

**AN ESSAY ON THE EARLY
HISTORY OF THE LAW
MERCHANT:
BEING THE YORKE PRIZE ESSAY
FOR THE YEAR 1903; PP. 3-176**

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of the Law Merchant,

being the Yorke Prize Essay for the year 1903

by

W. MITCHELL, B.A.

St Catharine's College.

Assistant Master at the Perse School, Cambridge

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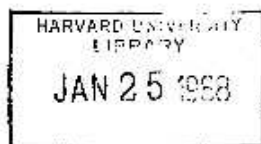
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PREFACE.

THIS Essay does not in any way claim to be a Treatise on the subject. Lack of leisure has compelled me to omit many important topics and to deal all too briefly with others. My debt to previous writers—to Bensa, Huvelin, Schaube, Pollock and Maitland, and above all to Goldschmidt—is evident on every page; as far as time and opportunities allowed I have gone to the original authorities. While the Essay was in the Press, I learnt that there were numerous fair rolls preserved in the Record Office and upon these I am at work. To Sir F. Pollock for kind suggestions I wish to express my thanks.

judges were ordered to give aliens no better law than their own citizens would have in the alien state.

Sometimes the variations in the Law were of far-reaching importance, and perhaps no better example can be given than the rules regulating the effect of Earnest money. Here, if anywhere, a definite and universal rule might be expected, for otherwise no merchant could be sure of his bargain. In the 13th century, however, the effect of the Earnest had not been finally settled. As a general rule it may be said that the payment of a God's penny was effectual to bind a mercantile bargain, and Fleta expressly declares that such was the law amongst merchants. Edward I., for instance, gave the Earnest a binding force, as a favour to the foreign merchants. "Every contract," ran a clause in the *Carta Mercatoria*, "between the said merchants and any persons whencesoever they may come, touching any kind of merchandise, shall be firm and stable, so that neither of the said merchants shall be able to retract or resile from the said contract when once the God's penny shall have been given and received!" At Avignon¹ the same rule prevailed; but there were exceptions. The Preston *custumal*² allowed the

Spalati in quacunq[ue] curia et foro cujuscunq[ue] civitatis...illud simile jus et justicia per similem modum et formam fiat in curia et foro civitatis illis hominibus."

1429. *St. Marc. Brixia*, cap. 43. "Etiam possunt [consules mercatorum] forensibus tale jus reddere quale et quem ad modum in eorum terris redditur nostratibus."

¹ Maitland, *Select Pleas in Manorial Courts*, 133.

² *Custumal of Preston*, Article 12. Bateson, *Eng. Hist. Review* (1900), p. 497. "Item si Burgensis aliquid forum vel

seller to break the contract by repaying double the Earnest, and the buyer by forfeiting five shillings. In Italy most of the commercial statutes¹ declare that if once an Earnest is accepted the contract is binding, but Varese² again offers an exception to the general rule, while in Sicily³ it was the custom among merchants to consider the Earnest merely as a

aliquem mercem emerit et hernas dedit et ille qui vendiderit de foro suo penitebit duplicabit hernas ementis. Si autem emens forum suum palpabit vel habebit forum vel quinque solidos de vendente."

¹ Circa 1200. St. Antiqua Mercatorum Placentiae, cap. 65, p. 20. "Et si quis de nuali (=mercantiae) jurisdictione mercatum fecerit...et...denarium dei dederit vel dari fecerit, illud mercatum inter partes ratum haberi faciam."

1214, confirmed in 1265. St. Legis civitatis et insulae Curzulae (in *M.H.S.M.*), cap. xxxv. p. 15. "Si quis mercatur emendo aliquid ab aliquo dedit unum denarium parvum pro arris, mercator sit firmum et venditor teneatur dare et emptor recipere merces: ab uno denario supra si aliquis dedit arras, pro quo remenebit mercatum, ille teneatur solvere alteri parti arras in duplum." Cf. p. 86, cap. 38.

1302. Florence. St. Calimalae, Lb. iii. cap. i. "Quo denario dato mercatum stabile sit et firmum."

1312. Spalati vetus statutum, Lb. iii. cap. 96, p. 109 (in *M.H.S.M.*). "Si...arre date fuerint...dictum mercatum sit firmum et ratum...quia nihil tam contingit fidei humane congruum quam ea que iuste per pactum inter aliquos intervenerunt observari."

14th century. St. Scardouae (in *M.H.S.M.*), cap. x. p. 122. "Si aliquas arras dederit, illud mercatum nec emptor nec venditor valeat relinquere."

² 1347. Lattes, *Dritto Commerciale*, p. 132, note 14. "Quando le merci fossero state spalmate o benedicate, chi mancava al contratto dovesse risarcire ogni danno, invece se si fosse soltanto data la caparra, chi l'aveva dato dovesse perderla, chi l'aveva ricevuta, restituire il doppio." Quoted from St. de Varisio.

³ Brunneck, *Siciliens Mittelalterliche Stadtrechte*, p. 186, note 1.