That famous Philosopher Xenophon, extolling the Persian Laws, testified that their Citizens from their infancy, were educated and taught not to attempt, or almost to imagine any thing but honest and useful. Which was the cause, as Gellius reporteth, that Draco a Citizen of Athens made their laws so strict and severe, that it was said they were written with Blood, and not with Ink; whereas on the other side the Law made by Solon was compared to a spider's web, which taketh the lesser flies and suffereth the greater to escape and to break the same. So that (every extreme being vicious) Reason requireth a Law not too cruel in her Frowns, nor too partial in her Favours. Neither of these defects are incident to the Law-Merchant, because the same doth properly consist of the Custom of Merchants in the course of Trafficke, and is approv'd by all Nations, according to the definition of Cicero, Vera Lex est recta Ratio, Natura congruens, diffusa in Omnes, Sempiterna:

True Law, is a right reason of nature agreeing therewith in all points, diffusa and spread in all Nations consisting perpetually, whereby Meum and Tuum is distinguished and distributed by Number, Weight and Measure, which shall be made apparent. For the maintenance of Trafficke and Commerce is so pleasant, amiable and acceptable unto all Princes and Potentates, that Kings have beene and at this day are, of the Society of Merchants: And many times notwithstanding their particular differences and quarrels they doe neverthelesse agree in this course of Trade, because riches is the bright Starre, whohght Trafficke takes to direct it selfe by, whereby Kingdomes and Commonweales doe flourish, Merchants being the meanes and instruments to performe the same, to the Glorie, and Benefit of their Monarchies and States. Que?tionlesse, therefore, the State of a Merchant is of great dignity and to bee cherished; for by them Countrys are covered, Familiaritie betweene Nations is procured, and politike Experience is attained. Whereupon I have been moved (by long observation) to put the worthines of the Customarie Law of Merchants, in plain and compendious writing, by undoubted principles, familiar examples, and demon?trative reasons, without affectation of curious words, more than the grauitie of the Theame (in some places) did require.
I have intituled the Booke, according to the ancient name of Lex Mercatoria, and not Ius Mercatorum; because it is a Customary Law approved by the authoryte of all Kingdomes and Commonweales, and not a Law established by the Soueraintie of any Prince, either in the first foundation or by continuance of time. And beginning with Time, Number, Weight and Measure, I doe descend to the three Essential Parts of Traffike, divided into three parts accordingly, by comparing them to the Bodie, Soule, and Spirit of Commerce, namely, Commodities, Money, and Exchange for money by Bills of Exchanges. The first, as the Bodie, upheld the World by Commutation and Bartring of Commodities, untill money was devised to be coined. The second, as the Soule in the Bodie, did imbue life to Traffike, by the means of Equality and Equitie preventing advantage betweene Buyers and Sellers. The third, as the Spirit and Facultie of the Soule, (being seated euerywhere) corroborateth the Vital Spirit of Traffike, directing and controlling (by just proportions) the prices and values of Commodities and Moneys. For euens as Merchants are the Instrumentall Cauze of Trade; euens is the Exchange for Moneys, the Efficient Cauze with vs in the course of Traffike, and become Predominant or ouer ruling the price of Commodities and Moneys, as aforesaid. This is manifest by three Paradoxes alluding to the three Essential Parts of Commerce, which (for a Corollari) I have added in the latter end of this Booke, with such other worthy observations as in the first Chapter are declared. And euens as the roundness of the Globe of the World is composed of the Earth and Waters: So is the Bodie of Lex Mercatoria, made and framed of the Merchants Customes, and the Sea-Lawes, which are involved together as the Seas and Earth. In the description whereof, I have made repetition of the Material points, according as occasion did require me for to make application thereof, for the better understanding of the ingenious Reader, which is the main Scope that all Writers are to regard and care for. The means whereby the differences and controversyes happening betweene Merchants in the course of Traffike are ended, is all declared, which must of all require Breuitie and Expedition, and had need of a peremptorie proceeding, as was invented for the Common Lawe of the Realm of England, the due commendation whereof is added hereto; shewing all the means by which there might bee made an Art or Science, and what observation of other Lawes are concurring with ours, both in the strictness of Lawe, and the lenity of Equitie, most consonant with the Law-Merchant, the knowledge whereof is of so great conquence, that without it all Temporal Lawes are not compleat, but imperfect. The Scope of all therefore is, That the Rule of Equitie and Equitie may take place betweene Vs and other Nations, which Velut Ariadnæ cæca regens filo vei?gia, non modo nos errare non sinit, sed etiam efficac, vt aberrantes in rectam viam deducamur, as hath beene mentioned in our last Treatise of the maintenance of free trade, lately published. Concluding (gentle Reader) upon all the premises handled (as I hope) substantially, I commend and submit the same to the loving entertainement of the discreet, wise, and experienced; wishing that (like matter yet downe by the Penne of Apollo) they may sound weetly in your apprehension, and give to your conceit most harmonious Mischie; Pleasure and Delight. London the 25 of November 1622.

Thine to v?e alwaies readie,

GERARD MALYNES.

[...]

AN INDUCTION TO LEX MERCATORIA, OR THE LAW MERCHANT, AND THE ANTIQUITIE THEREOF.

CHAP. I

When Almighty God had created man, good and a sociable creature, who could not so well live alone, as other creatures sufficiently prouided (by nature) for their sustenance, and had reason assigned and given unto him, above all the said creatures: yet all the means and faculties of his bodie and soule, were not sufficient to make him happy while?t he was alone. But nece??tie did require a concourse of men helping one another to supply (with a common strength) the said weakness;?t for the burden of the said necessity was so weightie and great, that one man alone was not able to manage the same. Then it came to pass, that by mutual contribution of offices, euerie man did afford means according to his ability for the common good, so that theo??e which were of a strong bodie did employ their labour to get living and maintenance for them?elues and others: And theo??e which were endued with the be?t part of the soule, as Venus?tanding
and Rea?on, did vndertake the mo?t important matters, teaching men how to liue well, and informing them of their felicitie (which they judged chiefly to con?i?t in virtuous actions) endeaouering to make impr?tion in the ?oule of man, of certaine good lawes for the ob?eruation thereof, with a reference of them to the fir?t law engraffed in the ?oule of man, as a part of that diuine light, which was in?u?ed in him to know (in ?ome mea?ure of perfection) the good and euill, and accordingly to receiue reward of puni?ment.

As for the other and better part of informing and guiding the thoughts and affections of men to a ?upermaturall end, that, as ?urpa??ing the compa??e of that lower ?pheare wherein I now moue, mu?t be left unvntouched by me, who here take for my object not the ?pirituall but the ciuill life of man and the meanes thereto conducing.

Touching therefore the externall part. The mutuall contribution of offices among?t men hath from the beginning continued both in labouring and manuring the natural riches of the lands in come and pa?turage, as in the immediate children of our fir?t father Adam, and in planting Vines, and making an extract of the iuyce of the fruit of them, as Noah. Which riches in matter and foundation natural, and partly al?o in alteration and managing artificially, euyery po???e?or not long after the beginning of the world ?euerally inioyed in propertie: and hence did proceed a commerce, fir?t, in real? enchanter and communication of things of the ?ame or other kinds, but all natural riches commodities, as ?hepee for ?hepee, ?hepee for come, wine for yle, &c. between man and man, or nations and nations, according to number, weight, and mea?ure, and after, to avoid confu?ion, by a commune pignus currant mutual, which we call money, both by way of merchandizing, the mo?t ancient evidence hereof is Abrahams purcha?ing for money a field for buriall. The ob?eruation and cu?tomes whereof, was the beginning of the Law-Merchant, and that e?pecially when mankind was propagated into an infinite number, and the dome?tiques or neere hand commodities were not ?ufficient for their ?u?tenance in ?ome countries, and in other countries were ouver aboundant: Then of nece??itie followed the v?e of tru?ting, exchanging, and trading; fir?t, on the Land in the maine Continent, and then extenuy vpon the Seas, both for fi?hing and negotiation. Then did merchants trauell from countrey to countrey: So in the da?es of the Patriarke Jacob, did the merchants Medianits in their journe?y meete with the children of Iacob, and then lo?eph was carried ther with all his family. And then it was and proued to be true, (which experience hath confirmed) that Vita civilis in ?ocietate po?ita e?t, ?ocietas autem in imperio & commercio:

So that in plainely appeareth, that the Law Merchant, may well be as ancient as any humane Law, and more ancient than any written Law. The very morall Law it ?elfe, as which hath ?o continued and beene daily augmented ?uccesiuely vpon new occa?ions, and was not altogether made in the fir?t foundation, as the Lawes whereby the Common-weales of Irael (who?e Lawes were vniformely made by Mo?es from God:) or tho?e of Crete, Cybaris, Sparta, & Carthage, by Minos, Charondas, Lycurgus, and Phalcas. Neuerthele??e, many Emperours and Kings haue alwaies referred the ending of differences, which happen betweene Merchants, to be done & decided according to the Law-Merchant, That is to ?ay, according to the Cu?tome of Merchants, who by their trauels found the diuer?tile of weights and mea?ures, and the goodne??e and v?e of commodities plea?ing to all nations, whereby the ?uperfluities of them were vented among?t them. Vt quod v?piam na?citur boni, id apud omnes affluat.

This Law of Merchants, or Lex Mercatoria, in the fundamentals of it, is nothing el?e but (as Cicero dинфeth true and iu?t Law) Recta Ratio, natura congruens, diffu?a in omnes, Con?i?tans ?empiterna: True Law is right Rea?on, agreeable to Nature in all the points, diffu?ed and ?pread in all Nations, con?i?tting perpetuall without abrogation: howbeit ?ome doe attribute this definition vnto ius gentium, or the Lawes of Nations, which con?i?teth of Cu?tomes, Manners, and pre?creptions of all Nations, being of like conditions to all people, and ob?erued by them as a law: But the matter being truely examined, we ?hall find it more naturally and properly belongeth to the Law-merchant.


Princes and Potentates by their prerogatuiues (re?pecting the law of Nations) doe permit among?t them?e elues a free travelling by land through their ?euerall Kingsdomes, Territories, and Dominions, vnle??e they bee open enemies: They hold likewi?e a communitie of the ?eas for Nauigation, as al?o a dii?ct dominion of the ?eas adioyning to the territories and iuri?diction of their countries, they take Cu?tome, Sub?dies, and as al?o duties for the fi?hing in their Seas, Streames, and Dominions; of all which the Merchant is to take e?peciall notice, to avoid danger in the trafficke and trade with their ?ubjects, for non-payment of the ?ame, which they claime iure gentium.

Are not the Sea Lawes e?tabli?hed to decide the controuer?ies and differences happening betweene Merchants and
Marriners? And is it not convenient for Merchants to know them? Considering that Merchants mainaine the Fishers-men, and (by way of Trade) cause the Sea and Land Commodities to bee dispersed everywhere? So that the said prerogatives do also appertaine to the Law-merchant as properly inherent unto commerce, and the observance of Merchants being of like condition to all people and nations.

Concerning manners and prescriptions, wherein the differences is to be noted from the Law-Merchant; the same consist in the erecting of Offices, creating of Officers, and making of Lawes, which of themSELVES make a separation betweene Cu?tomes: Also the giving or bestowing of honours and dignities, the granting of privileges, and the doing of any thing which concerneth the Honor, Body, and goods [...]

Powered by TCPDF (www.tcpdf.org)