' eloquent argument to the House of Lords in 1662 for an expert mercantile Admiralty jurisdiction failed.\textsuperscript{266} By 1663 the Parliament had also rejected a bill for transferring mercantile matters to Admiralty, "the sense of the House inclining to think, that those things be better redressed by the law merchant . . . and by courts of Merchants to be erected in some few of the considerablest ports of the nation."\textsuperscript{267}

With such questions afoot, it was not surprising to see a new edition in 1676 of Ridley's \textit{A View}.\textsuperscript{268} Three factors, however, were now strongly favoring increased common law incorporation of the law merchant. First, the very inefficiency of the Courts had inspired, by 1680, the first experiments in arbitration ever held outside the trade guilds. This development led, in turn, to the novel Arbitration Act of 1698.\textsuperscript{269} The availability of private arbitration helped merchants to live with insensitive and expensive courts, and has remained a leading solution to this problem to this day.\textsuperscript{270}

Second, new statutes governing trade and imports made domestic legislation increasingly important to the merchant, a development which has also continued to the present.\textsuperscript{271} Especially important were the great Navigation Acts, the first of which passed in 1651.\textsuperscript{272} In 1669, a bill to make bills of debt transferable was actually put before the House of Lords, and, in 1672-73, another bill was ordered prepared to allow for assigning bills and bonds.\textsuperscript{273}

\textsuperscript{264} Lamb, \textit{supra} note 262, at 458, \textit{cited in} 5 W. \textsc{Holdsworth}, \textit{supra} note 5, at 150 n.8.

\textsuperscript{265} W. \textsc{Cole}, \textit{A Rod for the Lawyers} 12-13 (London 1659), \textit{quoted in} 5 W. \textsc{Holdsworth}, \textit{supra} note 5, at 150 n.8.

\textsuperscript{266} See Steckley, \textit{supra} note 62, at 166.

\textsuperscript{267} See 5 W. \textsc{Holdsworth}, \textit{supra} note 5, at 150-51 (quoting 2 Marvel, \textit{Works} 88).

\textsuperscript{268} T. \textsc{Ridley}, \textit{supra} note 105.

\textsuperscript{269} 9 Will. 3, c.15. See G. \textsc{Cross} \& G. \textsc{Hand}, \textit{supra} note 206, at 251.


\textsuperscript{271} These statutory measures originally began to encourage local control over English trade at the expense of the Hanseatic merchants, who had largely controlled English trade prior to the rise of the Merchant Adventurers. The expulsion of the Hanseatic merchants in 1578 preceded many similar acts to encourage foreign trade by English nationals. Some were passed at the very time Ridley was writing. See 4 W. \textsc{Holdsworth}, \textit{supra} note 5, at 333.

\textsuperscript{272} An Act for increase of Shipping, and Encouragement of the Navigation of this Nation, 1651, 2 \textit{Acts \& Ords. Interregnum} 559, \textit{cited in} G. \textsc{Gilmore} \& C. \textsc{Black}, \textit{supra} note 162, at 961.

\textsuperscript{273} 8 W. \textsc{Holdsworth}, \textit{A History of English Law} 151 n.1 (2d ed. 1937). Malynes first suggested relief. G. \textsc{Malynes}, \textit{supra} note 176, at 71-74. Both bills were dropped.
At this time abridgements of the statutes were printed for merchants and common lawyers alike, and the sections under “trade” were fat.\textsuperscript{274} Finally, in 1676 common lawyers received a great “hornbook” which vindicated incorporation of the law merchant as the “reasonable state of nature.” It also provided an easy guide to the old law merchant, and summarized the new statutes. This book was Charles Molloy’s great \textit{Treatise of Affairs Maritime and of Commerce}.\textsuperscript{275}

D. \textit{Charles Molloy (1646-1690) and His Treatise}

Molloy’s \textit{Treatise} would be one of the most popular books on the law of trade ever printed. It went through a second edition almost immediately, and would go through ten more printings by 1793.\textsuperscript{276} As a treatise, it was “very successful,” and constantly in print for over one hundred years, a record matched by very few books on trade law.\textsuperscript{277} Lord Mansfield cited the fifth edition in \textit{Luke v. Lyde}\textsuperscript{278} and in \textit{Pillans v. Van Mierop}.\textsuperscript{279}

Ridley’s \textit{A View} and Molloy’s \textit{Treatise} were in total contrast to each other. It would be difficult to imagine a pair of books on the same subject so entirely opposite in content, style, ideology, and purpose. Yet, even their printing dates show how they were historically linked to each other, and to the entire span of the struggle over incorporation.

The first edition of Ridley’s \textit{A View} immediately followed the Common Pleas challenge to the Admiralty in 1606, the challenge that was the cast gauntlet opening the final struggle to nationalize the law merchant. The fourth edition of \textit{A View} in 1676 directly coincided with the first edition of Molloy’s \textit{Treatise}. Sixteen seventy-six also marked the death of Sir Mathew Hale, the great compromiser between Royalist and common law causes, and the beginning—in the trial of Lord Danby—of the career of John Holt, who, together with Lord Mansfield, was the man most responsible for integrating law merchant principles into common law doctrines.\textsuperscript{280} The last edition of

\textsuperscript{274} See, e.g., E. \textsc{Wingate}, \textit{An Exact Abridgement of the Statutes in Force and Use From the Beginning of the Magna Charter 588-92} (London 1681). Particularly interesting is 13 & 14 Car. 2, c. 2, which sets up one of the first insurance commissions requiring a barrister-at-law as a member!

\textsuperscript{275} C. \textsc{Molloy}, \textit{supra} note 21.

\textsuperscript{276} The \textit{Treatise} was republished as follows: 2d ed. 1677; 3d ed. 1682; 4th ed. 1688; 4th ed., second printing 1690; 5th ed. 1701; 6th ed. 1707; 7th ed. 1722; 8th ed. 1744; 9th ed. 1769 (in 2 volumes); 10th ed. 1788; 10th ed. 1793 (3 volumes in Spanish). There may have been more. 1 L. \textsc{Maxwell}, \textit{A Legal Bibliography of the British Commonwealth 511} (2d ed. 1955); 2 D. \textsc{Wing}, \textit{Short Title Catalogue of Books Printed in England, Scotland, Ireland, Wales, and British America, and of English Books Printed in Other Countries 443} (1948); 1 J. \textsc{Worall}, \textit{Biblioteca Legem Angliae} 227 (London 1786).

\textsuperscript{277} See 5 W. \textsc{Holdsworth}, \textit{supra} note 5, at 131.


\textsuperscript{279} 97 Eng. Rep. 1035, 1041 (K.B. 1765).

\textsuperscript{280} The critical roles of Sir Mathew Hale, John Holt, and Lord Mansfield will be
Ridley’s A View in 1682 coincided with the third edition of Molloy’s Treatise. That year also marked the elevation of Holt to Recorder of London, his first seat as a commercial law judge. The ninth edition of Molloy’s Treatise in 1769 came soon after Mansfield’s decisions in Pillans v. Van Mierop and Luke v. Lyde, and the last edition of Molloy’s Treatise in 1793 corresponded exactly with Mansfield’s death. Thus, Ridley’s A View and its classical counterpoint, Molloy’s Treatise, covered precisely that period of English legal history that saw the professionalization of the law merchant. The period of their overlap marked the final debate on the merits of the professionalization of the law merchant by common lawyers, and the later editions of Molloy essentially covered the time needed to implement the result.

If Sir Thomas Ridley was the archetypal “Doctor” in his opposition to English legal provincialism, Charles Molloy was surely a very different sort of professional. He entered Lincoln’s Inn when he was seventeen years old, having come from his rural home in King’s County, Ireland to read law in London. In 1669 he transferred to Gray’s Inn, and he practiced near Fleet Street until his death in 1690. Evidence of administration for the benefit of creditors indicates a less than spectacular career for Molloy, but at least one son followed in his father’s footsteps and reedited the 1722 edition of the Treatise. Lack of effective copyright probably prevented Molloy from achieving wealth through the phenomenal success of his book.

In contrast to Ridley’s work, Molloy’s book showed no sign of originality. Almost all of the contents of Treatise were taken from Malynes’ Lex Mercatoria, and the crucial section on “Bills” is considered inferior to that in John Marius’ Advice Concerning Bills of Exchange. Kent, who made a careful comparative study of seventeenth century sources on bills and notes, said that Molloy only “cast a rapid glance” over the law concerning bills of exchange, particularly when compared with the “formal and exact” work of Marius. Yet, although Malynes and Marius have been the apple of schol-

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281 See 1 THE COMPACT EDITION OF THE DICTIONARY OF NATIONAL BIOGRAPHY 1391 (1975), and sources cited therein.

282 See id.; notes 207-50 and accompanying text supra (Malynes) & notes 237-45 and accompanying text supra (Marius).

283 3 J. KENT, COMMENTARIES * 126; cf. J. HOLDEN, supra note 280, at 42-52 (the contribution of Marius).
ars' eyes, in their own time Malynes' book enjoyed few printings, and Marius' book was not nearly as popular as Molloy's *Treatise*, which went through edition after edition.\(^{284}\)

There are two possible reasons for Molloy's popularity, and both go to the heart of what was happening in the law itself. First, as strange as it may seem, Molloy could claim to be the first English common lawyer to write a book about the substantive law merchant for lawyers.\(^{285}\) He was a self-consciously professional writer, writing not for all times or for all men, but for other lawyers and their immediate professional needs, and only incidentally for merchants and shipowners.\(^{286}\) Molloy was also the first person to write a book about the law merchant who could technically be called a common lawyer, in the sense that none of the other writers—unless one includes William West—had been a member of an Inn of Court.\(^{287}\) But to say that the main difference between Molloy and earlier writers such as Ridley, Marius, or Malynes was membership in an Inn of Court is to state the contrast far too narrowly, even considering the symbolic import of that fact. The fundamental difference between Molloy and the earlier writers was that whereas Ridley wrote his book as a jurist for the universal "opinion of Men,"\(^{288}\) and Malynes and Marius wrote as merchants and accountants for other merchants and accountants,\(^{289}\) Molloy wrote a book about the law merchant for common lawyers. This fact, in itself, reflected a most important change in the conception of the law merchant.

Molloy was not only the first important English common lawyer to write a book about the law merchant, he was also the first to focus on its practical, substantive aspects. By "substantive" I mean that Molloy was a prime example of that race so hated by Bentham, the "expositors."\(^{290}\) Molloy was far less interested in the right or wrong of questions than he was interested in the *authority* for both sides. More important, he was far less interested in

\(^{284}\) Malynes was printed four times, in 1622 (extremely rare), 1636, 1656, and 1686. See 2 D. *Wing*, *supra* note 276, at 396; 1 J. *Worall*, *supra* note 276, at 229. Marius was printed six times, in 1651, 1655, 1670, 1674, 1685, and 1700. See 2 D. *Wing*, *supra* note 276, at 402; J. *Worrall*, *supra* note 276, at 232. For bibliographical information about Molloy's *Treatise*, see note 276 *supra*.

\(^{285}\) 5 W. *Holdsworth*, *supra* note 5, at 131.

\(^{286}\) See C. MOLLOY, *supra* note 198, at i-xii, 444-62. Molloy treated merchants and factors as if they were strange, unfamiliar people requiring careful introduction.

\(^{287}\) See 5 W. *Holdsworth*, *supra* note 5, at 131; notes 232-35 and accompanying text *supra*.


\(^{289}\) 5 W. *Holdsworth*, *supra* note 5, at 131-35; 3 J. KENT, *Commentaries* *\(^{126-27, \ 128.}\)

\(^{290}\) J. BENTHAM, *supra* note 13, at 12 ("Not that a race of lawyers and politicians of this enervate breed is less dangerous to the duration of that share of felicity which the State possesses at any given period, than it is mortal to its chance of attaining to a greater.").
any question, no matter how fundamental, than he was interested in what was agreed on by all.

An excellent example of this tendency is Molloy's treatment of the jurisdictional dispute which Ridley perceived as central to the question whether common lawyers like Molloy should be writing books on trade law at all. Molloy begged the question:

As to those Matters that have passed the Pikes at the Common Law, I have as carefully as possible referred to their several Authorities. In the whole Work I have nowhere meddled with the Admiralty or its Jurisdiction (unless by the by, as incidentally falling in with other Matters) knowing well that it would have been impertinent and sawcy in me to enter into the debate of Imperium merum, Imperium mixtum, Jurisdiction simplex, and the like... since all that can be said, as well on the one Side, as the other; hath been so fully atd [sic] Learnedly handled and treated of by several worthy Persons, (that have indeed said all that can be said) ... .

Molloy then proceeded to assume a restrictive view of Admiralty jurisdiction without further discussion of any kind.

Molloy's decision to take this approach, infuriating as it might have been to a jurist like Ridley, was quite deliberate and, in a peculiar way, shrewd. As Molloy observed,

He that hath never so little to do as the Compass, though he sits still in his place, does as much or more then all the other necessary noise in the Ship; the comparison is quit of Arrogance, for it holdeth in the Design, it is not meant of the Performance.

Molloy's book was designed for performance. To rely on the test of time, or on the inherent rightness of the author's individual intellect, was hardly to appeal to the practitioner who needed to know what would be upheld by a court tomorrow and by what authority. As Sir Edward Coke said in his

291 C. Molloy, supra note 198, at xvi.
292 Id. at xvi-xii (consecutive pages).
293 Id. at xii.
294 Nevertheless, Molloy apparently assisted with an edition of the Resuscitatio of Francis Bacon's works in 1670. At least a "Charles Molloy" wrote both the dedicatory piece (to Charles II) and the introductory section of the second part of this collection of Bacon's works. See Molloy, To the King's Most Excellent Majesty and To the Reader in The Second Part of the Resuscitatio or a Collection of several Pieces of the Works of the Right Honorable Francis Bacon (2d & 6th pages, unpaginated) (W. Rawley ed. London 1670). The dedication to Charles II would be consistent with Molloy's other known literary endeavor, Holland's Ingratitude or a Serious Expostulation with the Dutch (London 1666), which contained laudatory verses about Prince Rupert and the Duke of Albermerle. See 1 The Compact Edition of the Dictionary of National Biography 1391 (1975). In addition, Molloy had just the year before—in 1669—joined Gray's Inn, where Bacon was regarded as a patron saint.
But this hardly meant that Molloy was neutral on the questions Ridley raised about the merits of incorporation. Rather, Molloy was fighting back with the same weapons pioneered by Coke fifty years before. His Treatise was an attempt to further "incorporate" the law merchant by begging all historical questions, but it also provided common lawyers with the relevant law, exhaustively compiled. Later experts, such as Kent, would attack Molloy's Treatise for being superficial in parts, but it was clear, well-indexed, and readable. For the purpose of introducing a new body of learning to a profession that was increasingly coming to discard the specialization demanded by a multi-jurisdictional system, the Treatise was a well-designed book. What is more, it was a book designed to make the law merchant appear more certain and less subjective than it really was. In this Molloy was not alone. Even as Bacon lamented the lack of rational debate on the future of English law, Coke, through his Reports and Institutes, again and again quietly begged the question, using a somewhat dubious certainty and authority from the past to support powerful asserted principles which were, in the last analysis, not a function of authority, but of Edward Coke himself.

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296 See 3 J. KENT, COMMENTARIES * 126.
297 Molloy's chapters are not only laid out in outline at the beginning of each of his three books, C. MOLLOY, supra note 198, at 1st-3d unpaginated pages following page xvii, but there are outlines at the beginning of each chapter of its contents, e.g., id. at 1, 24, 46, and a complete topical index, id., unpaginated section at end. By contrast, it is very difficult to approach Malynes and almost impossible to approach Marius without extensive knowledge not only of the terminology and structure of the law, but also of the organization of the particular books. For a quick reference point or a review of the law, both would be very awkward. Molloy, on the other hand, is so highly organized through its "book, chapter, index, and outline" system that he seems to be almost a precursor of the "West Key Number System."
298 It was, of course, Blackstone who was the culmination of this trend. Perhaps nowhere did professional generalism take root as much as in America, where Blackstone's initial influence was paramount. See, e.g., L. FRIEDMAN, A HISTORY OF AMERICAN LAW 88-89, 285-92 (1973); THE LEGAL MIND IN AMERICA 19-30, 92-105 (P. Miller ed. 1962); R. POUND, THE FORMATIVE ERA OF AMERICAN LAW 138-67 (1937).
299 For example, Kent regarded Molloy as superficial in his treatment of bills of exchange and the law attending them. See 3 J. KENT, COMMENTARIES * 126-27. See also 5 W. HOLDSWORTH, supra note 5, at 131-35.
300 See F. BACON, A Proposition, supra note 147, at 70; 5 W. HOLDSWORTH, supra note 5, at 486-89.
301 See 5 W. HOLDSWORTH, supra note 5, at 78-90; T.F.T. PLUCKNETT, supra note 5, at 281-87. See also Coates, Book Review, 68 YALE L.J. 172 (1958) (reviewing J.
This, however, would be the last thing that Coke himself would admit and, indeed, the same is true for Molloy. Here was the essence of what Bentham termed the "expository" tactic, a systematic intellectual fraud which guaranteed that there would be no rational debate of the fundamental issues. It was, as Bentham recognized, the most successful tactic in the history of English law.

There was a second reason for Molloy's success: he came at the right time. Molloy himself had noted, in speaking of Bacon, that it sometimes appeared "better for a man to be fortunate than wise, for worldly wisdom, though she seem always to fawn on fortune, yet can never command." In 1676, both the literature of the law merchant and the practice in London were ripe for a popularizer. The law merchant had begun to be dominated by a new theoretical outlook which was destined to lead it to new rigidity and inflexibility, fulfilling the prophecy of Thomas Ridley. The times invited a work like Molloy's Treatise.

And the values reflected in the Treatise eventually prevailed. The values of cosmopolitanism and flexible procedure based on practice, so eloquently pleaded by Ridley, were extinguished forever when, in Bromwich v. Lloyd, it was decided that once judgment on a custom had been given, that custom was judicially noticed and no proof was required in later cases. From Bromwich it was a logical step to Edie v. East India Co., in which Mansfield himself prevented evidence from going to jury to show that a previously proven custom was no longer the practice. Mansfield's novel use of the special verdict, to establish facts on which a determination of law by the judges could be based, had incorporated mercantile law into a precedent system. Total, fixed "incorporation" had become a certainty.

EUSDEN, PURITANS, LAWYERS AND POLITICS IN EARLY SEVENTEENTH CENTURY ENGLAND (1958)).

302 J. BENTHAM, supra note 13, at 11-12. See generally id. at 3-30.
303 Id. at 11 n.2.
304 Molloy, supra note 294, at 3d unpagedinated page. Molloy apparently admired Bacon and edited some of his writings. See note 294 supra.
306 Id. at 871-72.
308 Id. at 803-04; see Bright v. Purnier, 97 Eng. Rep. 1047 (London Tr. 1765); Blissart v. Hirst (1771), cited in F. BULLER, INTRODUCTION TO THE LAW OF TRIALS AT Nius PRIUS * 269. Mansfield, according to Buller, also refused to hear evidence as to custom of merchant in these cases where the law was "clearly otherwise." Id. at * 269.
309 For a general discussion of developments after 1676, see 1 W. HOLDSWORTH, supra note 62, at 316-36 (development of Admiralty jurisdiction); 8 W. HOLDSWORTH, supra note 273, at 170-76 (role of Holt, C.J., in incorporation movement reflected in his application of common law rules rather than mercantile custom to bills of exchange). See also Lickbassow v. Mason, 100 Eng. Rep. 35 (K.B. 1787) (Buller, J.) (reflecting traditional importance of Mansfield); P. NORTH, CHESHIRE &
Undoubtedly, part of the victory was due to Charles Molloy. In the great "incorporating" decisions of Luke v. Lyde and Pillans v. Van Mierop, Molloy's Treatise was cited as authoritative on mercantile custom. Indeed, in Luke v. Lyde, Mansfield even cited Malynes "as transcribed" by Charles Molloy. If ever a popularizer was victorious, it was at that moment—even

North's Private International Law 36 (10th ed. 1979) (Mansfield's contribution to "conflict of law" jurisprudence); T.F.T. Plucknett, supra note 5, at 247-51, 668-69 (Mansfield's use of special verdict as basis for finding of law by judge, and the effect of that finding as precedent).

310 Nevertheless, even after 1857 and the dissolution of Doctor's Commons, there were a few narrow, vestigial remnants of the civilian specialties. The last member of the College of Advocates, Dr. Thomas H. Tristram, died relatively recently, in 1912. See G. Squibb, Doctors' Commons 203 (1977); Six Lectures on the Inns of Court and of Chancery 95 (W. Ogders ed. 1912).

The continuing existence of ecclesiastical courts, with appeals to the provincial courts of Canterbury and York and then to the Privy Council (Judicial Committee), was radically changed by the Ecclesiastical Jurisdiction Measure of 1963, which established a new Court of Ecclesiastical Causes Reserved and provided for an ad hoc Commission of Review apart from the Privy Council. Ecclesiastical Jurisdiction Measure, 1963, c. 1, § 1; see G. Cross & G. Hand, supra note 206, at 238-39.

These measures essentially severed the ecclesiastical courts from the civil court system. This was certainly appropriate when, following the creation of the new Queen's Court of Probate and Divorce by the Matrimonial Causes Act, 1856, 20 & 21 Vict. c. 85., the ecclesiastical jurisdiction became limited to Church rituals and the behavior of clerics. See generally G. Cross & G. Hand, supra note 206, at 237-39; Manchester, The Reform of the Ecclesiastical Courts, 10 Am. J. Legal Hist. 51, 70-75 (1966).

The exclusive civilian jurisdiction in the university courts of Oxford was terminated in 1854 by a statute, 17 & 18 Vict., c. 81, § 45, that gave those courts permission to follow common law procedure. G. Duncan, The High Court of Delegates 40 n.3 (1971). The statute did not apply to the university courts of Cambridge. Id. Both the Oxford and Cambridge university courts are now largely defunct, although some claim that these courts still could decide cases applying substantive civil law. For discussions of the university courts, see J. Morris, Oxford 73-74, 195 (1965); J. Williams, The Law of the Universities 90 (1910).

The High Court of Chivalry actually did go back into session, after being dormant from 1737-1954, in the case of Manchester Corp. v. Manchester Palace of Varieties, Ltd., [1955] P. 133, 135-37 (1954). This case involved the unauthorized use of the city's arms by a theatre. See G. Squibb, The High Court of Chivalry 123-27 (1959). There is thus at least one English court in technical existence that, arguably, "is a civil law court and can proceed only in accordance with that law." Id. at 162 (footnotes omitted) (citing T. Ridley, supra note 105, at 86, 89). "Dormiunt aliquando leges, moriuntur nunquam!" E. Coke, The Second Part of the Institutes of the Lawes of England * 161.

the great Lord Mansfield got some of his law merchant from Charles Molloy.\footnote{There is a final irony. Recent English judicial “reforms” have only now abolished the last ghosts of the civilian specialties. These “reforms” have coincided with new attempts to provide a separate and specialized treatment for so-called “commercial list” cases.}

The last vestige of the old civilian jurisdictions was the peculiar mix of business in the Probate, Divorce, and Admiralty Division of the English High Court of Justice, created by the Judicature Act of 1873, 36 & 37 Vict., c. 77. As Dickens noted, civilian monopoly was the only link between “people’s wills and people’s marriages, and disputes among ships and boats.” C. Dickens, *David Copperfield* 403 (T. Blount ed. 1966). Under the Administration of Justice Act, 1970, c. 31, § 1, this last trace of the civilian monopolies was eliminated, with all contested probate work given to the Chancery Division, and all “Admiralty” work joined with the commercial work already being done in the Queen’s Bench Division. As the remaining work is all domestic relations, the new Division name will be the “Family Division.” Indeed, “[i]t seems possible that in the not very distant future the distinction between Queen’s Bench judges and Family Division judges will disappear.” G. Cross & G. Hand, *supra* note 206, at 295; see R. Walker, *Walker & Walker’s The English Legal System* 163-64 (4th ed. 1976); M. Zander, *Cases and Materials on the English Legal System* 32-36 (1973).

On the occasion of the second reading of the Administration of Justice Act in the House of Lords, it was only appropriate that Lord Gardiner, the Lord Chancellor, made a last, passing reference to the English civilians. Lord Gardiner remarked that “the lawyers who had practised in the old ecclesiastical courts... even had their own Inn, known as Doctors’ Commons, as your Lordships may remember from the pages of *David Copperfield.*” Id. at 32. How chagrined Cowell and Ridley would have been to know that Dickens’ caricatures would be their last memorial in the House of Lords!

Ironically, in the same speech, Lord Gardiner welcomed a new Commercial Court as a separate court within the Queen’s Bench Division. Id. at 33. While such a “Commercial Court” had existed within that division since 1895, in that there had been special arrangements for commercial cases, the “Commercial Court” had previously enjoyed no statutory status. Gardiner stated that “[i]t is most desirable for many reasons, both legal and economic, national and international, that we should do whatever we can—just as Lord Mansfield did in the eighteenth century—to attract commercial litigation into our courts...” Id. at 35. The new court was to have had special powers to dispense with the strict rules of evidence and to sit in private, but the privacy power was defeated by one vote in the Commons, after a determined campaign by certain members of the common law bar. Id. Gardiner also stressed the need to have specialized judges “experienced in commercial cases” to sit in the “Commercial Court” and specialized judges “experienced in Admiralty matters” to sit in the new “Admiralty Court” section of the Queen’s Bench Division. Id. Of course, these were all recent attempts to solve the problems predicted by Ridley’s *A View*, problems that were among the ultimate consequences of the professional “incorporation” of the law merchant which the Administration of Justice Act of 1970 has now brought to a final, total completion. See G. Cross & G. Hand, *supra* note 206, at 295-96; R. Walker, *supra*, at 303-05. And some civilian ideas have indeed been retained, as “incorporated.” Thus, the new “Commercial Court” has
Ridley and Molloy were excellent examples of conflicting views of the law merchant and its "incorporation." They also represented radically different attitudes toward the use of legal literature and toward the function of legal culture. Ridley was a cosmopolitan, and a precursor of the Benthamite radicals. He saw that the role of legal learning was to broaden perspective, to criticize the status quo, to identify and debate options for the future development of the law. He, like Bacon, drew on a body of past knowledge that was European in scope. He relied on his individual intellect, submitted only to Bentham's "polished test of reason."

Molloy was a conventional "expositor" and popularizer of the first rank. The test of reason meant little to him, as he explicitly said. For Molloy, it was the living body of the law that gave his work authority, and nothing else. Whereas Ridley presented his ideas as strictly his own, Molloy posed as merely an interpreter of the status quo, a spokesman for the law that actually was rather than the law that should be. Molloy wrote to assist the practitioner and the judge, and he was amply rewarded by citation in some of the greatest decisions of the law merchant. The professional incorporation of the law merchant was, to no small degree, a vindication of Molloy's "professional" approach to legal literature and his convictions as to how the legal culture itself serves to guide the law. Francis Bacon would have regarded Molloy's limitations with contempt, but Edward Coke would have seen Molloy as a true servant of the common law.

been designed to encourage the decisions of mercantile cases on "documentary evidence alone"—a civilian practice. *Id.* at 303. The new "Admiralty Court" will look to expert naval assistance from the Elder Brethren of Trinity House, yet another civilian practice. G. Cross & G. Hand, *supra* note 206, at 295-96. But, as Marius and Malynes predicted, the commercial community still shows a preference for arbitration, *see, e.g., id.* at 323 n.3, and the Courts Act of 1971, c. 23, § 43, abolished the last specialized "pie poudre" court of the law merchant, the Bristol Tolzey and Pie Poudre Courts. R. Walker, *supra* at 61 n.3. Almost no traces of the civilians remain, and great vision of a separate, cosmopolitan, and specialized bar of experts in trade law is now a vanished dream.

Does any significant monument to the civilians still survive in England? Despite many attempts to alter the situation, English university teaching in law remains relatively isolated from legal practice, a last vestige of the days when all law teaching was a civilian monopoly. *See* Coquillette, *supra* note 6, at 13-17. As James Barr Ames observed in 1913, "Even now the department of law at Oxford and Cambridge is not and does not claim to be a professional school." J. Ames, *Lectures on Legal History* 357 (1913). Good or bad, this is the last memorial of the English civilians. Ironically, it may have been the one they least desired.

315 *See* notes 290-91 and accompanying text *supra*. 