The Bathurst Lecture 2021

The enduring qualities of commercial law

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I am greatly honoured to have been asked to present this the third Bathurst Lecture on Commercial Law. This lecture follows those given by the Honourable Murray Gleeson AC and Graham Bradley AM. The third in a series is very early days for discerning a trend, but we may perhaps be seeing an oscillation between speakers with an advocacy background and speakers with a corporate background. As you will see, I think that is a good thing. We all know lawyers who have an unduly inflated impression of their understanding of things – my wife regularly reminds me of this. Lawyers and perhaps especially litigators can tend to have a skewed understanding of commercial enterprises. Litigation is a catastrophe for most businesses. What occurs 99% of the time – when they are running their businesses, dealing with their suppliers and customers and competing with their competitors – is utterly different from what occurs in the tiny minority of the time when they are wasting their time and money in litigation. Chief Justice Allsop has written about this, in a paper which warrants careful attention, and which includes a perceptive passage explaining why much commercial success is not built on hard-faced greed, but upon mutual respect, decency and honesty, and that:[1]

> "Litigation lawyers (including judges and arbitrators) sometimes scoff at this. But they only see the scrapping unpleasantness of failure and the often bad manners of litigation, or 'dispute resolution' in whatever form. They often overlook the fact that the vast majority of commercial arrangements do not end in tears, but rest on reciprocity, mutual self-interest and a requisite degree of trust."

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1 J Allsop, "Characterisation: Its place in contractual analysis and related enquiries" (paper delivered at Contracts in Commercial Law Conference, Sydney, 18-19 December 2015); (FCA) [2015] *Federal Judicial Scholarship Articles* 29.

Let me return to the man in whose honour this lecture series is known. I am delighted that he is present today. The Honourable Thomas Frederick Bathurst was 18 years my senior at the Bar, and I had the good fortune to be briefed in cases involving him. In particular, I was briefed in one great case as Bathurst QC's junior, *Australian Securities Commission v Nomura International plc*,[2] to defend Nomura's conduct in unwinding an arbitrage position between physical stocks mirroring the index and SPI futures – essentially, selling $600 million of stock, price insensitively, in the 30 minutes at the end of the March quarter in 1996, a quarter of a century ago last month. The most extreme aspect of the regulator's case had the potential to make it unlawful to sell large volumes of shares without regard to price, even for the legitimate purpose of meeting a maturing futures obligation maturing on the same day. To be fair, other aspects of the case addressed parts of Nomura's conduct which were, to say the least, less nobly motivated and best not dwelt on. Both regulator and market participant wished to have their dispute heard and determined swiftly, and that is what happened. Proceedings were commenced in 1997 and heard over 3 weeks in August 1998, with lay and expert witnesses, recordings of orders placed with brokers, and even a view of the ASX to see the SEATS system in action. I still recall my surprise at the speed at which my leader shuffled down from chambers to Bridge St, as well as the unfeigned delight of Justice Sackville, then a recently appointed member of the Federal Court, at learning how the bid and ask stacks worked in real time, and at the human interest in the variegated personalities within Nomura: the boffins who identified the opportunity, the traders who executed the strategy, and the senior executives who reaped the lion's share of the profits generated.

Bathurst and I appeared as allies in a wide range of other litigation: in various contested takeovers;[3] in a regulatory dispute concerning interchange fees charged by Mastercard and VISA;[4] in the long-running Estate Mortgage litigation in the Supreme Court of Victoria and the C7 litigation concerning pay television in this country.[5] We were more often than not aligned, although we were opposed in a dispute concerning the supply of thermal coal to the Bayswater and Liddell power stations.[6] I think I was only ever briefed without a leader against Bathurst QC in one case – as a very junior junior against a very senior

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2 (1998) 89 FCR 301.

3 *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77; [2006] FCA 274; *Re Cashcard Australia Ltd* [2004] FCA 223 (an acquisition by scheme, with a contest as to class definition).

4 *MasterCard International Incorporated v Reserve Bank of Australia* [2003] FCA 1260.

5 The former settled after many weeks of hearing; the latter was decided as *Seven Network Ltd v News Ltd* [2007] FCA 1062.

6 *Peabody Resources Ltd v Macquarie Generation* (unreported, Supreme Court of New South Wales, Equity Division, Einstein J, 23 November 1998), appeal dismissed *Macquarie Generation v Peabody Resources* [2000] NSWCA 361.

Queen's Counsel. Telstra and Optus hybrid fibre coaxial cables were being rolled out in 1998 across Sydney and Melbourne. The cables were opposed by many local councils, which, stymied by federal law from preventing the rollout altogether, imposed substantial rates on the easements for the cables. Telstra and Optus claimed that the rates were invalid, including as an excise contrary to s 90 of the Constitution. Optus briefed Bathurst QC, leading a very capable junior, Stephen Gageler. Dick Conti QC, Francis Douglas QC and Gavan Griffith QC were for the other parties. I was briefed for the NSW Attorney on a narrow point, to oppose the submission that the rates were duties of excise.[7] I think it was my second unled appearance in a constitutional case, and I seem to remember that my most earnest submissions were not made to the Federal Court, but to the Crown Solicitor, to the effect that on the one hand this was a vitally important case for the State such that it should intervene, but at the same time it would be a bad look for the Solicitor General himself to appear, because it might give undue credence to Bathurst's argument. This was an exquisite conflict between self-interest and duty, but eventually the self-interested junior's advice was followed, and I saw and learnt from four very fine counsel at the peak of their game.

I now appreciate, much better than I did at the time, how much I was learning from seeing all those pieces of litigation unfold, both about law and about human nature. To paraphrase the words with which Herbert Hart concluded his inaugural lecture as Professor of Jurisprudence at Oxford, it is very difficult to see what is visible in the works of our predecessors until one is taught how to look by one's contemporaries.[8] It was an immense privilege to learn the advocate's craft from masters, a tradition which can readily be traced to mediaeval times (I shall return to this in a moment). But pleasurably nostalgic though that survey of litigation from a different age has been (at least for me), it is not wholly unrelated to my purpose today. In all of the litigation I have mentioned, important commercial interests were at stake, mostly worth tens of millions of dollars – and that is 1990s dollars – involving listed corporations. Some of the proceedings would be described as "commercial". Others might not. For some, it might depend on whom you asked. A contractual dispute about the supply of thermal coal is surely "commercial", even

7 *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322; [2000] FCA 1887. An appeal (*Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198; [2002] FCAFC 92) and further appeal (*Bayside City Council v Telstra Corp Ltd* (2004) 216 CLR 595; [2004] HCA 19) ensued, but not with Bathurst QC.

8 H Hart, "Definition and Theory in Jurisprudence" in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983) 21, p 47.

though the purchaser is a State owned corporation.[9] But can a constitutional case count as "commercial"? Much of the litigation mentioned above involved regulators (especially, ASIC and the Reserve Bank); does a characterisation of litigation as "regulatory" preclude its being "commercial" in a world where so much trade and commerce is tightly regulated? All those questions might make it tempting to ask: "what is commercial law?" Does it extend to "public law" litigation, such as administrative law challenges to decisions of the Takeovers Panel or the Reserve Bank? Does it extend to competition law such as the alleged contravention of Pt IV at the heart of the C7 litigation? Does it extend to a telecommunications company's response to a council that its rate amounts to an unconstitutional excise? And, more generally, how can one consider the enduring values of commercial law without first defining what it is?

As I indicated at the outset, there are difficulties in analysing commercial law through the lens of litigation. They are not the only difficulties. Sir Roy Goode said that commercial law extended to "all those legal principles, from whatever branch of law they are drawn, which regularly surface in commercial disputes".[10] That is a very broad definition! He concluded (in my edition of his classic work it is some 1430 pages later – there is quite a lot of law that falls within his definition of commercial law) under the heading "Final Reflections":

> "The law affecting business transactions is not a seamless web, nor is it a jigsaw in which, with careful study and some luck, all the pieces can be fitted neatly together to make a harmonious whole. Rather it is a collocation of ill-assorted statutes bedded down on an amorphous mass of constantly shifting case law."

Pausing there, I suspect most or all of us present this evening appreciate the force of that observation. It is far from novel. Much the same point was made a century ago, on the first page of Henry Disney's *The Elements of Commercial Law.*[11] There is a great deal to be said for the thesis propounded in the most recent issue of the Hastings Law Journal, to the effect that much commercial litigation involves the intersection between different branches of law, but that is a topic for another occasion.[12] However, Sir Roy went on to say, less despondently:

9 Contrast the importance of mercantile status in medieval times; see below.
10 Preface to the first edition of R Goode, *Commercial Law* (Penguin Books, 1982).
11 H Disney, *The Elements of Commercial Law* (Macdonald and Evans, 1908), p 1: "Commercial law is an expression which is incapable of strict definition, but which is used to comprehend all that portion of the law of England which is more especially concerned with commerce, trade and business."
12 G Castellano and A Tosato, "Commercial Law Intersections" (2021) 72(4) *Hastings Law Journal* 999.

> "But if we view commercial law as the totality of the law's response to the needs and practices of the mercantile community, then, indeed, commercial law exists and flourishes in England, adapting itself constantly to new business procedures, new instruments, new demands.
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> This, then, is the essence of commercial law – the accommodation of rules, usages and documents fashioned by the world of business; the facilitation, rather than the obstruction, of legitimate commercial development. This is achieved not through ad hoc responses to particular problems but through the development of principles within a sound conceptual framework."

While Sir Roy Goode identified essential principles of commercial law, he did so without a precise definition. That reflects something quite profound, which is worth pausing to consider. Definition in law is for the main part illusory. This was something considered carefully by Herbert Hart. Hart perhaps knew more about the actual practice of law than any other professor of jurisprudence. His background was as a consummately successful Chancery junior, without a law degree; he and Richard Wilberforce were the leading juniors of the 1930s.[13] It is a remarkable fact that after being elected to the Chair of Jurisprudence at Oxford in 1953, Hart chose as the subject of his inaugural lecture "Definition and Theory in Jurisprudence".[14] He referred to "the great anomaly of legal language – our inability to define its crucial words in terms of ordinary factual counterparts".[15] The point was familiar to Jeremy Bentham, Frederick Pollock and Frederic Maitland in the nineteenth century.[16] Another very profound thinker, Harold Berman, considered the same point in some detail from the other side of the Atlantic. His posthumously published *Law and Language: Effective Symbols of Community* built on Hart's observations:[17]

> "It is, of course, true, that legal reasoning is characteristically circular. If one says that the claimant has a right to a certain tract of land because he owns it, and that he owns it because it was devised to him by the testator, the terms 'right', 'own', 'devised', and 'testator' all refer to each other, and each is defined in terms of the

13 See N Lacey, *A Life of HLA Hart: The Nightmare and the Dream* (Oxford University Press, 2004), esp pp 46-53.

14 Published by Clarendon Press, Oxford 1953, reprinted in H Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983).

15 Ibid, p 25.

16 See Pollock and Maitland, *The History of English Law* (2nd ed, Cambridge University Press, 1898), vol 2, p 31 ("Legal reasoning seems circular:– for example, it is argued in one case that a man has an action of trespass because he has possession, in the next case that he has possession because he has an action of trespass; and so we seem to be running round from right to remedy and then from remedy to right.").

17 H Berman, *Law and Language: Effective Symbols of Community* (Cambridge University Press, 2013), p 82.

other."

Hart observed that those who ask these questions were not asking how to use the words correctly: "though the common use of these words is known, it is not understood; and it is not understood because compared with most ordinary words these legal words are in different ways anomalous".[18] The difference between the role of definitions in law, compared with, say, mathematics or formal logic, reflects a profound difference in the natures of those disciplines.

But "commercial law" is not a legal concept *within* the legal system. It is a description of an element or a subset of the legal system. Perhaps it is not subject to the same difficulties to which Hart and Berman referred. Yet try to define other elements of the legal system, like "equity" or "common law", and problems nonetheless emerge. Take "equity". Sir Frank Kitto commenced his foreword to the first edition of Meagher, Gummow & Lehane's *Equity: Doctrines and Remedies* with the words, "The lawyer dreads the layman's question, What is equity?". It is very tempting to conclude that the key to understanding "equity" is the doctrines and remedies sourced from the court of chancery.[19] That isn't much help to the layperson. "Common law" is much harder to define. For one thing, "common law" is sometimes used in contradistinction with equity, such as the Common Law and Equity Divisions of the Supreme Court of New South Wales. But quite often, "common law" includes equity. Commercial entities which choose to have their transactions governed by "the common law of England" seldom wish to disavow any entitlement to equitable relief in the event of actual or anticipatory breach. Another difficulty, and one which is close to a theme of this lecture, comes from statutes. "Much of what is ordinarily regarded as 'common law' finds its source in legislative enactment." Dean Landis of Harvard Law School wrote those words almost a century ago,[20] in 1934, when President Roosevelt took him from his chair and appointed him as a member and shortly thereafter as Chairman of the Securities and Exchange Commission. His obituary on the front page of the New York Times said that he "achieved the rare distinction of being

18 Hart, "Definition and Theory in Jurisprudence", p 22.

19 This was Maitland's definition, and it continues as the standard approach in the United States: see *Liu v Securities Exchange Commission* 140 S.Ct. 1936 (2020) and S Bray, "A Student's Guide to the Meanings of 'Equity'" (7 April 2021), available at SSRN: https://ssrn.com/abstract=3821861.

20 J Landis, "Statutes and the Sources of Law" in J Beale and S Williston (eds) *Harvard Legal Essays* (Harvard University Press, 1934) 213, p 214. The quote from Landis commenced F Beutel, "The Development of Negotiable Instruments in Early English Law" 51 *Harvard Law Review* 813 (1938), emphasising the importance of statute in the history of negotiable instruments.

regarded as a conservative by liberals and as an extreme liberal by conservatives".[21] Landis was not without his flaws, but two commendable aspects of the man were the way he straddled law in the academy and law in practice, while at the same time emphasising the links between the law created by courts and that created by legislatures.

Sir Victor Windeyer pointed out half a century ago how simplistic it was to think that common law was distinct from statute.[22] Sir John Baker's Hamlyn lectures, marvellously titled *English Law under Two Elizabeths* published earlier this year, reminds us that many of the problems in this current age of Elizabeth II occurred under her predecessor in the 16th century.[23] Let me give two examples. In Sir Edward Coke's notebooks, fully one decision in three is a decision on statutory interpretation.[24] That is probably not so great a proportion as in the 21st century's "Age of Statutes", but it may seem a surprisingly high proportion if you are inclined to think of statutes as modern twentieth century invaders into the undefiled fields of judge-made law. And in 1602, when introducing the second part of his Reports, Coke wrote that the greatest questions in law arose not upon the rules of the common law but on the interpretation of "Acts of Parliament overladen with provisoes and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law".[25]

Another 16th century lawyer, Christopher St German, who warrants more attention than his work is often given, was acutely conscious of the shades of meaning, including the contrast between common law and commercial law. His second dialogue between Doctor and Student, asking "What is ment by this terme, whan it is sayd/ thus it was at the comon law" states:[26]

> "[I]t is often tymes pleded also in base courtes as in courte barons/ the countye & the court of pypouders/ & suche other that this mater or that .&c. ought nat to be determyned in that courte but at the comon law that is to saye in the kynges courtes .&c."

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21 *New York Times*, 31 July 1964, p 1.

22 *Gammage v The Queen* (1969) 122 CLR 444 at 462; see also *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 at 204-208.

23 J Baker, *English Law under Two Elizabeths* (Cambridge University Press, 2021).

24 Ibid, p 96.

25 *Le Second Part des Reportes* (1602) sig v verso. The translation is perhaps unduly kind.

26 See C St German, *Doctor and Student* in T Plucknett and J Barton (eds) for the Selden Society (William Clowes & Sons, London, 1974), Second Dialogue, p 180.

I shall return to this notion of common law.

One aspect of the difficulty in ascribing meanings to basic legal terms was noted a couple of months ago by Gageler J in *Minister for Home Affairs v Benbrika*.[27] He was writing in relation to the concept of judicial power. He said that "Nothing that has a history can be defined".[28] Gageler J's approach in *Benbrika* was to look to the "historically observed incidents" of the (separate) classes of judicial, legislative and executive power. He did so not because "the judicial power of the Commonwealth is frozen in time". He did so because "contemporary exposition of that judicial power is necessarily informed by traditional practices within historical institutional structures". This is true of much in law, and much in life. Adopting a similar approach, the better question appears to be: what are the enduring qualities of commercial law, and how do they bear upon its contemporary exposition?

As you may by now already have guessed, insight into this question may be derived from some snapshots from earlier times. Many regarded Thomas Scrutton, who dominated a very strong Court of Appeal in the 1920s and 1930s, as an exceptionally unpleasant individual, but everyone acknowledged was exceptionally well versed in commercial law.[29] He wrote, prominently, in his *Elements of Mercantile Law*, that "if you read the law reports of the seventeenth century you will be struck with one very remarkable fact; either Englishmen of that day did not engage in commerce, or they appear not to have been litigious people in commercial matters, each of which alternatives appears improbable."[30] That was something of an overstatement.[31] Even so, there is a measure of truth in Scrutton's explanation:[32]

> "The reason why there were hardly any cases dealing with commercial matters in the Reports of the Common Law Courts is that such cases were dealt with by special Courts and under a special law. That law was an old-established law and largely based on mercantile custom."

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27 [2021] HCA 4; 95 ALJR 166.

28 Ibid at [66], echoing F Nietzsche, *The Genealogy of Morals* (Essay 2), section 13: "definirbar ist nur Das, was keine Geschichte hat".

29 See D Foxton, *The Life of Thomas E Scrutton* (Cambridge University Press, 2013), p ix.

30 T Scrutton, *Elements of Mercantile Law* (W Clowes and Sons, 1891), p 4.

31 See J Baker, "The Law Merchant and the Common Law before 1700" (1979) 38(2) *Cambridge Law Journal* 295, and see the account in J Rogers, *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law* (Cambridge University Press, 1995).

32 T Scrutton, "General Survey of the History of the Law Merchant" in *Select Essays in Anglo-American Legal History* (Little, Brown & Co 1909), Vol 3, p 8.

According to Scrutton, in the earliest period – before 1600 – the “law merchant” was “a special law administered by special Courts for a special class of people”.[33]

The “special Courts” were originally the courts of “piepowder” convened at markets and fairs in continental Europe and in England and so called because they were “frequented by chapmen with dusty feet who wandered from mart to mart”[34] – *pieds poudre* referring to the dust on the merchants' feet. For every fair or market, there was a court, with jurisdiction over matters arising out of the fair. Many of you will have been to Cambridge, and some of you may have walked north east out of town along the Cam, where the rowers train and race and bump one another. You will have passed through Stourbridge Common, although you may not have noticed doing so. Today it is very peaceful. You might be lucky if you see a cow or two. But this was once one of the largest fairs in Europe, for three weeks each September for many centuries,[35] the inspiration of the Vanity Fair of Bunyan's Pilgrim and Thackeray's Becky Sharp and ultimately the glossy publication,[36] and where, by the way, Isaac Newton was once thought to have bought his copy of Euclid's Elements.[37]

A taste of the law applied in such a court emerges from what was said of the Canterbury piepowder court in 1567 (I am quoting from Sir John Baker's account):[38]

> “[A] plaint was made on Saturday morning; the defendant was summoned to appear at 2 p.m. and finally appeared at 6 p.m.; … he was given until 8 a.m. on Monday to answer, when he failed to plead; a jury to assess the damages reported at 1 p.m., and judgment was thereupon given to recover £94 17s 4d [something like £250,000 in today's money]; finally, at 5 p.m., the defendant was committed to gaol to enforce payment.”

Now we only know about this because of the plea rolls records in the King's Bench, which court asserted an error jurisdiction over the ancient courts of the markets. In fact, the main distraction I encountered when preparing this lecture was appreciating that I was about 5

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33 Scrutton, *Elements of Mercantile Law*, p 7.

34 C Gross (ed) for the Selden Society, *Select Cases concerning the Law Merchant* (Professional Books Ltd, London, 1974), p xiv.

35 See W Bewes, *The Romance of the Law Merchant* (Sweet & Maxwell, 1923), pp 93-96.

36 See K Milne, *At Vanity Fair: From Bunyan to Thackeray* (Cambridge University Press, 2017).

37 But see A Hall, “Sir Isaac Newton's Note-book 1661-65” (1948) 9 *Cambridge Historical Journal* 239.

38 Baker, *English Law Under Two Elizabeths*, pp 198-199. The actual roll may be seen at: http://aalt.law.uh.edu/AALT5/Eliz/KB27no1224/aKB27no1224fronts/IMG_0034.htm and http://aalt.law.uh.edu/AALT5/Eliz/KB27no1224/bKB27no1224dorses/IMG_0025.htm

clicks away from being able to look at clear photographs of the original rolls in the rich archive known as KB27, stored in the National Archives at Kew, which is an almost continuous record of proceedings over four centuries between the reigns of Edward I and William III. I am far from the first person to realise that the digitalisation of much of one of the gems of legal history, the court records which formerly could only be seen upstairs in the map room of the National Archives, is going to change the way legal history is done, but it is a revelation if you are interested in these things, and I thought I should share it with you; the gateway is the AALT (for Anglo-American Legal Tradition) website at the University of Houston, with its more than 9 million images. If you take away nothing else from this lecture, try googling AALT.

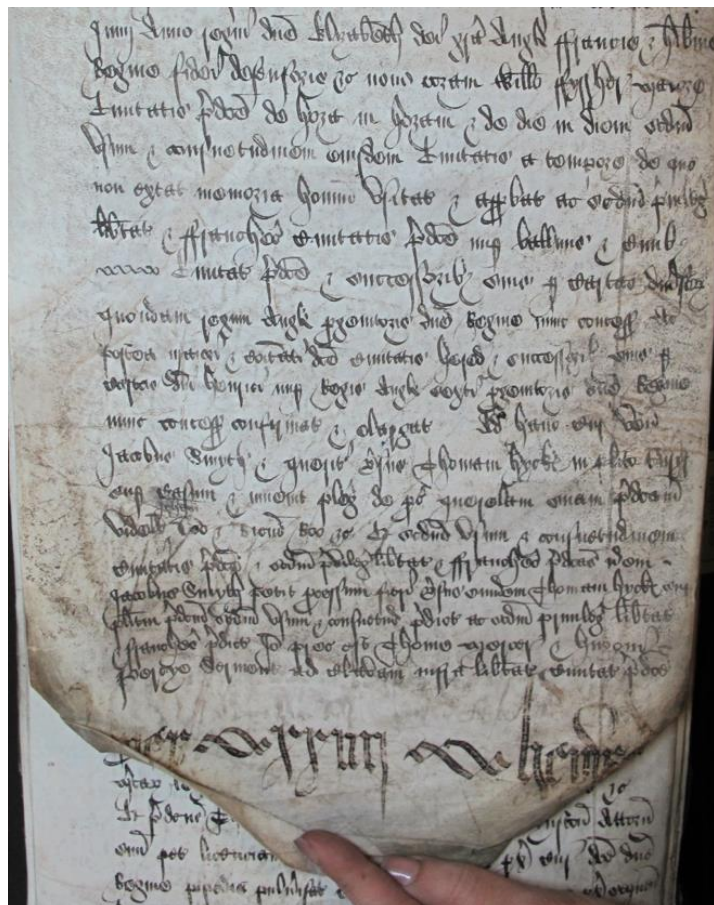

Image 1: *Smyth v Hyckes* (1567) KB 27/1224, m 24[39]

If you are deeply familiar with the political and commercial rivalries of north-western Europe in the 13th and 14th centuries, you can relax for the next minute or so. If not, a quick refresher of how the ancient piepowder courts were replaced by statutory courts is in order. These courts were replaced by statute, by a process with close parallels to events

[39] Anglo-American Legal Tradition, University of Houston, O'Quinn Law Library, Crown copyright images reproduced by permission of the National Archives, London. Available at: http://aalt.law.uh.edu/AALT5/Eliz/KB27no1224/aKB27no1224fronts/IMG_0035.htm

centuries later, designed to create specialist courts for merchants:[40]

> "[T]he rulers of the West embarked upon a 'Privilege War' to entice to their lands as many merchants as possible. In 1277 Florent of Holland tried to cajole the Hamburg merchants to frequent his marts rather than the Flemish ones; in 1280 Guy of Flanders granted privileges at Ardenbourgh to the merchants of Spain and of the Empire; in 1298 Holland and Flanders were still rivals for the Custom of the Almains, whilst Philip was protecting the Flemings coming to trade in France and protecting, also, all merchants save his declared enemies, the English, going to trade at Bruges. Brabant was equally zealous, especially in her anxiety for English trade, whilst Edward I, desperately casting round for money and fully alive to the possibilities of organized Customs Revenue (if only as a gage to elicit loans from Italian bankers) was well in the fore-front with a long series of protections for merchant-strangers."

Hence Edward I's statute of Acton-Burnell, which permitted the registration of debts, in London, York and Bristol. This was confirmed in the Statute of Staples of 1353, which exempted merchants from the common law in relation to transactions arising in any of 15 staple towns. The Mayor possessed a Law Merchant jurisdiction, and was also made a royal officer for the sealing and execution of recognizances of debt.[41] None of this is greatly different from the creation of specialised commercial courts more recently, both in our own region and in the northern hemisphere. Importantly, the King's courts were ordered not to interfere with the staple jurisdiction – which was, emphatically, *not* administering common law.[42] A deal of the early history of negotiable instruments derives from these staple courts, created for merchants.[43]

But political and economic change intervened. The fall of Calais, the prohibition on the export of wool, and the growth of manufacture of cloth and the rising trade in other commodities were accompanied by interference from the common law courts.[44] The writ of error to King's Bench mentioned above is an example. As Beutel put it, "[t]he merchants

40 E Rich, *The Staple Court Books of Bristol* (Bristol Record Society, 1934), p 39 (footnotes omitted).

41 27 Edw III c ix; Rich, *The Staple Court Books of Bristol*, pp 47-8. Compare the conferral of vice-admiralty jurisdiction on colonial supreme courts, and indeed the so-called "autochthonous expedient" conferring federal jurisdiction upon State courts.

42 27 Edw III cc 5 and 6; Beutel, "The Development of Negotiable Instruments", p 828.

43 See J Holden, *The History of Negotiable Instruments in English Law* (The Athlone Press, University of London, 1955).

44 Rich, *The Staple Court Books of Bristol*, pp 88-91, Beutel, "The Development of Negotiable Instruments", p 833.

driven from their courts by formalities of the common law and its lawyers, again sought remedies elsewhere", and for some of the 16th century, they resorted to the admiralty courts with their civilian administration.[45] This contributed to the writs of prohibition against the admiralty, giving rise to some of the learning underlying s 75(v) and the supervisory jurisdiction of this Court.

The "special class of people" for whom the law merchant was administered was made up of merchants. Very broadly, this was originally confined to foreign merchants (who needed protection from the prejudices of local juries), then extended to all merchants, then generally. This process gave rise to some disputes which seem quaint today, although the underlying facts are timeless. Take *Sarsfield v Witherly.* In 1688, while the Glorious Revolution was taking place, the son of Sir Thomas Witherly drew a bill on his father in London, which was refused when it was presented. The son's defence was that "he was a gentleman, the son and heir of Dr Thomas Witherly" who needed the money to travel, and he denied that he was a merchant. The son succeeded in King's Bench on the merchant's demurrer, but his victory was overturned in the Exchequer Chamber, on the basis that "this drawing a bill must surely make him a trader for that purpose".[46] The argument reflects the fact that the bill was only enforceable if the law merchant applied to the exclusion of the common law, and that turned upon his temporary status as a merchant.

I return to Scrutton's first point: "a special law". Here there has been signal change. The common law which flourished under Henry II was *common* precisely because it applied uniformly throughout the kingdom, in contrast with the local laws of the borough, the guild and the forest. For many centuries the same controversy when involving different people was to be adjudicated according to different rules, and often in a different forum. Most obviously, a peer had a right to be tried by his or her peers; a serf was subject to the authority and rules of the manorial court. Some persons could invoke the so-called benefit of clergy. There are many other examples. How did this apply to the mediaeval commercial law affecting merchants?

One scholar has said that "the chief divergencies between Law Merchant and the Common Law of England lay not so much in the different doctrines which they embodied

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45 Beutel, "The Development of Negotiable Instruments", p 833.
46 (1689) Holt KB 112; 90 ER 960.

as in the different methods of proof which they allowed."[47] By no means are those differences to be belittled. The different procedural rules led to very different outcomes. Most civil litigation is, and has always been, about debts. In mediaeval times, a merchant with a large debt would ordinarily have evidence of it, in the form of a document or, more likely and more reliably, a tally. But at common law, a defendant could wage his law against tally or a script. Under the law merchant, a man could not, generally speaking, wage his law against a tally.[48] That is to say, the same underlying transaction, evidenced in the same way, would be treated differently depending upon whether it was litigated in a common law court or at merchant law; at common law, if the defendant swore he owed nothing, and obtained the sufficient number of oathhelpers, he had a complete defence. This is an excellent example of Maitland's adage that substantive law has the look of being gradually secreted in the interstices of procedure.

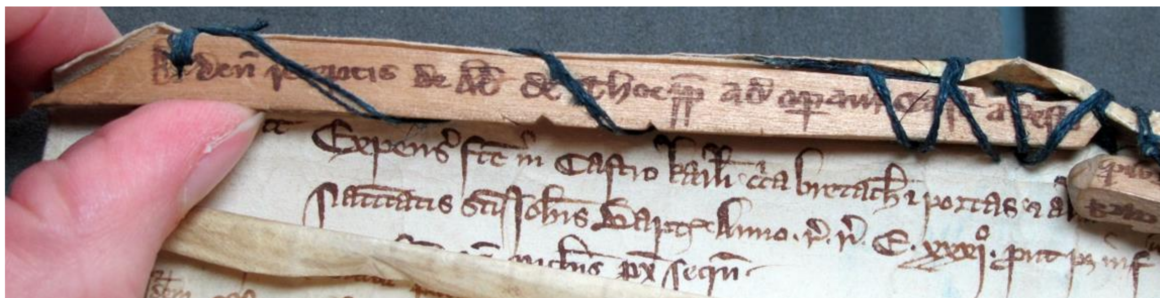


Image 2: Tally[49]

Returning to the history of specialist commercial courts, after the decline of the piepowder courts, and the staple courts, and the admiralty courts, and with the rise of maritime trade, a new specialist court was created in 1601. The preamble to a statute enacted in the 43rd year of Queen Elizabeth commenced "Whereas it ever hath been the Policy of this Realm by all good Means to comfort and encourage the Merchant, thereby to advance and increase the General Wealth of the Realm, her Majesty's Customs, and the Strength of Shipping".[50] The perception that a commercial court attuned to the needs of merchants produces benefits to the general economy, and to government revenue, which these days might be referred to as having a greater "multiplier" effect, is very ancient. The statute

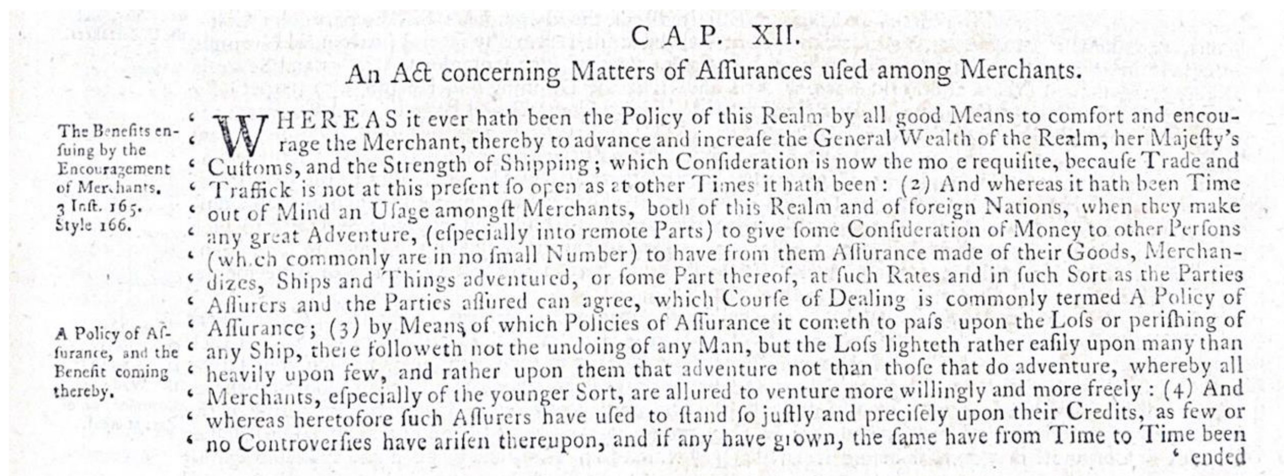
47 Rich, *The Staple Court Books of Bristol*, p 32; see also Baker, "The Law Merchant and the Common Law before 1700", p 300.

48 For details, see Rich, *The Staple Court Books of Bristol*, pp 33-36. For a description of a tally, see J Watson, *The Duty to Account* (2016, Federation Press), p 20.

49 Anglo-American Legal Tradition, University of Houston, O'Quinn Law Library, Crown copyright images reproduced by permission of the National Archives, London. Available at: http://aalt.law.uh.edu/aalt5/marginalia/pictures/tallies/index.htm

50 (1601) 43 Eliz I c 12, and see A Meagher, "Insurance and the Courts" (Keynote speech to Asia Pacific Insurance Conference, Singapore, 19 October 2017).

created a court to deal with causes arising under insurance policies entered into in London. The Court was to comprise the Judge of the Admiralty, the Recorder of London (an office of the municipal court), two Doctors of the Civil Law, two common Lawyers and eight “grave and discreet” merchants “as Men by reason of their Experience fittest to understand, and speedily to decide those Causes”. That body was to hear insurance cases “in a brief and summary course, as to their discretion shall seem meet, without formalities of pleadings or proceedings”. That is the same ethos – down to the use of Commercial List Statements rather than formal pleadings – which is reflected in Justice Hammerschlag's list 420 years later.



CAP. XII.

An Act concerning Matters of Assurances used among Merchants.

The Benefits ensuing by the Encouragement of Merchants. 3 Inst. 165. Style 166.

A Policy of Assurance, and the Benefit coming thereby.

'WHEREAS it ever hath been the Policy of this Realm by all good Means to comfort and encourage the Merchant, thereby to advance and increase the General Wealth of the Realm, her Majesty's Customs, and the Strength of Shipping; which Consideration is now the mo e requisite, because Trade and Traffick is not at this present so open as at other Times it hath been: (2) And whereas it hath been Time out of Mind an Usage amongst Merchants, both of this Realm and of foreign Nations, when they make any great Adventure, (especially into remote Parts) to give some Consideration of Money to other Persons (which commonly are in no small Number) to have from them Assurance made of their Goods, Merchandizes, Ships and Things adventured, or some Part thereof, at such Rates and in such Sort as the Parties Assurers and the Parties assured can agree, which Course of Dealing is commonly termed A Policy of Assurance; (3) by Means of which Policies of Assurance it cometh to pass upon the Loss or perishing of any Ship, there followeth not the undoing of any Man, but the Loss lighteth rather easily upon many than heavily upon few, and rather upon them that adventure not than those that do adventure, whereby all Merchants, especially of the younger Sort, are allured to venture more willingly and more freely: (4) And whereas heretofore such Assurers have used to stand so justly and precisely upon their Credits, as few or no Controversies have arisen thereupon, and if any have grown, the same have from Time to Time been 'ended

Image 3: *Act concerning Matters of Assurances used among Merchants* 1601, 43 Eliz I c 12

However, the Elizabethan court fell into disuse after the common law courts held that its decisions did not prevent further litigation at law or in equity.[51] Almost two centuries later, James Allan Park wrote that it had heard and determined fewer than 60 cases.[52] This reflected the success of common law courts in dealing with commercial law, accompanied by a change in substantive law and also procedure, which we largely associate with Lord Mansfield.

The traditional view of Lord Mansfield's contribution was as a moderniser of commercial law, importing doctrines and doing away with the common law anomalies. The chapter in Fifoot's 1936 biography on Commercial Law[53] recounts example after example where Mansfield was said to have stripped away spurious analogies from ancient land law when applied to commerce. Like most hagiography, the truth is both more nuanced, and more

51 *Came v Moye* (1658) 2 Sid 121; 82 ER 1290.

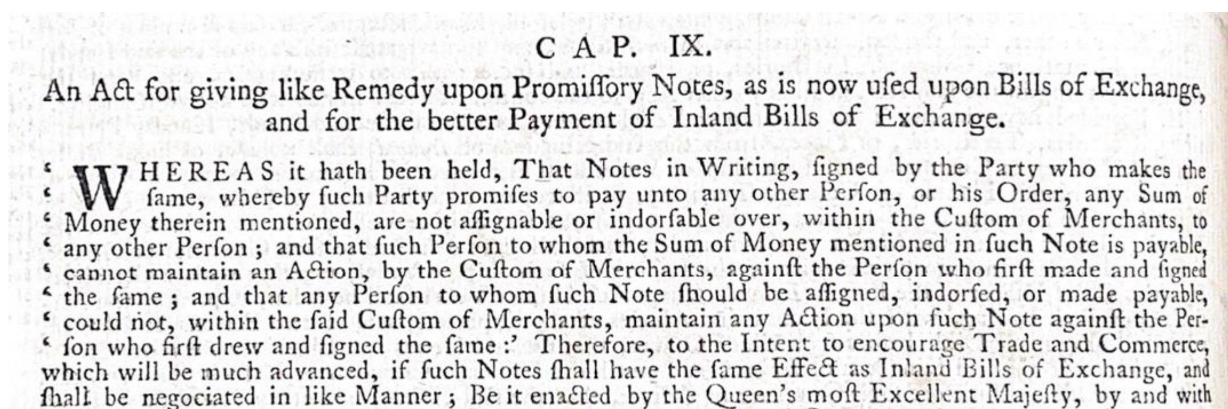
52 J Park, *A System of the Law of Marine Insurances* (His Majesty’s Law Printers, London, 1878), p xl.

53 C Fifoot, *Lord Mansfield* (Clarendon Press, Oxford, 1936), ch IV.

interesting. The better view, favoured by Sir John Baker and Professor David Fox,[54] is that the rules governing bills and notes were always part of the common law, and Mansfield's contribution was as an expounder rather than innovator.

Let me illustrate this by two examples at the heart of commercial law: the negotiability of promissory notes, and marine insurance. Sir William Holdsworth wrote of Chief Justice Holt's "campaign against promissory notes" at the beginning of the 18th century.[55] In *Clerke v Martin*,[56] Holt CJ held that the payee of a note payable to order could not enforce it at common law. It followed that a note payable to bearer could not be enforced either. This seems strange today, but the underlying facts of *Moses v Macferlan* – where Lord Mansfield truly was an innovator – are equally strange (an inability even to tender signed writing by the creditor, obtained for valuable consideration, that he would not enforce four 30 shilling notes).[57]

In rapid response to Holt CJ, the merchants caused Parliament to enact the *Promissory Notes Act* 1704, which said that it was intended to encourage trade and commerce, which will be much advanced if notes such as those held to be unenforceable by the Chief Justice had the negotiability of inland bills of exchange. That meant that notes payable to bearer and to order were valid in law. Thereafter a body of law developed as to the negotiability of promissory notes.



CAP. IX.

An Act for giving like Remedy upon Promissory Notes, as is now used upon Bills of Exchange, and for the better Payment of Inland Bills of Exchange.

'WHEREAS it hath been held, That Notes in Writing, signed by the Party who makes the 'same, whereby such Party promises to pay unto any other Person, or his Order, any Sum of 'Money therein mentioned, are not assignable or indorsable over, within the Custom of Merchants, to 'any other Person; and that such Person to whom the Sum of Money mentioned in such Note is payable, 'cannot maintain an Action, by the Custom of Merchants, against the Person who first made and signed 'the same; and that any Person to whom such Note should be assigned, indorsed, or made payable, 'could not, within the said Custom of Merchants, maintain any Action upon such Note against the Per-'son who first drew and signed the same:' Therefore, to the Intent to encourage Trade and Commerce, which will be much advanced, if such Notes shall have the same Effect as Inland Bills of Exchange, and shall be negociated in like Manner; Be it enacted by the Queen's most Excellent Majesty, by and with

Image 4: *Promissory Notes Act* 1704, 3 Anne c 9

54 Baker, "The Law Merchant and the Common Law Before 1700"; D Fox, "Bona Fide Purchase and the Currency of Money" (1996) 55(3) *Cambridge Law Journal* 547, p 559.

55 W Holdsworth, *A History of English Law* (Methuen & Co Ltd Sweet and Maxwell, London, 2nd ed, 1937), Vol VIII, p 171.

56 (1702) 2 Ld Raym 757; 92 ER 6.

57 For details, see M Leeming, "Overlapping claims at common law and in equity" (2017) 11 *Journal of Equity* 229.

The culmination is often said to be *Miller v Race*,[58] where negotiability prevailed even when there was an intervening theft. The plaintiff acquired, in good faith in the ordinary course of his business and for value, a stolen bank note in the sum of £21 10/- payable to bearer on demand. An elaborate argument was made, based on the absence of title of a thief, or the thief's assignee. After all, *nemo dat.* How could a thief give anyone title to the stolen note? A recently appointed Lord Mansfield rejected it, and explained it thus:

> "But the whole fallacy of the argument turns upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, viz. to goods, or to securities, or documents for debts.
>
> Now they are not goods, not securities, nor documents for debts, nor are so esteemed: but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money, as guineas themselves are; or any other current coin, that is used in common payments, as money or cash."

Two things may be noted. First, this was not the incorporation of principles of the law merchant, despite what is often said. It was the working out of a statute enacted by the merchants in order to overturn Holt CJ's decision, and it was the *statute* which extended or incorporated principles of the law merchant.[59] This is an excellent example, in a commercial law context, of the entanglement of common law and statute.[60] Secondly, the key to resolving the dispute was to ask the right question. Lord Mansfield was rejecting a very familiar form of legal argument: the outcome of this dispute involving X should be in my favour because X is like Y, and this is the position with Y. This happens constantly to this day. It is central to the processes of applying or distinguishing a decision, and to determining the proper application of legislation.

I turn to the second example. I have already mentioned James Allan Park's classic work on *Marine Insurances*, which was first published in 1787, shortly before Lord Mansfield's

58 (1758) 1 Burr 452; 97 ER 398. See D Fox, "Bona fide purchase and the currency of money" [1996] *Cambridge Law Journal* 547, pp 558-559.

59 For the legislative history, see Holdsworth, *A History of English Law*, p 173 (including Holt CJ being summoned to the House of Lords).

60 Compare the "three centuries of case law which has the effect of allowing specific performance of a contract which on its face the Statute of Frauds renders unenforceable" which is the doctrine of part performance: *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67 at [19].

retirement after some thirty years as a judge. Park was Mansfield's protégé.[61] The flowery introduction sings Mansfield's praises, in unrestrained augustan prose, over some 7 pages, but there is a remarkable focus. Not one of the judge's decisions is mentioned. Instead, the preface expounds on Mansfield's *procedural* reforms, which permitted the consolidation of separate actions against each individual underwriter, encouraged the reservation of questions of law and the stating of special cases, and made a rule that all cases reserved must be set down for argument within the first four days of the following term. All these procedural reforms were directed to enabling a speedy, binding decision of the real dispute between the parties. Park explained his purpose:[62]

> "It will be the business of the following work, which professes to lay down a system of the law, as it now stands, to point out, amongst other things, the improvements, which have been made by the legislature from time to time on the system of insurances, by many wise statutes, and salutary restrictions; and to prove, that the learned judges of the courts both of law and equity, by their liberal and equitable constructions of those statutes, and by adopting the true principles of commerce in their decision of the many intricate cases, which have been brought before them, have added another pillar to that beautiful structure of rational jurisprudence, which has deservedly acquired the admiration of mankind."

One can see the author's consciousness of the stream of reforming legislation, and consequential innovations from the courts, in order finally to align common law and merchant law.

Moving ahead a century to the Victorian age, in 1871 a parliamentary committee had acknowledged the "general dissatisfaction existing among the mercantile community" with the superior and county courts.[63] One distinguished historian of the era has written:[64]

> "Most businessmen had long resented the cost, slowness and technicality of common law adjudication, but there was now a substantial body of opinion that objected also to the rigorous application of legal doctrines and hankered after a court which would apply their own customs and usages in a pragmatic,

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61 See E Foss, *A Biographical Dictionary of the Judges of England* (John Murray, London, 1870), p 496, and the entry in the *Oxford Dictionary of National Biography*.

62 Park, *A System of the Law of Marine Insurances*, Introduction, p xliv.

63 Select Committee on Tribunals of Commerce, Report, 1871, p 1, cited in P Polden, below.

64 P Polden, "Tribunals of Commerce" in *The Oxford History of the Laws of England* (Oxford University Press, 2010), Vol XI, pp 773-776.

commonsense way."

The judicature reforms of 1873 and 1875, and the 1883 revision of the rules, do not appear to have attended to this concern. In the first Bathurst Lecture, Murray Gleeson explained how dissatisfaction with commercial litigation in the 1890s led to the establishment of the Court of Arbitration in 1892, to which the "Commercial Court" – actually a Commercial List within the Queens Bench Division – was the response in 1895,[65] as was, somewhat indirectly, the *Commercial Causes Act 1903* (NSW). What was sought was a court, or at least a list, dedicated to commercial disputes, with judges experienced not as participants in trade or commerce, but in commercial law and the process of commercial dispute resolution, which would be more expeditious than that of the ordinary courts and better adapted to commercial requirements.[66]

The position was no different six decades ago, when the practice note for the Commercial Court was published:[67]

> "The purpose of the Commercial Court, as it is commonly called, is to provide a service to the commercial community by enabling commercial disputes to be decided as quickly and as cheaply as circumstances allow."

The note goes on to refer to the identification of the real issues, the possible elimination of pleadings, restrictions on discovery, and the importance of the judge being told as early as possible the real issues. Those themes were reiterated in Justice Rogers' reinvigoration of the Commercial Division in 1986.[68] They were applied by Justices Giles and Hunter when I was attempting to cut my teeth in the Commercial List, and in the subsequent quarter of a century.

Conclusion

This has been a very selective survey from seven or eight centuries of commercial litigation. It is very hard to escape the sense that the more things change, the more things remain the same. The commodities and services traded by modern day merchants are often unrecognisably different from the wool and leather which dominated the courts of the fair and the staple courts in the 13th and 14th centuries. Merchants' tallies have been

65 M Gleeson, "Advocate, judge and arbitrator: perspectives on commercial law" [2018] (Spring) *Bar News* 37, p 38.
66 Ibid.
67 [1962] 3 All ER 527.
68 A Rogers, "The New Practice & Procedure in the Commercial Division of the Supreme Court of New South Wales" (Address to Young Lawyers Section of the Law Society of New South Wales, 10 December 1986).

replaced by electronic communications. Stourbridge common is much changed from its heyday as one of the greatest fairs in Europe.

However, the desirability for the whole community of there being a reliable, expeditious and commercially attuned court to adjudicate the inevitable disputes which will arise has been perceived for centuries, and is utterly unchanged today. Governments have, for centuries, seen fit to make provision for such courts. Indeed there has been competition between rival states to do so for centuries. We have finally reached the position where the same body of law applies to disputes, whether or not they be between merchants. But we have maintained the tradition that one-size-fits-all does not work in terms of the procedure which will be applied. The overwhelming majority of civil claims in New South Wales are commenced and resolved in NCAT and the Local Court (considerably more than 95% by volume). But there nevertheless remains a very important class comprising a much smaller number of proceedings which warrant special procedures in a forum attuned to commercial causes. That has been an enduring quality of commercial litigation in the Anglo-Australian tradition for centuries. It has endured notwithstanding the constantly changing regulatory landscape under which trade and commerce take place.

I commenced this lecture with the observation that one should be careful about lawyers who think they know all there is to know about trade and commerce. Although I embrace Sir Roy Goode's description (which falls short of a definition) of commercial law as the totality of the law's response to the mercantile community, I am a long way from professing any deep understanding of how commerce works in the overwhelming majority of cases when litigation is avoided. But while litigation is an evil, it is inevitable, and the qualities accompanying it are enduring. I return to Lord Mansfield, who said in *Lickbarrow v Mason*:[69]

> "The great object of commerce is a quick and speedy sale of goods; and it frequently happens that a merchant disposes of his cargo by means of a bill of lading, to a very great advantage, and has received the price of the goods before the ship arrives in port, and the merchant is thereby not only relieved from the danger of temporary inconveniencies, but is likewise enabled to extend his capital, and to enter into further mercantile concerns."

69 [1793] IV Brown PC 57 at 64-65; 2 ER 39 at 44.

Lord Mansfield's words anticipated the commercial interests at play in *Australian Securities Commission v Nomura International plc*. The idea of a market in the right to buy or sell something in the future was at the heart of Nomura's commercial enterprise, and it was something Mansfield well understood. And the litigation before Sackville J was conducted expeditiously, and efficiently, before a court which was sympathetic to the legitimate needs of commerce. It embodied the enduring qualities of commercial law.