

The Barratry of the Shipmaster in Early Modern Law: The Approach of Italian and English Law Courts*

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Summary

For a long time, the concept of barratry (at least in its maritime meaning) was one and the same on both sides of the Channel. The barratry of the shipmaster was part of the mercantile usages, and it identified the intentionally blameworthy conduct of the master. When law courts began to decide on insurance litigation they were confronted with a notion quite alien to them. Broadly speaking, the shipmaster's barratry could well be considered a fraud of sort. But in order to decide on its occurrence in a specific case, law courts had to analyse it in legal terms, and so according to the specific legal categories of their own system. The point ceases to be trivially obvious if we think that the different legal framework of civil and common law courts progressively led to very different interpretations of the same thing. Thus, with the shift of insurance litigation from mercantile justice to law courts maritime barratry began to acquire increasingly different features in the two legal systems. Very often, the very same conduct of the shipmaster was considered as negligent by civil law courts and barratrous by common law courts. The difference was of great practical importance, for many policies excluded barratry from the risks insured against. So, depending on the kind of law court, an insurer could be charged with full liability for the mishap or walk away without paying anything. If the beginning of the story was the same, its end could not have been more different.

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1. Barratry and the Courts

The growth of insurance litigation before law courts (or rather, the encroachment of high courts on insurance and other commercial subjects) took place in civil law Europe as much as in common law England, and neither legal system was particularly well equipped to cope with

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maritime barratry. Both considerations would suggest a comparative approach to the subject. This work will therefore focus on the approach of the main Italian courts¹ during the late *ius commune* and on that of contemporaneous common law courts, mainly the King's Bench. As to England, looking at the King's Bench was a forced choice, for the vast majority of the (admittedly, not many) reported cases on the subject come from that court. As to the civil law side, the reason to look at Italian courts (paying also attention to some Iberian ones) is eminently practical: the sheer number of edited collections of high courts' decisions. Unlike many northern European courts, Mediterranean ones often provided a reason for their decisions. In principle, only high courts structured as *rotae* (and so, vested exclusively with judicial powers) were bound to justify their choices. Courts structured as senates did not need to – again, in principle.² But even there, when publishing a collection of their decisions, the editor (typically, a judge of that court) often sought to fill the gap with his own notes on each case.³

Comparing civil and common law from the point of view of the law courts means doing something different from most comparative legal works. But perhaps also more profitable: so long as we consider civil law as a system based on deductive reasoning and common law as on the contrary based on inductive reasoning, no meaningful comparison is possible. Besides, instead of furthering our understanding of each system (since comparing two different things is a valuable way of understanding each of them more in-depth), the results often risk strengthening the starting point. The operation is circular, but this circularity is well hidden.

As said, many civil lawyers focus on the development of legal thought. Common lawyers look first and foremost at case law. This of course does not mean that they are blissfully protected from the risk of envisaging misleading continuities in the development of any given subject, or from the temptation to presuppose the existence of substantive rules whose core remained immune to the passing of the time. But at least common lawyers are not so exposed to the seduction of linearity: the jigsaw they are faced with does not have a clear picture printed on the box – for the simple reason that there is no box. So the face of the jigsaw may well change according to the number of pieces one is able to collect, or - and especially - on how does one link them together.

If common lawyers do not start with a series of learned treatises, it is not because they do not believe much in their utility. They just do not have them. The centuries separating Bracton from Blackstone saw very few learned elaborations of the common law. Thus, the common lawyer is forced to look at the 'interstices of procedure', as Maine famously had it.⁴ The civil lawyer is not. The consequence, almost an obvious one, is that case law is traditionally neglected by many Continental legal historians, or at best considered of secondary importance. Much unlike the common lawyer, the civil lawyer writing on the evolution of a subject does not have necessarily to look at what the courts actually did. And, admittedly, dealing with case

¹ With the conspicuous exception of Venice, omitted for two (mutually related) reasons. First, because it is difficult to think of a high court in the jurisdictional structure of the *Serenissima*: the *Avogaria di comun* was a supreme court, but it was hardly a 'central' one, at least in the sense that we would ascribe to the term. Second, and moreover, because the legal system of Venice remained considerably *sui generis* throughout the whole early modern period. From a legal point of view, the Republic of Venice was the least Italian part of the Italian peninsula.

² For the difference between *rota* and senate, especially in Italy, see e.g. M. Ascheri, *I grandi tribunali*, in *Enciclopedia Italiana*, Appendix VIII: *Il contributo italiano alla storia del pensiero - Diritto*, Rome 2012, p. 121-128.

³ This is the case for the very first printed collection of the decisions of a high court: the collection of decisions rendered by the Neapolitan *Sacro Real Consiglio* (not bound to give a reason for its decisions), published by one of its members, the ex-law professor Matthaeus de Afflictis (1447/50-c.1523): *Mathei De Afflicto Neapolitani regii consiliarii Decisiones causarum Sacri Consilii Neapolitani suo tempore*, In ciuitate Neapoli, per magistrum Ioannem Antonium de Cane Papiensem, die vltima mensis Aprilis 1509.

⁴ H.J.S. Maine, *Dissertations on Early Law and Custom*, 1883; 2nd edn., London 1891, p. 389.

law can be unpleasant at times – a systematic, well-written treatise is just nicer to read and much easier to deal with, since it provides immediately all the information one needs. Besides, playing with jigsaws can be a dangerous game, for the outcome might be different from the clear, if general, idea one has at the beginning. Not only can it challenge the linearity that we often implicitly assume in the development of the law, but it may also question our approach as to the sources.

The paradox is that the jurisprudence of many high courts of civil law is considerably more consistent than that of the courts of Westminster, especially in a long-term perspective. Civil law courts built on their own jurisprudence and, for a rather long time, on that of other, particularly important courts, at the very least as much as common law courts did. With the difference that they often applied the same principles more consistently and much longer than common law courts, without particularly significant changes either in procedural terms or in substantive ones.

2. Barratry and the Courts: the Italian Approach

This work is based on reported cases. Among the early modern printed decisions on mercantile issues, as it is well known, the decisions of the Genoese mercantile Rota have a particularly important place. Nonetheless, the Genoese court does not occupy a central position in this work. Among the printed decisions of the Rota of Genoa, the subject of the barratry of the master appears only rarely. This is particularly the case for the period in which the Rota had the greatest influence across Europe (and especially southern Europe): the sixteenth century. In the enormously influential collection of Genoese decisions that circulated mainly in the edition of Bellonius (Marc'Antonio Bellone, fl.1580)⁵ there are remarkably few references to barratry. This silence has probably little to do with the customary (and later on, also legislative) exclusion of barratry from Genoese policies.⁶ On the contrary, such an exclusion should have encouraged the Rota to look into the matter: when barratry lies outside the scope of the policy, it is very common to find the insurers seeking to qualify the conduct of the master as barratrous, so as to avoid liability. Be that as it may, even when the Rota mentions barratry, it does so only in passing, without elaborating on it.⁷ A few decisions of the early seventeenth century, which we will study, are more elaborate. But by then the Genoese Rota - at least on insurance matters - was losing its pivotal position, and other influential courts were already building on their own jurisprudence.

Among the - few - clear explanations of maritime barratry by early modern civil law courts, one of the clearest is probably to be found in a decision of the Roman Rota of 1676. The explanation highlights the main elements of barratry in its historical evolution. According to the Rota, barratry indicates a vile behaviour of the judge (linking thus the untrustworthiness and baseness of the old *barattieri* with the Roman *crimen repetundarum*, the extortion by a

⁵ A slightly earlier edition, published in Genoa in 1581 by Antonio Roccatagliata, had considerably less fortune. Cf. J.P. van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800*, Cape Town 1998, vol. 1, p. 200, note 14.

⁶ Even before the express exclusion of barratry from the insurance risks with the Statute of 1588 (pt. 4, ch. 17), Genoese practice seems to have excluded barratry. In a decision of the Genoese Rota rendered before the Statute, the court stated that 'communiter in hac civitate [i.e. Genoa] admittitur assecuratores non teneri de dolo et barattaria patroni'. Marcus Antonius Bellonius, *Decisiones Rotae Genvae de Mercatvra et Pertinentibvs ad eam ...*, Venetiis [apud Franciscum Zilettum], 1582, dec. 166, fol. 221v, n. 4.

⁷ *Ibid.*, dec. 3, fol. 18v, n. 15; dec. 166, fol. 221v, n. 4. In both cases the court uses the same locution, 'dol[us], et barattaria patroni'. But it never goes beyond this - rather generic - idea of fraud of the master.

magistrate), which was then also applied to the shipmaster.⁸ Between judge and shipmaster, however, there was an obvious difference: the judge was not trying to steal something, but to pocket money. While the base behaviour of the judge led to the crime of extortion, the court noted, that of the shipmaster was closer to the delict of theft. In addition to simple theft, barratry had a further component - deceit. Hence the *barataria* of the shipmaster could be said to consist in betraying the merchant consignor (and, if he was insured, then possibly also the insurers) so as to embezzle the merchandise.⁹

The distinction between simple theft and deceit resulting in theft (in a contractual relationship, mainly, embezzling) is probably easy to explain, but it might have been considerably less immediate to work out with regard to barratry. In a system of discrete categories as the early modern civil law one, theft exercised a powerful attraction over the unclassified case of maritime barratry. The first problem faced by law courts, therefore, was to distinguish them, explaining why exactly did barratry need something more than simple theft and, especially, what.

2.1. Barratry as a qualified case of theft: an early decision of the Florentine Rota

To introduce the concept of Barratry, the famed jurist Benvenuto Stracca (1509–1578) described three shipmasters: the first let a Turkish spy onboard, leading to the capture of the vessel by the Turks, the second brought the cargo to the Turks, the third started to rob the cargo by himself.¹⁰ This crescendo might have been inspired by the similarly famous Petrus Santerna (Pedro de Santarém, c.1460–?), who discussed barratry just after piracy, as if moving from external to internal theft (i.e. from the theft perpetrated by a third to the theft made, so to say, in house).¹¹ Just as Stracca, however, also Santerna was not particularly clear as to the legal features of the shipmaster's barratrous conduct. If the two pre-eminent (and most influential) early modern authorities on maritime insurance were both somewhat uncertain as to the qualification of barratry in civil law terminology, one could hardly blame civil law courts for their not terribly successful early attempts to do the same.

The earliest published decision of an Italian law court specifically on maritime barratry does not come from the Mercantile Rota of Genoa, but from the Civil Rota of Florence. This is all the more interesting for our purposes: just as the Rota of Genoa, that of Florence enjoyed Europe-wide reputation, but unlike the other one it was not specialised in commercial disputes. Its judges were therefore more representative of the typical civil law judge - trained in the law but no expert in commercial disputes. The decision does not bear a precise date, but it likely dates to the very early seventeenth century (the case was an insurance dispute on a policy of 1602, and the decision was then published in the late 1610s).¹² It focuses on similarities and

⁸ *Clarissimi Ivris. Benvenuti Stracchae ... De Assecurationibus, Tractatus. ...*, Venetiis, 1569, gl. 31, fol. 128r-v, n. 1. Cf. Rossi, *Barratry of the Shipmaster in Early Modern Law: Polysemy and Mos Italicus*, *Tijdschrift voor Rechtsgeschiedenis* 86 (2019), ***

⁹ 'Baratteria ... plane barbarum vocabolium ad Judicis sordes designandas adhibitum ... subinde usus transtulerit ad indicandam machinatione, seu dolum, quem Navarchus in fraudem assecurantium, et assecuratorum ad merces intervertendas adhibeat'. *Sacrae Rotae Romanae Decisionum Recentiorum a Joanne Baptista Compagno J.C. Romano selectarum*, Venetiis, Apud Paulum Balleonium, 1716, vol. 16 (1669-1670), dec. 420 (7.2.1676), p. 496, n. 6-7. The decision is part of a long case discussed more in detail *infra*.

¹⁰ G. Rossi (note 8), ***

¹¹ In other words, Santerna described barratry almost as a logical progression of piracy - as if the shipmaster turned into a sea-rover and behaved accordingly. Santerna dealt with the theft of the pirates and with the barratry of the master in his *Tractatus pervtilis et quotidianus, De Assecurationibus et Sponsionibus Mercatorum, à D. Petro Santerna Lusitano ... aeditus*, Antverpiae, apud Gerardum Spelmannum, 1554, pt. 3, fols. 40v-42r, n. 62-67, and fol. 42r-v n. 68 respectively.

¹² *Decisionvm Lvcensivm, Florentinarvm, et Bononiensivm ... Libri Tres ... Antonio Monacho ... Auctore*, Venetiis, Apud Petrum Mariam Bertanum, 1619, Florentinarvm Decisionum, dec. 1, p. 1-9. The policy (pre-printed and incomplete) is reported at p. 3. A much abridged report may also be seen in Josephus Laurentius Maria de

differences between theft and maritime barratry. Despite the abundance of details, however, this early pronouncement does not stand out as an exemplary decision. Paradoxically, what makes it worth studying is its poor legal reasoning: the wanting quality of its legal arguments shows in full the difficulties that law courts encountered when trying to make sense of this (for them, new) subject.

No other known decision deals so much in detail with the precise features of barratry as opposed to those of theft, and for a good reason: among the perils insured against, the policy included barratry but excluded theft onboard. So the insured sought to prove the occurrence of barratry but not of theft; conversely, the insurers did their best to prove that the wrongdoing was theft but not barratry. Given these premises, it should not be surprising that the decision came at the end of a rather long legal struggle between the parties - it was the third (and last) ruling of the court on the same case. The Rota eventually found for the insured, condemning the insurers to pay the insurance money because, the judges decided, the wrongdoing was barratry and not theft.

What the court found puzzling was the distinction between barratry and theft in the policy. If barratry is a qualified case of theft, then what is the element that allows to distinguish between the specific case and the general delict? In mercantile practice, it should be noted, theft onboard had little to do with barratry. One of the main risks insured against was that of 'theft by friends or enemies', which chiefly meant spoiling of cargo by any vessel. Theft onboard was different because it referred only to the case in which the ship arrived at destination. In such a case, the shipmaster - as carrier - would be answerable to the consignee for anything missing from the ship. Where the theft onboard was excluded from the risks insured against, the purpose of that exclusion was to narrow down the scope of the policy without putting into question the recoverability of other kinds of thefts. If theft onboard was on the contrary included in the policy, its inclusion was typically meant to single out a specific fraudulent conduct of the shipmaster and separate it from other kinds of fraud of the master. This way, it was possible to exclude barratry from the policy while at the same time making the insurers liable for theft onboard - which was precisely the aim of the Florentine policy in discussion. The point was clear in several insurance laws and mercantile compilations, from the 1608 Antwerp compilation known as *Compilatae*¹³ to the slightly earlier insurance customs of London - which went as far as stating explicitly that theft onboard did not constitute barratry.¹⁴ More importantly, that was the practice of Florence as well, as attested in its insurance rules of 1524.¹⁵

Having clarified why was theft onboard specifically included in a policy that on the contrary excluded barratry, we can go back to the facts of the case. The policy was a cargo insurance from Lisbon to Leghorn. The vessel sailed in a convoy, but during night-time it left the convoy and changed voyage, with the intent of bringing the cargo to Barbary instead of Leghorn. The vessel was however intercepted towards the bottom of the Italian Peninsula (at St Mary of Roccella, in Calabria) and the shipmaster was condemned for barratry by the local authorities. That the master attempted to steal the cargo was pretty clear. The problem was whether his conduct could be qualified as barratry for the purposes of the insurance policy.

Casaregis, *Discursus Legales de Commercio*, 2nd edn., Venetiis, Ex Typographia Balleoniana, 1740, vol. 2, disc. 141, p. 58-59 (vol. 3, p. 105-107, in the 1st edn. of 1719).

¹³ *Compilatae*, pt. 4, tit. 11, sec. 4, art. 112. See also the insurance code of the Spanish Consulate in Bruges of 1570, tit. 10, ord. 1.

¹⁴ G. Rossi, *Insurance in Elizabethan England. The London Code*, Cambridge 2016, p. 278-279.

¹⁵ Statutes of Florence of January 1524, policy models appended. The statue may be found in Ascanio Baldasseroni (1751-1824), *Dizionario Ragionato di Giurisprudenza Marittima e di Commercio*, Livorno, Stamperia di Tommaso Masi e Comp., 1786, vol. 3, p. 505-509.

Taken at their face value, the events would clearly point to the attempted theft of the shipmaster.¹⁶ The problem of the insurers was how to persuade the bench that attempted theft was different from attempted barratry. To that end, the insurers sought to distinguish according to the relationship between the stolen goods and the intended profit of the thief. If the intended profit derived directly from the stolen goods (that is, the thief stole something to keep it to himself) then the case would be theft. But if the intended profit were to come indirectly from the stolen goods, then it would be barratry. This indirect profit could be realised by stealing at the request of someone else.¹⁷ In such a case, argued the insurers, the profit of the thief would not derive directly from the stolen goods, but rather from the person for whom he stole them.¹⁸ The distinction is clearly specious, but it was a way for the insurers to link the barratry of the shipmaster to the notion of barratry as the extortion by a magistrate. Although hardly accurate, the etymological explanation of barratry (*barataria*) as barter (*baratum*) was quite widespread among early modern jurists.¹⁹ The insurers sought to use this etymology to distinguish between (proper) theft and barratry. The barter of the judge who takes a bribe consists of a *facio* (doing or not doing) *ut des* (receiving the bribe).²⁰ This is the reason for the term barratry. For barratry is but a fraudulent *quid pro quo*, they maintained, in which one party does something unlawful in order to receive something. In arguing as much, the insurers shrewdly mentioned Ulpian's explanation for the aggravated liability of the sailors (the strict liability of the *receptum nautarum*) as a way of preventing collusion between sailors and thieves.²¹ In handing over the cargo to the thieves, the sailors made a 'fraudulent barter' (*dolosa permutatio*): this element, argued the insurers, is necessary to have barratry.²² Clearly, the insurers were twisting Ulpian's words. But in so doing they found a foothold in the sources to explain barratry as a fraudulent *do ut des*. The master was not the thief, but he sought to deprive the consignor of his goods by giving them to the actual thieves, thereby colluding with them. To stress even further the interpretation of barratry as a bribe to do something unlawful, the insurers quoted a number of

¹⁶ *Decisionvm Lvcensivm, Florentinarvm, et Bononiensivm ... Libri Tres ... Antonio Monacho ... Auctore* (note 12), dec. 1, p. 4, n. 5: 'Furtum erit quatenus Patronus circa corruptelam, vel collusionem cum alijs, ipsemet rapuit, seu intendit rapere pro se merces assecuratas'.

¹⁷ Cf. the case of the shipmaster who brought the cargo to the Turks, described in Stracca (note 8), gl. 31, fol. 128v, n. 2. Cf. Rossi, *Barratry of the Shipmaster in Early Modern Law: Polysemy and Mos Italicus* (note 8), ***

¹⁸ *Decisionvm Lvcensivm, Florentinarvm, et Bononiensivm Bononiensivm ... Libri Tres ... Antonio Monacho ... Auctore* (note 12), p. 4, n. 8-9: 'Barattaria vero non verificari, dicebant informantes pro DD. Assecuratoribus, quia ea committantur, quando Magister Nautis non ipse rapit, sed intendit rapere pro se merces assecuratas, sed quando propter aliquod commodum, et vtilitatem sibi ab alio collatam, vel propter aliquod extrinsecum suum interesse spem, et commoditatem, praeter quam acquirendi pro se ipso dd. merces, operatur quod versus d. merces amittat, vel quod alij illas acquirant, et contractent, vel quatenus dominus nautis voluerit merces omnes habere pro derelictis ita quod proprio nomine ad recuperationem partis admitteretur'.

¹⁹ Rossi, *Barratry of the Shipmaster in Early Modern Law: Polysemy and Mos Italicus* (note 8), ***

²⁰ *Decisionvm Lvcensivm, Florentinarvm, et Bononiensivm ... Libri Tres ... Antonio Monacho ... Auctore* (note 12), p. 4, n. 10-11: 'Exemplo officialium cum aliquid a priuatis recipiunt, vt faciant non facienda, vel facienda omittant ... vbi Baratariam Iudex committit, qui corruptus tulit sent[entiam]'.

²¹ See esp. D.4.9.1.1. Cf. Gloss, *casus ad D.4.9.1pr*, § *Maxima* (Parisiis 1566, vol. 1, col. 661): 'Dicit Vlpia[nus] quod maxima et vtilitas huius edicti: quia nautae, cau[pones] stabularij surripiebant olim omnia, et associabant se furibus, et etiam post hoc edictum huiusmodi flagitiis non abstinabant: vnde statuit hoc edictum vt tollantur fures, et eorum malitiis obuietur, et vt etiam puniantur: cum sit in ipsorum arbitrio vt eos non recipiant.' See further G. Rossi, *The Liability of the Shipmaster in Early Modern Law: Comparative (and Practice-Oriented) Remarks*, 12 (2017) *Historia et Ius*, paper 12, p. 1-47, at 8-11.

²² *Decisionvm Lvcensivm, Florentinarvm, et Bononiensivm ... Libri Tres ... Antonio Monacho ... Auctore* (note 12), p. 4, n. 14: 'Nihil aliud esse barataria, quam permutatio dolosa, quasi, *Barattorio*, ita quod, vbi permutatio aliqua non intercedat, Barattaria dici non possit, quare in term[in]e Baratariae Nauarchi esse dicebatur, quod habetur in l. 1 in princ. ff. tit. naut. caup. (D.4.9.1.1) vbi consideratur, quod cum furibus colluserit in pernicem Domini' (cf. D.4.9.1.1: '... nisi hoc esset statutum, materia daretur cum furibus aduersus eos quos recipiunt coeundi').

authorities that explained barratry as extortion, ranging from the Divine Comedy²³ to a (probably lost) decision of the Florentine insurance magistrates, the *Offiziali di Sicurtà*.²⁴ In that decision (of 1584), according to the insurers, the magistrates allegedly distinguished between theft and barratry according to whether the shipmaster kept the cargo for himself or just caused its loss.²⁵ It would seem more likely, however, that the *Offiziali* distinguished between theft and barratry because the master had deliberately sunk the vessel. In such a case, it would not be possible to accuse the master of stealing the whole cargo, since he caused its destruction.

It was worth reporting the position of the insurers in some length both because it highlights the affinity between maritime and judicial barratry (which is not surprising since, as noted, law courts were considerably more familiar with the latter) and because of the very different approach of the insured. According to the insured, the shipmaster's fraudulent attempt to bring the cargo to a different destination was sufficient to qualify his conduct as barratrous,²⁶ all the more since the fraudulent design had been nearly carried out.²⁷ The insured had a point of course. The ship came from Portugal and was supposed to conclude her voyage at Leghorn. Instead, the master was arrested towards the end of the Italian peninsula: short of any plausible excuse, this behaviour would clearly point to barratry. What is really interesting in the position of the insured, however, is what it does not say. Reading the (remarkably lengthy) report of the case, it is difficult to avoid the impression that the counsel for the insured privately agreed with the insurers: the master had tried to steal the cargo, but theft was excluded from the policy. Whatever barratry was for merchants, the counsel might have thought, surely in law the shipmaster was guilty of attempted theft. Complex discussions as to the precise nature and the exact scope of barratry vis-à-vis theft were therefore best avoided, as they might backfire. Possibly moving from the persuasion that barratry and theft were too similar to be clearly distinguished, therefore, the counsel for the defendant sought to ignore theft and focus only on barratry.

The position of the court is even more interesting, for it reveals a remarkably poor understanding of maritime insurance and especially a rather confused notion of barratry. It is worth remembering that the Rota of Florence was renowned for the quality of its decisions. But this was (if not the earliest, at least) one of the first cases where the learned judges of the Florentine Rota had to deal with a maritime custom not yet properly classified within the legal system. Their confusion could only increase given the inclusion of barratry but the exclusion of theft from the policy: it was quite a baptism of fire! Surprisingly enough, the court managed to make the right decision - but on the basis of a very unorthodox reasoning.

First of all, the court clarified that theft and barratry are quite different.²⁸ But their difference has nothing to do with the insurers' argument that barratry is just an adaptation of the crime of

²³ *Decisionvm Lycensivm, Florentinarvm, et Bononiensivm ... Libri Tres ... Antonio Monacho ... Auctore* (note 12), p. 4, n. 13. The counsel for the insurers referred to the famed (though admittedly not particularly brilliant) commentary of Christoforo Landino (1424-1492) on the 21st *canto* of the *Inferno*, reporting an excerpt where Landino explained the meaning of barratry as extortion (*repetundae*).

²⁴ Very few sixteenth-century decisions of the *Offiziali di Sicurtà* can be found in the National Archives of Florence. My researches have failed to uncover any reference to this specific case.

²⁵ '[F]urtum esse quatenus partem mercium patronus pro se ipso habuit et arripuit, Baratariam vero quatenus reliquarum mercium submersionem procuravit', decision of the *Offiziali di Sicurtà* of 28.3.1584 as reported by the counsel for the insurers (*ibid.*, p. 4, n. 14).

²⁶ *Ibid.*, p. 5, n. 29-32.

²⁷ In other words, the insured claimed, it was not an offence merely attempted, but it could well be considered as a committed one: 'Maxime, quia actus iste erat proximus facto, vnde habetur pro consumato' (*ibid.*, n. 33).

²⁸ In stating as much, the judges relied more on Stracca than Santerna. This might explain why the court was keen to distinguish barratry from theft: unlike Santerna, Stracca did not move from theft (or rather, piracy) to explain

extortion. On the point the reasoning of the judges betrays the distress of the civil lawyer faced with some strange maritime practices. The insurance policy had a list of perils insured against. Among them, barratry was the last to be named – since it was often excluded, it was customary to name it for last. Following the Florentine custom, however, the policy closed the list of perils with two exclusions: 'hatches' (*stiva*) and 'customs' (*dogane*). The first of the two referred to the damage to the cargo not properly stored under the hatches ('*stiva*'); the second covered problems with the authorities for unpaid customs ('*dogane*'). Neither of these two cases had anything to do with barratry of course. But their position in the policy – their exclusion from the policy just after the inclusion of barratry - let the court jump to the conclusion that they must have been sub-categories of barratry. This reasoning is convoluted just as it is bizarre, but it led the court to dismiss the reconstruction of barratry (proposed by the insurers) as 'fraudulent barter' (*dolosa permutatio*): since 'hatches' and 'customs' are very specific cases of barratry, the court reasoned, and neither of them could be described as barter, it followed that the general category (barratry) could not be a fraudulent *do ut des* either.²⁹ It remained to be seen what barratry was.

By the eve of the seventeenth century there were remarkably few legal treatises on maritime insurance. And the main ones, those of Santerna and Stracca, did not provide a definition of maritime barratry. The Florentine court therefore sought to find other authorities. As it often happened in that period, the bench sought to compensate for the dearth of punctual, legal authorities with classical *auctoritates*.³⁰ So the court pointed to a letter of Boccaccio, in which he reported how Scipio, coming back from Africa, was accused of 'baratteria' in the sense of embezzlement.³¹ The case of Scipio was probably the best example that the court could find, so the judges sought to strengthen the point citing other classical authors (Gellius and Livy)³² where the same point could be found: a tribune of the plebs (Quintus Petilius) accused Scipio of embezzling part of the treasure of Antiochus III. The Latin sources pointed to extortion, and Boccaccio translated it in the vernacular as barratry. To the bench, this argument looked quite stronger than the one based on 'hatches' and 'customs', if only because it came from classical authors.³³ What is noteworthy (and typical of early modern legal sources) is not just the reliance on classical authorities, but their use to entirely different purposes. The Florentine Rota needed the prestige of some old authorities (the older the better) so to reach a pre-determined conclusion: disproving the narrow interpretation of barratry advanced by the insurers. In their turn, the insurers were relying on the wholly artificial interpretation of some civil lawyers based on the semantic affinity between barratry and barter: the similarity of the terms barratry and barter proved the etymological derivation of the first from the second, and this derivation would also explain its actual meaning. In order to reject the linguistic point advanced by the insurers, the bench had to find a linguistic counter-argument. Looking at the reality of things – the

barratry, but rather from judicial barratry (and so, corruption - something entirely different from theft). *Ibid.*, p. 5, n. 38-39. Cf. *supra*, notes 11 and 17 (on Santerna and Stracca respectively).

²⁹ *Ibid.*, p. 5-6, n. 41-43.

³⁰ The court observed how 'Academici Florentini in eorum vocabulario Baratariam non aliter latine dixerunt, quam deceptionem, fraudem, imposturam, prout et antiquiores baratariam pro impostura acceperunt', *ibid.*, p. 6, n. 44.

³¹ *Ibid.* Cf. Boccaccio, *Consolatoria a Pino de' Rossi* (1367), in F. Corazzini (ed.), *Le Lettere Edite e Inedite di Messer Giovanni Boccaccio*, Florence 1877, p. 91. See also a few pages earlier in the same letter, p. 75, where 'barattare' was used as synonym of 'rubare' (to steal). The recipient of the letter was one of the twelve citizen accused - and condemned - by the *Podestà* of an attempted coup to sell Florence to the Visconti. See further E. Filosa, *L'Amicizia ai Tempi della Congiura (Firenze 1360-61)*, *Studi sul Boccaccio*, 42 (2014), p. 195-219, at 200-205.

³² Gellius, *Noctes Atticae*, 4.18 (the judges attributed the passage to Plutarch); Livy, *Periochae*, 38.10.

³³ From the classical sources cited, concluded the court, 'nulla permutationis vestigia considerari possunt, quapropter cum nulli magis credatur, quam iudicibus, quam scilicet Respublica iustitiam ipsam committit custodiendam'. *Decisionvm Lvcensivm, Florentinarvm, et Bononiensivm ... Libri Tres ... Antonio Monacho ... Auctore* (note 12), p. 6, n. 45.

ordinary way in which any contemporary Tuscan would have used the term 'barratry'³⁴ – was not appropriate. Because the insurers were relying on authorities, other authorities were needed to disprove them. Common sense was no authority, and so literary sources of classical Rome were more important than the daily practice of contemporary Florence.

Having duly dismissed the argument of the insurers with a long skirmish of authorities, the court felt sufficiently confident in its own position: the master did not attempt barratry but rather tried to steal the cargo. The problem now was to tell theft and barratry apart.

What is the difference between theft and barratry? The answer of the court was to consider barratry as a qualified kind of theft. Based on the wickedness (*improbitas*) of the act, the court distinguished three kinds of theft - simple, heinous and most heinous theft. The third case was that of robbery,³⁵ and the Florentine court sought to qualify barratry as a specific case of robbery. The distinction of theft according to the wickedness of the act was not common practice,³⁶ as it was of little use in distinguishing the specific features of each kind of theft. Perhaps, however, this is the reason why the court adopted it. A better classification would have been problematic for two reasons. First, because it would have required providing some precise features for barratry as well - something that the court was not able to do. Secondly, because it would have seriously questioned the affinity between barratry and robbery. The most obvious feature of robbery is violence (actual or threatened), but the shipmaster was caught while stealing the cargo in a remarkably peaceful manner.

Qualifying barratry as a specific and particularly heinous kind of theft allowed to punish the wrongdoer as a thief without denying the barratrous nature of his act. This way simple theft would be absorbed into the aggravated one (barratry), while at the same time retaining the (conceptual) distinction between the two.³⁷ The arguments used by the court to classify robbery as a qualified kind of theft are somewhat ambiguous.³⁸ But the end justifies the means: barratry

³⁴ G. Rossi, *Barratry of the Shipmaster in Early Modern Law: Polysemy and Mos Italicus* (note 8), ***

³⁵ *Decisionvm Lvcensivm, Florentinarvm, et Bononiensivm ... Libri Tres ... Antonio Monacho ... Auctore* (note 12), p. 6, n. 48: 'furtum triplex esse dicitur improbum, quod est simplex furtum, improbus, quod est expilatae haereditatis, improbissimum, quod est robaria [i.e. spoliatio]' (square parenthesis as in the text).

³⁶ Most sixteenth-century treatises on criminal law do not even mention it. A short mention, among other ways of classifying theft, is however to be found in the famed work of Benedikt Carpzov (1595–1666), *Practicae Novae Imperialis Saxonicae Rerum Criminalium Benedicti Carpzovii ...*, Lipsiae, Impensis Christiani Kirchneri, literis Joh. Erici Hahnii, 1669, q. 78, p. 235, n. 3, but the author does not really make use of it. For a useful scheme of different kinds of theft in sixteenth-century practice see in particular the very thorough one by Jodocus Damhouderius (Joos de Damhouder, 1507-1581), *Clarissimi Viri D. Iodoci Damhovderii ... Praxis Rerum Criminalivm ...*, Antverpiae, Sumptibus viduae et haeredum Ioan. Belleri, 1601, p. 424-425. As in Carpzov, the *improbitas* of the *furtuum* is mentioned, but it is of secondary importance (and indeed de Damhouder does not rely much on it in his treatise).

³⁷ *Decisionvm Lvcensivm, Florentinarvm, et Bononiensivm ... Libri Tres ... Antonio Monacho ... Auctore* (note 12), p. 6, n. 50: 'Eadem ratione furtum a Barataria confunditur, et suffocatur, quia barataria dicitur crimen enorme'.

³⁸ To further prove that robbery is an especially serious case of theft, the court added that barratry may sometimes entail the punishment for *lèse majesté*: '*adeo quod etiam pena laesa Maiestatis pro ea [scil., barattaria] aliquando inferatur*' (p. 6, n. 51). And yet, in *ius commune* literature there was no doubt that the kind of barratry which attracted the punishment for *laesa maiestas* was the corruption of the judge - and not the barratry of the shipmaster. Many authors dealing with the bribe-taking judge qualified that as a possible case of *lèse majesté*, whereas none ever stated as much for barratry in a nautical sense. Not even the author whom the Court expressly cited on the subject (Hieronymus Gigas - i.e. Girolamo Giganti) stated as much (*ibid.*). Quite on the contrary, he was unequivocally speaking of barratry as judicial corruption: Hieronymus Gigas, *Tractatus de Crimine Laesae Maiestatis ...*, Lvdgvni, apud haeredes Iacobi Iuntae, 1557, lib. 3, § *De proditoribus*, q. 2, p. 376-377, n. 1-4.

Another weakness in the Court's reasoning lies in the 'absorption' of theft into barratry in consideration of the latter's gravity. The reasoning is surprising both because it clashes with what the Court would say later on (namely, the non-occurrence of theft in the present case: if 'absorbed' into barratry, either both delicts are committed or neither is), and, moreover, because it is plainly weak in law. Rather unsurprisingly, the Court had some trouble in finding some foothold in the sources to justify its conclusion. It is revealing that the sole *auctoritas* the judges

had to be classified within the general category of theft (so as to reject the insurers' interpretation of fraudulent *do ut des*), but at the same time its specific features had to be sufficiently different from ordinary theft (since it was possible to insure against barratry while at the same time excluding the risk of theft).

Having somehow distinguished simple theft from barratry, the judges then sought to prove the non-occurrence of theft so as to conclude that only barratry had taken place. Here as well, the court's arguments are somewhat peculiar. First, the judges did not believe much in attempted theft, not even in case of *furtum manifestum*: catching the thief red-handed was not sufficient. According to the bench, the actions of the shipmaster (fleeing with the cargo and heading towards Barbary) constituted an offence that would materialise with the simple conduct (*statim ipso facto consumatur*).³⁹ Theft, on the contrary, could only be found after a more complex process, which could be considered as complete only at a later stage. So long as the thief did not manage to escape with the loot, in other words, proper theft could not be found.⁴⁰ Second, and moreover, the judges found impossible to speak of theft of the cargo because the cargo – rather unsurprisingly – happened to be in the ship, and the ship belonged to the shipmaster. As the shipmaster was not trying to steal his own vessel, the offence he was trying to commit could not be that of theft.⁴¹ This specious reasoning would effectively preclude finding for attempted theft until the delict was committed in full, and possibly even beyond that: for the court, theft would materialise only when the thief had actually sold the stolen thing. So, bizarrely enough, taking someone else's property with the intention to make a gain was not sufficient to have theft.

It would not take a great legal mind to conclude that the court's reasoning was deeply flawed. But the point is quite another. With a series of remarkably poor legal statements, the court was quietly trying to make a U-turn: moving away from the idea of barratry as specific kind of theft towards a more general concept of fraud – without however saying as much.

What might seem self-contradiction was in fact the product of a deliberate choice. Ambiguous as it was, the notion of barratry of the Florentine judges pointed to the breach of trust with the purpose to make a profit. If in the early modern period the rigid boundaries of old between different contracts were beginning to blur, the same was not true for delicts. In a system of discrete delictual remedies, the most obvious candidate for the wrongdoing of the shipmaster was the delict of theft. As barratry would have not been actionable as an autonomous delict, the court sought to qualify it as theft. But the peculiarity of the insurance policy (including

were able to cite was a rather weak *consilium* of Agostino Berò (1474-1554). In that *consilium*, Berò opposed the view that a (Bolognese) statute on robbery could not be applied to theft because of the harsher penalty envisaged by the statute, which had therefore to be interpreted restrictively. To oppose this conclusion, Berò merely noted that, in the vernacular, the daily use of the term 'robatoria' was akin to simple theft. *Consiliorum sive Responsorum Avgvstini Beroii Bononien. ...*, vol. 3, Venetijs, apud Franciscum Zilettum, 1577, cons. 213, p. 611-612, n. 2 and 10. It is not clear how useful could have been to the Florentine judges the flimsy reasoning of Berò on the point. Clearly, however, a poor *auctoritas* was better than none.

³⁹ *Decisionum Lvcensium, Florentinarum, et Bononiensium ... Libri Tres ... Antonio Monacho ... Auctore* (note 12), p. 6, n. 55: 'Amplius furtum a fuga mutatione itineris, et a culpa patroni absorberi necessario resultat ex eo, quia haec ipsa statim ipso facto consumatur, antequam furtum in rerum naturam deducatur'.

⁴⁰ *Ibid.* Clearly the argument is weak in law: there is no reason why the delict of theft should become actionable only at a later stage, if all its features are already present at the time of the attempted flight. The court sought to deny as much claiming that not all the features of theft were present in the case at stake, because the thief was caught while fleeing away: 'immo plerumque euenit, vt nec furtum fieri possit, vt in casu nostro, dum capta nauis per fiscum Roccellae [i.e. the town in Calabria where the master was detained] illud committi non potuit'. *Ibid.*, p. 6, n. 55.

⁴¹ *Ibid.*, p. 6, n. 57-59: 'Nec ex fuga ipsa cum nauis statim furtum resultat, quia nauis est ipsius Domini, furtum autem rei propriae non consistit ... unde furtum absolute commissum dici non potest, quia sermo indefinitus, vel vniuersalis in vno falsus, in omnibus redditur falsus...'

barratry but excluding theft onboard) forced the court to explain the actual difference between theft and barratry. This is what makes that decision interesting. The apparent schizophrenia of the court was in fact a juridical necessity: barratry had first to be somehow qualified as theft in order to become actionable in a civil law court. But since the policy distinguished the two kinds of wrongdoing, it was then - and only then - necessary to detach barratry from theft.

Only at this second stage did the court operate a full distinction between theft and barratry, and it is important to think of this distinction in the light of what said so far. Theft, stated the court, may be committed only if something is stolen from the ship either before departure or upon arrival at destination.⁴² This way, any deceit of the master occurring during the voyage may be clearly distinguished from theft. In drawing this distinction, the court was able to show the existence of some kinds of theft, either committed by the master or for which the master was vicariously liable, which did not overlap with barratry, thereby making sense of the distinction between barratry and theft onboard in the insurance policy. We have seen how that distinction was worked out by merchants not to alleviate the position of the shipmaster, but that of the insurers: since barratry was often excluded from the policy, it became customary to single out the shipmaster's liability for theft onboard. This way, the insurers did not need to include the general risk of the fraud of the shipmaster to cover against theft perpetrated on the ship. In the hands of the court, ironically, a rule thought to help the insurers was turned against them.⁴³

Having analysed this Florentine decision, it should come to little surprise that, although not completely ignored,⁴⁴ it is not often found in later decisions. This partial silence is remarkable given that, in all probability, it is the most elaborated analysis on the difference between theft and barratry among all published decisions of early modern civil courts. Wanting as it may be in its legal reasoning, this decision shows the difficulties that law courts encountered when starting to subsume the merchants' notion of barratry within civil law categories. Considering barratry as a qualified form of theft was safe enough, unless it was necessary to distinguish barratry from theft - as in the present case.

One of the few authors who mentioned this decision was a pre-eminent jurist and the author of one of the most important early modern treatises on commercial law, Josephus Laurentius Maria de Casaregis (Giuseppe Lorenzo Maria Casaregis, 1670-1737). Overlooking the way in which the court reached its decision, Casaregis focused only on its outcome (perhaps this is why he approved of it). In his comment, Casaregis argued that barratry is indeed a qualified

⁴² *Ibid.*, p. 6-7, n. 60-62: 'Vbi ergo verificabitur furtum? ... [N]ullus alius remanet post praedictos alios casus, quam si consideretur nauis salua in genere, seu habita relatione ad terminum a quo, idest a portu a quo discessura erat, seu ad terminum ad quem, idest ad portum in quo remansura: vtrobique enim furtum consumari potest, et vtrobique casus furti dabitur, si hoc vel illo portu, quid de nauis furtiue surripiatur; quod si fiat, profecto hoc vitium nullam habet cum alio communionem, quia nondum fuga, nondum robaria, et nondum mutatio itineris, nec alia id genus vitia adhuc verificari potuerunt in portu a quo; sicut nec fugam vllam, nec robariam, nec mutationem itineris, nec alia id genus supradicta vitia intercidisse, aduentus ipsiusmet Nauis, et Nauarchi in portum ad quem satis superque demonstrant; posthaec quid aliud remanet nisi furtum si res deficiat ex vitio? Aut si non ex vitio quid aliud manebit quam casus, aut aliud quidpiam, de quo in praesentiarum non tractatur. Quare concludendum videtur, furtum non nisi salua nauis in genere recte non posse considerari.'

⁴³ What was left to the court, for the sake of completeness, was to work out a few corollaries. So for instance the exception to the insurers' liability for the theft of the master did not apply when the master stole the entire vessel. Leaving that door open would have questioned the entire reasoning of the judges. It is however interesting to note the laborious reasoning of the court also on this issue, for in principle (following the literal tenor of the exception to the insurers' liability) the clause in the policy might have encompassed also that extreme case. The problems that the court faced in ruling out this eventuality seem to attest - yet another time - the specious difference between theft and barratry (*ibid.*, p. 7, n. 65-69).

⁴⁴ See e.g. *infra*, note **Error! Bookmark not defined.**

case of theft,⁴⁵ and that the barrator has the same aim as the thief. But while theft is done secretly and without fraud, barratry is a conduct both manifest and fraudulent.⁴⁶ The presence of fraud in barratry and its absence in (normal) theft is also important, for fraud implies breach of trust. As such, it is possible to speak of fraud only in case of a pre-existing relationship between victim and perpetrator of the crime.

2.2. The elements of barratry

The Florentine court was hardly the only one to consider barratry as a qualified kind of theft. The consequences of this qualification may be appreciated in a decision of a few decades later, this time of the Rota of Rome.

Two shipmasters borrowed money under a maritime exchange (which was a variation of the maritime loan, where the lender bore the risk of mishap and so acted as an insurer of sort).⁴⁷ Because of the risk he bore, the lender-insurer decided to insure his credit. So the case was substantially one of reinsurance. When the insured party was the shipmaster, barratry was always excluded from the insurance policy – and of course also from the reinsurance.⁴⁸ So in the present case the lender-insurer was able to insure his credit against any risk, with the exception of barratry of the master. When both ships sank, the (re)insurers refused to pay up, alleging that the mishap was due to the barratry of the shipmasters (i.e. the original borrowers), who had intentionally sunk their vessels. Initially, the Roman Rota qualified the mishap as barratry and so absolved the (re)insurers. On closer scrutiny and after a rather intricate appeal,⁴⁹ however, the court overturned its first decision. Requiring very stringent standards of proof to find for barratry, which the (re)insurers could not give, the court found for the lender-insurer and condemned the (re)insurers to pay for the mishap.

⁴⁵ 'Furtum ergo nihil est, quam rem alienam absque consensu Domini occulte subripere ... At quando furtum aliqua fraudulenta machinatione, fraude, ac deceptione, fugaque furis committitur, tunc secundum communem loquendi usum, hoc furtum Barattaria nuncupatur', Casaregis, *Discursus Legales de Commercio* (note 12), vol. 2, disc. 141, p. 58, n. 1 (vol. 3, p. 105, in the 1st edn. of 1719).

⁴⁶ *Ibid.*, p. 58, n. 9 (vol. 3, p. 106 in the 1st edn. of 1719). Cf. Domenico Azuni (1749-1827), *Dizionario Universale Ragionato della Giurisprudenza Mercantile del Sig. Senatore D^e. D. A. Azuni ...*, vol. 1, 2nd edn., Livorno, Glauco Masi, 1822, s.v. 'Baratteria', p. 211, n. 11; Baldasseroni, *Dizionario Ragionato di Giurisprudenza Marittima e di Commercio* (note 15), vol. 2, s.v. 'Baratteria', p. 250, n. 20.

Casaregis' distinction would hold even for *furtum manifestum*, for even a manifest theft (at least, in the intentions of the thief) is typically done *occulte* - only, the theft is caught in the act of stealing. As to the fraudulent conduct of the shipmaster, Casaregis (who clearly had access to more information about the case than us) realised the suspicious nature of the shipmaster's behaviour, who never set foot on land while the ship was on the dock, thereby hinting at the master's '*anim[us] fugiendi mercesque auferendi*' (Casaregis, *Discursus Legales de Commercio* (note 12), vol. 2, p. 59, n. 12; vol. 3, p. 106-107, in the 1st edn. of 1719).

⁴⁷ The maritime loan, *foenus nauticum*, was a loan repayable upon safe arrival of the ship or goods insured at destination. In case of mishap, the lender would not be able to recover his loan. Combining insurance with credit, the interest rate applicable to the loan was significantly higher than either a the interest charged in a normal loan or the insurance premium. Maritime exchange was a maritime loan where the borrower-insured would repay the lender-insurer in a different currency, chiefly to hide the premium with an inflated exchange rate, so as to circumvent the issue of usury. Cf. Rossi, *Insurance in Elizabethan England* (note 14), p. 50.

⁴⁸ It was in principle possible for the shipowner to insure the hull also against the barratry of his master. Because of the risk of collusion, however, an increasing number of jurisdictions did not allow as much and prohibited the inclusion of barratry in any hull policy. The two main exceptions to this European trend were the places we are most interested in: England and some Italian regions (especially Tuscany and Rome). See *ibid.*, p. 276-277.

⁴⁹ Decisions of 12.12.1678, 26.2.1680, 4.6.1681 and 19.1.1682. The case is accurately described in Giovanni Battista De Luca, *Theatrum Veritatis et Justitiae ...*, Venetiis, apud Paulum Balleonium, 1716, lib. 8, disc. 111, p. 190-192.

Since barratry is a delictual wrongdoing (or rather, as the bench had it, 'inasmuch as it smells of delict'),⁵⁰ it requires both stringent evidence⁵¹ and, moreover, *dolus malus* - that is, 'actual deceit, fraud or scheme' (*dolus positivus, fraus, vel machinatio*).⁵² While not as disastrously bad in law as the Florentine one, this Roman decision does not strike as a legal masterpiece either, but it is very revealing of the approach of civil law courts to the subject. 'Smelling' of delict, barratry required a higher probatory standard than other wrongdoings, especially of contractual nature, all the more given the progressive assimilation of delicts to crimes.⁵³ Fault may well be presumed - especially for someone, as the shipmaster, under *culpa levissima*.⁵⁴ But *dolus* should always be proven.⁵⁵ The system of presumptions elaborated by the courts to hold the shipmaster responsible for breach of contract,⁵⁶ therefore, was not applicable here. Further, the court did not simply speak of deceit (*dolus*), but of fraudulent scheme ('*fraus vel machinatio*'),⁵⁷ also requiring the plaintiff to prove its causal link with the mishap.

To better understand the issue, it is useful to look at what Casaregis wrote almost forty years after this decision on the elements necessary to find for barratry:⁵⁸

⁵⁰ Ansaldo de Ansaldo (1651-1719), *De Commercio et Mercatvra Discvrsvs Legales ...* Romae 1689, Ex Typographia Dominici Antonij Herculis, 1689, disc. 70, p. 429, n. 18: 'Quoniam cum Barattaria, vtpote redolens delictum, requirat ad sui canonizationem probationes ex omni parte indubitatas'.

⁵¹ *Ibid.*: 'probationes ex omni parte indubitatas, et premesse concludentes'.

⁵² *Ibid.*, n. 19.

⁵³ Cf. Baldasseroni, *Dizionario Ragionato di Giurisprudenza Marittima e di Commercio* (note 15), vol. 2, s.v. 'Baratteria', p. 249, n. 17.

⁵⁴ Cf. Rossi, *The liability of the shipmaster in early modern law* (note 21).

⁵⁵ E.g. Sforza degli Oddi (1540-1611), *Consiliorvm sive Responsorvm, D. Sfortiae Oddi Pervsini ... Venetiis*, apud Iunctas, 1593, lib. 1, cons. 31, fol. 93v, n. 2. See also *Sacrae Rotae Romanae Decisiones nuperrimae ...* vol. 7 (1701-1702), Romae, apud Simonem Occhi, 1758, dec. 206 (9.12.1701), p. 363-364, n. 15: 'dolus debeat plene, et concludentissime probari ab allegante, tamquam habens contra se praesumptionem Juris'. The same decision also ruled out *dolus* even for the case of 'animal-like credulity' ('adeo ut quaevis adduci possit excusatio, et credulitas, quae illum [reum] a dolo eximat sive vera, sive minus probabilis, et injusta; imo bestialis, et fatua', *ibid.*, p. 364, n. 16). On the difficulty to prove *dolus* in commercial transactions, and especially on the need to present full and unequivocal proof see *Sacrae Rotae Romanae Decisionum Recentiorum ... a Paulo Rubeo I.C. Romano ... selectarum ...*, Venetiis, Apud Paulum Balleonium, 1716, vol. 12 (1655-1658), dec. 157 (27.3.1656), esp. p. 227, n. 20.

On the relationship between *culpa lata* and actual *dolus* a statement rather representative of contemporaneous case law may be found in Benedetto Capra (Benedictus de Benedictis de Perusio, d.1470), *D. Benedicti de Benedictis de Capra ... Conclvsionvm, Regvlarvm, Tractatum, et Communium opinionum ... Venetiis*, 1568, vol. 1, concl. 87, fol. 95v, n. 12: 'culpa autem latior est dolus praesumptus, qui est quaedam machinatio ad decipiendum fallendumque alterum praesumptive adhibita: ut est quando indicia seu praesumptiones ex quibus dolus praesumitur, non sunt manifestae, nec concludentes, unde manifestum dolum non inducunt sed praesumptum ... ut est, si aliquis saluauit res suas proprias, sed non depositas uel commodatas, uidetur enim tunc fuisse in dolo: ut patet in dicta l. quod Nerua (D.16.3.32).'

⁵⁶ See again Rossi, *The liability of the shipmaster* (note 21).

⁵⁷ *Vel* should be probably read as *et* - not in the sense that they were two fully different elements and both were needed, but in the sense that fraud (at least the kind of *fraus* the court had in mind) meant fraudulent scheme.

⁵⁸ 'Barattaria, ad cuius probationem nonnulla requiruntur, praecipue, quod Truffator nullum Ius habeat in re diversimode disposita, et praemeditatus dolus sit praordinatus ad casum cum intentione convertendi in proprios usus alienas pecunias, seu merces', Casaregis, *Discursus Legales de Commercio* (note 12), vol. 1, disc. 73, p. 228, n. 1 (vol. 2, p. 127, in the 1st edn. of 1719). Casaregis wrote this definition when commenting on a decision of the Genoese Rota of 1711. See also *ibid.*, vol. 1, disc. 10, p. 30, n. 7 (vol. 1, p. 58, in the 1st edn. of 1719): 'cum [barattaria] consistat in dolosa machinatione praordinata ad casum ... debebat probari'; and *ibid.*, vol. 1, disc. 1, p. 6, n. 77 (vol. 1, p. 10 in the 1st edn. of 1719): 'Non omnis Navarci culpa est barattaria, sed solum tunc ea dicitur, quando committitur cum praesistenti ejus machinatione, et dolo praordinato ad casum, et ad proprium lucrum de mercibus alienis faciendum'; cf. *ibid.*, n. 80.

In order to prove barratry, quite a few elements are required, especially that the fraudster has no right to deal with the thing otherwise, and that the premeditated deceit be preordained to the mishap, with the intention to embezzle money or goods belonging to someone else

Casaregis' statement is hardly an isolated one,⁵⁹ but it is probably the clearest to be found on the subject, and especially the most useful to understand the approach of the law courts, all the more since it was not a definition of barratry but rather a list of the main elements needed to prove it. The first of such elements is a rather obvious one: lack of rights in the thing. Just as the thief, the barrator may not have any interest in the thing: the only reason he is allowed to deal with it is the undertaking to bring it to a specific destination. Any other use of the thing, therefore, would be illegitimate. The other two elements in Casaregis' list are considerably more important. First, in order to prove barratry it is necessary to show a premeditated scheme to enrich oneself at another's expense. Secondly, and crucially, there must be a direct causal link between that scheme and the actual mishap. Thus, the premeditated scheme and the causality link must both be proven, and proven in full.

In Casaregis' definition the element of fraud (*dolus*) appears more clearly than in either of the two decisions that we have seen so far. By and large, *dolus* was defined as a fraudulent scheme against someone.⁶⁰ As said, *dolus* may not be presumed.⁶¹ Only very few behaviours could be qualified objectively ('de sua natura') as fraud;⁶² apart from them, specific and clear evidence was needed to qualify a certain conduct as fraudulent. Moreover, explaining fraud in terms of scheming also meant requiring proof of causation, and so proving that the intended fraud was planned in such a way as to lead to the actual mishap. Thus, proving the fraudulent intent ultimately meant explaining the reason why something happened, including the motive – the intent to enrich oneself at another's expense. The requirement of premeditation complicated things even further: the plaintiff had to show not just the fraudulent intent and how did this lead to the mishap, but also that the same intent predated the conduct resulting in the mishap.

We will now look at the application of the above requirements in the jurisprudence of early modern Italian courts. What is important of course is not listing all or most cases on the subject – that would not tell us much of the courts' approach, not to mention that many other cases can be found among unreported decisions. Among the wealth of decisions to be found in printed sources, only a - relatively - few ones will be discussed. Many more will be either omitted or

⁵⁹ See e.g. De Luca, *Theatrum Veritatis et Justitiae* (note 49), lib. 8, disc. 106, p. 184, n. 28, who defines barratry as 'callidita[s], ac frau[s], vel dolu[s], seu alia ... preordinatio ... ad surripiendum merces, seu alias ad praejudicandum domino mercium, vel pecuniarium.' Cf. also *Decisiones Sacrae Rotae Romanae coram R.P.D. Ansaldo de Ansaldis ...*, Romae, Typis Reu. Camerae Apostolicae, 1711, dec. 41 (28.4.1698), *annotatio et additio* (by the same Ansaldo), p. 246, n. 14: 'Aut vero Gubernator nullum dominium, vel participationem habet super Naui; vel Mercibus respectiue assecuratis, et in his terminis exigatur ad concludendam veram Barratariam talis culpa in ordine ad sinistrum euentum, quae fuerit ad dolum positium praeordinata'; Azuni, *Dizionario Universale Ragionato della Giurisprudenza Mercantile* (note 46), vol. 1, s.v. 'Baratteria', p. 208, n. 3: 'in Italy it is considered as barratry only the wrongdoing committed with previous machination done with malice and deceit, to the purpose of acquiring and gaining through someone else's merchandise' (*In Italia ... non ogni colpa del capitano, e marina si considera per baratteria, ma soltanto quella, che si commette con precedente macchinazione accompagnata da dolo, e frode, affine di appropriarsi, e lucrare le altrui merci*). See further Carlo Targa (1614-1700), *Ponderationi Sopra la contrattazione Marittima, Opera del Dottor Carlo Targa ...*, Genova, per Antonio Maria Scionico, 1692, ch. 74, p. 304-5;

⁶⁰ E.g. Capra, *Conclvsionvm, Regvlarvm, Tractatuvm* (note 55), vol. 1, concl. 87, fol. 95v, n. 2: 'dolus est studiosa machinatio ad decipiendum alterum adhibita', and, perhaps more clearly, *ibid.*, n. 10: 'dolus autem uerus et manifestus est machinatio ad decipiendum fallendumque alterum manifeste adhibita'.

⁶¹ *Supra*, esp. note 55.

⁶² See esp. Marcantonio Savelli (c.1624-1695) *Marci Antonii Sabelli ... Summa Diversorum Tractatuvm ... collecta, ac propriis locis distributa a Leopoldo Josepho Crescini*, Venetiis, ex Typographia Balleoniana, 1748, vol. 1, lib. 1, s.v. 'Dolus', p. 545, n. 3.

summarily reported in footnotes. Thus, this selective approach aims at providing the most representative (and, typically, most widely quoted) decisions for the main cases of barratry. The purpose is to show how the combination of the two main requirements above (fraudulent scheme to make a gain and direct causality) resulted in an extremely onerous probatory burden for the plaintiff. Proving the occurrence of barratry was extremely difficult.

2.3. Kinds of barratry

While the list of barratrous conducts compiled by early modern jurists can be longer,⁶³ the main cases discussed by civil law courts may be grouped in five types: *i.* the shipmaster flees with the cargo; *ii.* voluntary change of voyage; *iii.* contraband; *iv.* fraudulent sinking of the vessel; *v.* lack of defence of the vessel. As not all of them are of the same importance, some will be discussed more in-depth and others more briefly.

i. Flight of the master. On the face of it, there could hardly be a conduct more obviously pointing to barratry than the shipmaster fleeing with the cargo. If however we were to apply the definition of barratry that we have seen above, then even this conduct could become problematic. While the causal link between conduct and loss was obvious, the fraud was not. The plaintiff did not need just to prove that the shipmaster fled, but also - and moreover - that his fleeing was the result of a premeditated scheme aimed at defrauding the merchant of his cargo. Hence what a panel of merchants would have found rather self-evident became extremely difficult to prove before a civil law court. The early case of the Florentine Rota discussed above in some length was hardly an isolated one. Fleeing away with the cargo was not sufficient to invert the burden of proof to the advantage of the plaintiff: the fraudulent machination of the shipmaster had still to be proven in full.⁶⁴

ii. Change of voyage. The case of change of voyage is particularly useful to appreciate the importance of the requisite of pre-ordained scheme at the merchant's expense, which is something different (and much more difficult to prove) than simple fraud. This difference is a

⁶³ The most complete list of barratrous conducts of the master to be found in early modern literature is probably that compiled by Baldasseroni. Even so, however, Baldasseroni's list is hardly exhaustive and, especially, somewhat artificial. Building on the cases already discussed - but in a less schematic fashion - by Geronimo Rocca (*Hieronymi Rocca ... Disputationes Juris Selectae, in duo volumina divisae*, Genevae, Apud Fratres De Tournes, 1697, vol. 2, disp. 97, p. 23, esp. n. 15-18), Baldasseroni listed seven different cases of barratry: *i.* the shipmaster fraudulently flees with cargo; *ii.* the master takes a bribe from the enemies so as to cause the loss of ship and merchandise; *iii.* the master consigns the merchandise at destination at different price or for a different use from that agreed upon (this case is somewhat ambiguous, as the shipmaster would seem to be acting as the merchant's representative - in mercantile jargon, as his *sopracarico* - and so at his risk); *iv.* the master changes voyage so as to keep the cargo (admittedly, a case difficult to distinguish from the first one); *v.* the master sinks or destroys the ship on purpose, so as to embezzle the cargo (presumably, feigning its loss); *vi.* the master replaces the actual cargo with other of lesser value at the place of loading, and then jettisons the cargo laden onboard feigning mishap; *vii.* the master overinsures the vessel and then sinks it so to receive the insurance money. Baldasseroni, *Dizionario Ragionato di Giurisprudenza Marittima e di Commercio* (note 15), vol. 2, s.v. 'Baratteria', p. 253-254, n. 25.

⁶⁴ See esp. two decisions of the Roman Rota in the 1660s, reported in *Sacrae Rotae Romanae Decisionum Recentiorum ... a Paulo Rubeo I.C. Romano ... selectarum* (note 55), vol. 14 (1663-1666), dec. 54 (30.04.1663), p. 56, n. 4 ('Ad convincendum aliquem de hoc crimine simplex illius fuga, non est sufficiens, sed debet constare illum dolose, et animo defraudandi eam praemeditasse'), and dec. 120 (14.01.1664), p. 126-127, n. 1-7. In both cases the Rota found for the defendant because of lack of proof on barratry. Cf. C. Delle Site, *La Sacra Rota Romana e le sue decisioni in materia commerciale nel XVII secolo* (unpublished PhD thesis, Università degli Studi di Milano, 2012), p. 143-144. Only a few jurists considered the act of fleeing as sufficient to presume barratry - but this position is not attested in case law. Cf. esp. Targa, *Ponderationi Sopra la contrattazione Marittima* (note 59), ch. 74, p. 305.

product of the typical approach of civil law courts, which sought to verify the presence in a practical case of all the elements of a given, abstract definition. This process, needless to say, was entirely alien to the approach of merchants. And there are few other cases where this difference is so manifest as in the qualification of voluntary change of voyage. To appreciate both the approach of the law courts and the contrast with pre-existing mercantile customs, it might be useful to look at a dispute heard by the Roman Rota in the early 1660s.⁶⁵ The case is interesting for our purposes because its peculiarities forced both the parties and the bench to focus on the difference between fault, fraud and barratry.

A shipmaster borrowed a sum of money under a maritime loan in Malta.⁶⁶ As said earlier, in a maritime loan the lender charged very high interest rates because he also acted as insurer. As such, apart from the normal risk of the debtor's default, the lender faced two additional risks: that the borrower-insured suffered a serious mishap (typically, that the ship - and so, the collateral - would sink) and that he disappeared with the ship (in effect, a sort of aggravated default of the debtor). Because of those risks, the Maltese lenders paid a third party to guarantee the repayment of their loan (thereby, in effect, re-insuring it) in the event that the shipmaster died and in the case that he committed barratry.

The shipmaster was supposed to reach Crete and then return to Malta. The ship did arrive to Crete, but during the journey back to Malta it suffered such damages that the shipmaster had to stop at Venice. The shipmaster then left the ship in Venice (presumably selling her there) and prudently avoided returning to Malta, settling in Leghorn instead. The lenders considered that as barratry and sought payment from the guarantor, who refused to pay. A rather long series of legal proceedings ensued. The lenders obtained a decision partially in their favour, and upon appeal a new decision of the Roman Rota condemned the guarantor to full payment on 1 April 1658.⁶⁷ The guarantor however appealed against the decision and secured the services of the famed Giovanbattista De Luca (1614-1683) as counsel.⁶⁸

As a result of the new appeal (or perhaps of De Luca's skills) the Rota found for the guarantor (30 April 1663),⁶⁹ rejecting the two main claims of the lenders: that the flight of the master amounted to barratry, and that the master's refusal to return to Malta was meant to defraud his creditors. The court dismissed the first claim on the ground that the lenders had managed to prove only the fact that the master had changed voyage, not also the fraudulent premeditation. If we were to believe De Luca, the lenders sought to stress the voluntary nature of the change of voyage so as to argue for barratry. It was easy for De Luca to point out the fallacy of the argument: in itself, voluntary change of voyage might amount to negligence, but not fraud.⁷⁰ It would appear that the lenders genuinely considered the voluntary change of voyage as sufficient to conclude for the occurrence of barratry. Despite De Luca's easy sarcasm, they had a point. Customarily, voluntary change of voyage did amount to barratry. Or, more specifically, it terminated the insurance policy and made the shipmaster liable to the merchant consignor

⁶⁵ The case may be read in De Luca, *Theatrum Veritatis et Justitiae* (note 49), lib. 8, disc. 93, p. 165-166, and in the two decisions of the Roman Rota in the note above.

⁶⁶ *Supra*, note 47.

⁶⁷ De Luca, *Theatrum Veritatis et Justitiae* (note 49), lib. 8, disc. 93, p. 165; *Sacrae Rotae Romanae Decisionum Recentiorum ... a Paulo Rubeo ... selectarum* (note 55), vol. 14 (1663-1666), dec. 54 (30.4.1663), p. 55.

⁶⁸ De Luca, *Theatrum Veritatis et Justitiae* (note 49), lib. 8, disc. 93, p. 165, n. 1.

⁶⁹ *Sacrae Rotae Romanae Decisionum Recentiorum ... a Paulo Rubeo ... selectarum* (note 55), vol. 14 (1663-1666), dec. 54 (30.4.1663), p. 55-56. De Luca (next note) reported incorrectly the date as 11 April 1663.

⁷⁰ 'In hoc autem, Scribentes pro actoribus, confundendo terminos barattariae, et culpae navarchi, quasi quod probata istius culpa in navigatione, probata diceretur barattaria, nimium insistebant in eo, quod ex mutatione itineris, resultare dicatur culpa, ac etiam dolus', De Luca, *Theatrum Veritatis et Justitiae* (note 49), lib. 8, disc. 93, p. 166, n. 4.

for the voluntary breach of the charter-party.⁷¹ From the court's perspective, however, a voluntary change of voyage would just amount to a faulty violation of the charter-party.⁷² Barratry requires fraud, reasoned the judges, and fraud may not be inferred from what might at the most appear as a faulty conduct.⁷³ The court similarly dismissed the second claim (that the shipmaster did not return to Malta in order to defraud his creditors), although in a rather superficial manner. The judges simply considered the need to change voyage (because of damages to the ship) as sufficient to rule out any fraudulent scheme of the master.⁷⁴

⁷¹ See e.g. the Amsterdam *Compilatae* of 1608, pt. 4, tit. 11, sec. 4, art. 110, together with a *consilium* of Johannes Wamesius (Jean Wamèse, 1524-1590), *Responsorum sive Consiliorum ad ius forumque civile pertinentium*, centuria IV, Antverpiae, apud Henricum Aertssens, 1651, cons. 25, p. 67-68, n. 4 and 6, on the position of the Antwerp Senate. For the *Logia Maris* of Barcelona see Antonius de Ripoll (c.1475-1555), *De Magistratus Logiae Maris antiquitate ... Tractatus*, Barcinonae, Ex Praelo Antonij Lacavalleria, 1655, ch. 21, p. 224-225, n. 75-76. For northern France see the compilation known as 'Guidon de la Mer' (*Gvidon, Stile et Vsance des Marchands Qvi mettent à la Mer*), Roven, Martin le Mesgissier, 1619, ch. 9, p. 41-42. Ultimately, the reason why voluntary change of voyage amounted to barratry is that it was an intentional breach of contractual duties. Cf. Rossi, *Barratry of the Shipmaster in Early Modern Law: Polysemy and Mos Italicus* (note 8), ***

⁷² But the court did not even find fault in the shipmaster's conduct, for the (re)insurers managed to produce a number of depositions attesting how he had been forced to change voyage so to repair the vessel. *Sacrae Rotae Romanae Decisionum Recentiorum ... a Paulo Rubeo ... selectarum* (note 55), vol. 14 (1663-1666), dec. 54 (30.4.1663), p. 56, n. 4-6.

⁷³ *Ibid.*, n. 4: 'Ad convincendum aliquem de hoc crimine [i.e. barattaria] simplex illius fuga, non est sufficiens, sed debet constare illum dolose, et animo defraudandi eam praemeditasse'. Cf. also De Luca, *Theatrum Veritatis et Iustitiae* (note 49), lib. 8, disc. 93, p. 166, n. 5-7, and esp. n. 9: 'quoniam Aliud est culpa, Aliud vero barattaria, ideoque ab ista recte arguitur ad illam, sed non e converso.'

Since barratry is a fraudulent scheme designed to take away the cargo from its rightful owner and make a profit with it, the change of voyage might be barratrous only if instrumental to the fraudulent design of the shipmaster. On the point, De Luca recalled the Florentine decision that we have seen earlier (on the distinction between theft and barratry). In that case, the new route followed by the shipmaster (heading towards Barbary) could only lead to non-Christian countries. As no compelling reason forced the master to do so, the only plausible explanation for the shipmaster's conduct was his intent to steal the cargo and put himself out of the reach of the law. That case, much unlike the present one, was a barratrous change of voyage. In arguing as much, De Luca conveniently forgot that the Rota of Florence ruled against the occurrence of barratry. De Luca, *Theatrum Veritatis et Iustitiae* (note 49), lib. 8, disc. 93, p. 166, n. 10: 'ista [barattaria] verificatur ubi cum malitia, et cum dolo positivo, ac vero, fiat actus principaliter ordinatus ad peremptionem mercium, atque in proposito mutationis itineris est ille, de quo agitur per Monac. dicta decisione Florent. prima [the decision of the Florentine Rota discussed *supra*, § 2.1], quod scilicet navarcus mutato itinere inter portus, et loca Christianorum, nulla ventorum vel tempestatis vi impellente, progressus erat ad loca Infidelium, quod ad aliud referri non poterat, nisi ad voluntatem surripiendi merces, ac accedendi ad loca extra nostrum commercium, in quibus impune, ac tute bona quamvis aliena retinere, vel distrahere poterat, absque eo quod civilis, vel criminalis actio contra eum esse exercibilis; Secus autem, ubi ex vi ventorum, seu tempestatis accedatur ad locum Christianorum, et amicorum ubi iustitia administretur, neque ille qui merces, ac navim eo traduxit sit tutus' (emphasis in the text).

Cp. a slightly later decision (28.2.1698) of the same Roman Rota, on a cargo insurance from Leghorn to Castellammare di Stabia (Naples). The ship had to go back to Naples for some problems, when it met a storm and sank. *Sacrae Rotae Romanae Decisiones nuperrimae* (note 55) ... vol. 5, pt. 2 (1698), dec. 421, p. 88, n. 10: 'ideoque cum mutatio itineris processerit ex justa causa, retrocedendo solum in eodem sinu maris per pauca milliaria, et modico temporis spatio, viaggium (sic) non dicitur mutatum, seu ruptum, et satis est, quod illius variatio non fuerit ad dolum praeordinata' (emphasis added).

⁷⁴ *Sacrae Rotae Romanae Decisionum Recentiorum ... a Paulo Rubeo ... selectarum* (note 55), vol. 14 (1663-1666), dec. 54 (30.4.1663), p. 56, n. 10: 'Minus urget, quod ex subsecuto post haec accessu ad Civitatem Liburni, et continua commoratione ibi facta, satis declaratus fuit animus in praeteritum aufugiendi, quia exitus acta probat, et cuius finis malus est, ejus praeordinatio praesumitur dolosa ... quia haec suspicio tollitur ex supradictis, quae aperte ostendunt in hoc itinere se opposuisse accidentia irreparabilia, de quibus Angelus patronus [i.e. the shipmaster-borrower], vel nullo modo potest dici culpabilis aut ex his, quae ipsi imputantur non potest censeris probata Barattaria'. The only testimonial deposition that the (re)insurers could produce on the fraudulent intent of the master was disregarded because rendered by a witness excluded for personal enmity against the same shipmaster: *ibid.*, p. 56, n. 7-9.

While the first claim of the lenders (the change of voyage was barratrous) was admittedly weak in law, the second (the master did not return to Malta to avoid his creditors) was not. The shipmaster did not simply call at a port - that of Venice – that had little to do with the route he was supposed to follow. He also sold the ship there, and then settled in Leghorn, safely away from his creditors. One might appreciate the lenders' frustration with this decision: it is not surprising that they appealed against it.

The Roman court ruled a last time on the subject on 14 January 1664, confirming in full its last decision. Perhaps the fact that the *iudex relator* was the same in both instances might have helped.⁷⁵ But this new and final decision is of some interest in its own right, for it focused more on the second claim of the lenders-insurers (not the flight of the shipmaster, but his prolonged absence from Malta once he sold the vessel abroad). From the conclusion of the bench, it would appear that the circumstances of the case were very clear to the judges. The shipmaster borrowed a considerable sum in Malta so as to furnish his ship. During the return voyage from Crete the vessel suffered serious but not irreparable damage, since it was still able to sail through the Adriatic Sea. Once arrived in Venice, the shipmaster likely sold what cargo was left onboard after the mishap, borrowed money to repair the vessel and then sold it at a profit. Then he settled in Leghorn, for going back to Malta would have meant facing imprisonment for debts.

Despite being perfectly aware of all the above facts, the court was not prepared to qualify them as barratry - that is, a premeditated scheme to defraud the counterparty. It is worth reporting in full a salient passage of this decision:⁷⁶

it is not possible to infer the intention to commit barratry from the change of voyage towards Venice and the subsequent prolonged dwelling in the city of Leghorn. Indeed, it may not be disputed that [the shipmaster] was reduced in poverty from all the misadventures occurred during the voyage, and that he had to entrust the vessel to someone else because he had to borrow money to repair it, and that the absence from his country was dictated by the need to avoid imprisonment for debts and not by his intent to commit barratry with the intention to defraud his creditors. The delictual nature of such an alleged conduct, for which it is now sought the condemnation of a third party [i.e. the guarantor], would require the submission of clear and conclusive evidence, which the creditors have failed to produce.

In respect of his creditors in Malta, the master's conduct was clearly dishonest - one would even say fraudulent.⁷⁷ Nonetheless, what was missing was the proof of the shipmaster's premeditated design to enrich himself at his creditors' expense. Few other decisions are as revealing as this on the subject. Applying to the letter the requirements for barratry, one might well conclude that even the fraudulent behaviour itself was probably not sufficient to prove the barratrous conduct of the shipmaster.

⁷⁵ In both decisions the *iudex relator* was Bevilaqua. The claim of change of voyage was easily dismissed with the same motivation as the 1663 decision: *Sacrae Rotae Romanae Decisionum Recentiorum ... a Paulo Rubeo ... selectarum* (note 55), vol. 14 (1663-1666), dec. 120 (14.01.1664), p. 127, n. 4-7.

⁷⁶ *Ibid.*, p. 127, n. 8: 'Non subsistit, quod per dimissionem Navis Venetiis, et assidua commoratione in Civitate Liburni abinde citra satis colligatur animus committendi Barattariam, quia cum ambigi non possit, quin ex tot infortuniis in hoc itinere passis Angelus fuerit in magna egestate redactus, et cum pecuniis alienis navis fuerit reaptata his de causis fuit conctus illius regimen alteri committere, et a Patria se absentare, ne a Creditoribus in Carceres detruderetur, non autem, ut committeret Barattariam, et habuerit intentionem Creditores Cambii [i.e. the lenders-insurers] fraudandi, hoc enim sapit delictum, et pro illo agitur de condemnando tertium, quo casu probationes manifestae, et necessario concludentes debent offerri, quales non sunt adductae per dd. Creditores, quae loquuntur in terminis actionis contra Nautam, vel caupones.'

⁷⁷ On the point, the position of the same Rota of Rome was quite consistent: cf. *supra*, note **Error! Bookmark not defined.**

iii. *Contraband*. If changing destination, selling the collateral (i.e. the ship) and disappearing from the creditors' reach was not sufficient to find for barratry, then it should not come to a surprise the reluctance of the courts to qualify as barratrous other situations in which the conduct of the shipmaster was similarly fraudulent, but not primarily aimed at the merchant. The clearest example is contraband. Also on this subject an important case was discussed before the Roman Rota in a series of decisions of the 1670s, on a shipmaster smuggling silver. Because this case is abundantly quoted by learned jurists and especially law courts (in particular Italian and Iberian ones) as the most important example on the relationship between barratry and contraband, it is worth looking at it in some detail.

A large cargo of olive oil (of a high value - 30,000 scuds) was loaded on a ship in Brindisi (Apulia) towards Ostend (West-Flanders). The cargo was insured for a value of 16,000 *scudi* at 7%. After a rough first leg of the voyage, where part of the cargo was lost,⁷⁸ the ship called at Cadiz. There, however, the authorities suspected the shipmaster of smuggling silver, and seized the remaining cargo. The insured then asked to be paid but the insurers refused alleging barratry, which was not covered by the policy. The insured then sued before the Roman Rota, which found for the insurers and rejected the demand of the insured on 5 December 1670. The insured appealed against the decision, and this time the Rota found in his favour, condemning the insurers to pay with a decision of 9 May 1674. It was now the turn of the insurers to appeal, but the Rota confirmed the previous decision on 7 February 1676. The saga however was not over, for the insurers appealed again, and the Rota was called to pronounce on the case a last time, on 5 May 1677, finding once again for the insured. We have the text of the policy,⁷⁹ but we lack any record for the first two decisions. The final two ones are on the contrary reported in sufficient depth so as to give a clear sense of the court's approach.

In the (penultimate) decision of 7 February 1676 the court dismissed the reconstruction of the insurers, who sought to qualify the conduct of the master as barratrous (so to avoid payment). The judges were clearly persuaded that the shipmaster was guilty of smuggling, but they felt that this was not sufficient to find for barratry. As always, the problem lay in proving the fraud. In itself, smuggling silver did not constitute fraud: in theory, the shipmaster might have ignored that doing so was prohibited. Of course any merchant (let alone a shipmaster) would have found such an excuse laughable. But, in a law court, the argument acquired a different meaning: in principle, the prohibition to carry silver without due authorisation was a local rule, and so not part of the *ius commune*. This, argued the court, sufficed to qualify the shipmaster's ignorance of the prohibition as *ignorantia facti* and not *iuris*, and so to excuse him.⁸⁰

⁷⁸ During the voyage, part of the oil was lost due to two violent storms. This partial loss did not give rise to any dispute, all the more since the *casus fortuitus* was duly proven before the Consulate of Alicante (as it was the nearest court to the place of the mishap).

⁷⁹ *Sacrae Rotae Romanae Decisionum Recentiorum a Joanne Baptista Compagno ... selectarum* (note 9), vol. 19, pt. 1 (1677-1678), dec. 58, p. 62-64, at 63, n. 1.

⁸⁰ *Ibid.*, vol. 16 (1669-1670), dec. 420 (7.2.1676), p. 496, n. 10: 'Ignorantia enim, quo haec bannimenta vigeant, facti ignorantia est, quae omnino excusat'. What is surprising is that the Roman court seems oblivious to the fact that the shipmaster who ignored the local legislation was in Spain, and therefore was supposed to follow the local law. On the same issue (a carrier smuggling silver out of Spain) one might compare the position of the Roman Rota with that of some Spanish courts. Joan Pere Fontanella (1576-1649) for instance reports a decision of the Catalanian Senate of the late 1630s or the early 1640s, in which a muleteer was arrested and his merchandise seized because he was trying to smuggle silver to France: 'Imputatur etiam et alia culpa sine dubio conductori equi, seu muli, si illicitis mercibus eos onerasset, propter quod confiscationi Regiae supponerentur nedum merces, sed equi etiam, et muli, provt est de anno 1636 in generalibus edictis inter Hispaniam, et Franciam prohibentibus commercium inter eas. In isto casu, nullus dubitat quin conductor teneatur, cum sit haec non levis, sed grauissima culpa illius' (*Sacri Regii Senatvs Cathaloniae Decisiones per Ioannem Petrvn Fontanella ... elaboratae*, Barcinone, ex Praelo, ac aere Petri Lacavalleria, 1645, vol. 2, dec. 535, p. 643, n. 10). See also a case examined by the *Regia Curia* of Sicily around 1608-9 (policy of 24.2.1606, abandonment to the insurers of 13.9.1607), reported in Mario Muta (d.1636), *Decisiones Novissimae Magnae Regiae Curiae, Supremique*

The court dismissed the specific accusation of barratry both because the insurers were not able to produce more than circumstantial evidence as to its occurrence,⁸¹ and because of the absence of a causal link with the mishap. On the face of it, the cargo was seized because it lacked proper licence, not because of barratry.⁸² The fact that the licence could not have been granted and that the shipmaster was willing to run the risk of having the cargo seized by the authorities in order to make a personal gain did not seem sufficient to establish a *direct* causal link between behaviour and mishap, let alone to speak of a clear fraudulent intent.

The insurers appealed a last time. And in the next - and last – decision the Roman Rota made up for its – somewhat shaky – previous arguments.⁸³ This final decision offers a good picture of the position of early modern civil law courts on the subject, and it provides us with an excellent example of the problems faced by a plaintiff seeking to qualify the conduct of the master as barratrous. Clearly the shipmaster was up to some mischief. Clearly that mischief resulted in the seizure of the cargo. But could the wrongdoing be qualified as barratry? Looking at the summary of the insurers' libel and comparing it with the definition of barratry provided by Casaregis,⁸⁴ their arguments seem to start in a very persuading manner but become progressively weaker. The insurers alleged barratry 'since the shipmaster, colluding with customs officers, smugglers, duties collectors or officials clearly introduced onboard prohibited goods purposely and with premeditation'.⁸⁵ So far, the insurers would seem to have a point. Very probably the shipmaster did collude with the port authorities of Brindisi to load forbidden cargo onboard. This behaviour could be hardly described as negligent, as it would clearly point to a preordained scheme. But such a preordination might not be sufficient to allege barratry, and so the insurers continued: the loading onboard of the prohibited cargo was done 'fraudulently and with deceitful and preordained scheme [*praeordinata machinatio*] to the loss of the merchandise'.⁸⁶

The insurers' reconstruction is problematic at least on two counts. First, the shipmaster did not stand to gain from the cargo entrusted to him by the merchant insured. His enrichment would have come from the successful smuggling of a different part of the cargo, not from the unlawful appropriation of the insured one. This behaviour could not be described properly as *machinatio*, for it lacked the purpose to enrich oneself at another's expense. Secondly, and crucially, strictly speaking the *machinatio* was not 'preordained to the loss of the merchandise'. The causal link between smuggling and seizure of the cargo was only indirect, whereas *praeordinatio ad casum* required the causal link be direct and immediate. Besides, the shipmaster was trying to defraud

Magistratus Regni Siciliae, Panormi, Apud Io. Baptistam Maringum Impressorem Cameralem, 1619, dec. 3, p. 14, n. 11.

⁸¹ *Sacrae Rotae Romanae Decisionum Recentiorum a Joanne Baptista Compagno ... selectarum* (note 9), vol. 16 (1669-1670), dec. 420 (7.2.1676), p. 496, n. 10-11: 'Ac proinde circumscripta omni machinatione, et fraude, nulla assignari potest baratteria, quae semper excluditur per probabilitatem in contrarium, nec est praesumenda'. Cf. also *ibid.*, vol. 17 (1671-1672), dec. 400, p. 527, n. 2. See also Delle Site (note 64), p. 144-145.

⁸² *Sacrae Rotae Romanae Decisionum Recentiorum a Joanne Baptista Compagno ... selectarum* (note 9), vol. 16 (1669-1670), dec. 420 (7.2.1676), p. 496, n. 15-16: 'Idque sive evenerit ex vi geminae tempestatis, sive ex licentia militum, sive ex quaecumque alia incognita causa, iam non intrat baratteria, sed assecuratores ex lege contractus, supplere tenetur quidquid deest quantitati in apocha onerationis expressae'.

⁸³ *Sacrae Rotae Romanae Decisionum Recentiorum a Joanne Baptista Compagno ... selectarum* (note 9), vol. 19, pt. 1 (1677-1678), dec. 58 (5.5.1677), p. 62-64. On the same decision see also De Luca, *Theatrum Veritatis et Justitiae* (note 49), lib. 8, disc. 106, p. 181-184, esp. 183-184, n. 24-35, and Rocca, *Disputationes Juris Selectae* (note 63), vol. 2, disp. 97, p. 22-25.

⁸⁴ *Supra*, text and note 58. Cf. also note 59.

⁸⁵ 'quia nempe navarcus, colludendo cum gabellariis, vel contrabandieriis, aliisque commissorum appaltatoribus, vel officialibus, merces prohibita ita studiose, ac praecordinate in navim introduxerit', De Luca, *Theatrum Veritatis et Justitiae* (note 49), lib. 8, disc. 106, p. 184, n. 28.

⁸⁶ 'et sic fraudulenter atque cum dolosa, et praecordinata machinatione ad mercium amissionem', *ibid.*

the Crown, not the merchant insured.⁸⁷ The insurers' claim was therefore rejected both because the master's conduct could not be qualified as barratrous (i.e. a fraudulent scheme preordained to the wrongful appropriation of the cargo), and because of the lack of a direct causal relationship between that conduct and the loss of the thing-at-risk.⁸⁸

Ultimately, the importance of this decision lies in that it made vividly clear the how little difference did it make excluding barratry from the insurance policy. The insurers who refused to cover for barratry could avoid liability for the fraudulent scheme of the shipmaster only if such a scheme was specifically directed at the insured property and it immediately resulted in its loss or damage.⁸⁹ Excluding barratry from the policy, in other words, did not mean ruling out the loss or damage deriving from any fraud of the shipmaster.

This remarkably strict approach to barratry was hardly the prerogative of the Rota of Rome. A similar case may be found in the Florentine Rota a few decades later, in a decision of 10 May 1709.⁹⁰ Once again, a cargo was seized by the Spanish authorities – this time directly at the port of departure – because the master was trying to smuggle silver. The contraband was proven beyond doubt.⁹¹ But that in itself was not sufficient for the court to qualify the shipmaster's conduct as barratrous. The fraud of the master was not 'aimed at the loss of the merchandise'.

⁸⁷ Better stated, the *dolus malus* of the shipmaster (a necessary element for barratry) was not directed against the merchant: see esp. Rocca, *Disputationes Juris Selectae* (note 63), vol. 2, disp. 97, p. 11, n. 23.

⁸⁸ De Luca, *Theatrum Veritatis et Justitiae* (note 49), lib. 8, disc. 106, p. 184, n. 28: 'Secus autem ubi introductio mercium facta sit ad solum lucrum, et industriam, quae navigantibus, ac viatoribus solet esse connaturalis, ita scilicet evitando solutionem emolumentorum, ac doganarum seu gabellarum, ideoque non est culpa ordinata ad casum.' The negative overtone in the description of the 'nature' of sailors seems to echo what might be called the 'presumption of dishonesty' used by medieval civilians to make sense of the aggravated liability of the maritime carrier as found in the Roman sources (i.e. the *receptum nautarum*). On the point see again Rossi, *The liability of the shipmaster in early modern law* (note 21), p. 8-11.

See also and especially Rocca, *Disputationes Juris Selectae* (note 63), vol. 2, disp. 97, p. 23, n. 19-20: 'Nullum autem ex praedictis [exempliis] necessario supponentibus dolum omnino ad casum praeordinatum concurrat in praesentia, cum satis, superque sit notum, etiam lippis, et tonsoribus, hujusmodi mercium, bonorumque extractiones sine solutione vectigalis, quotidie fieri per Nautas ex sola industria et lucri causa; pro evitanda vectigalium solutione; non autem ex dolo, et machinatione cum callida praeordinatione ad casum depraedationis aliarum mercium, illae enim non incidunt in commissum propter hoc delictum; sed salvae restituuntur Domino.' See also *Sacrae Rotae Romanae Decisionum Recentiorum a Joanne Baptista Compagno ... selectarum* (note 9), vol. 19, pt. 1 (1677-1678), dec. 58, p. 63-64, n. 8-9: 'Neque casus hujusmodi, quo fuit confiscata, et impedita Navis ob oneratum argentum a Navarcho contra Regium Bannimentum, visus est ab assecuratione excludendus tamquam omnino inopinatus, et non praevisus, cum optime comprehendatur sub generalitate juxta plurimum casuum singularium specificationem, praesertim cum fuerit expresse exceptus casus singularis Baratteriae, haec enim expressio singularis casus operatur, ut nullus omnino casus intellegatur exceptus sed omnis, et quicumque comprehensus ob quem Oleum non posset Ostenda deferre'.

⁸⁹ Rocca, *Disputationes Juris Selectae* (note 63), vol. 2, disp. 97, p. 23-24, n. 19-20: '... ideoque, stantibus praedictis, oneratio argenterum nullo jure dici poterit fraus Gubernatoris Navis directa, et subdole praemeditata; ad hoc, ut deinde tota navis, et oleum a classe Hispanica subtraheretur; prout ex supra firmatis praecise requiritur ad effectum, ut dici debeat commissa Baratteria; sed potius simplex culpa, ob quam, citra fraudem, voluntatemque Gubernatoris faciendi incidere merces assecuratas in commissum, orta est occasio depraedationis earumdem mercium, de qua culpa, utpote casum fortuitum redolente, absque dubio Assecuratores tenentur ex supra firmatis.'

⁹⁰ Bartolomeo Artimini (ed.), *Raccolta delle decisioni della ruota fiorentina dal 1700 al 1808*, Firenze, presso Leonardo Marchini, 1838, vol. 3, dec. 204 (10.5.1709), p. 5-16. The same decision may be read in the collection of Jacobus de Comitibus (Giacomo Conti, 1668-1738), *Jacobi de Comitibus ... Decisiones Inclitae Rotae Senensis et Florentinae ...*, Florentiae, ex Typographia Bonducciana, 1725, vol. 2, pt. 1, dec. 63, p. 17-24.

⁹¹ As a matter of fact, the court had some doubts (even) on that. And applied the same logic as the Roman Rota did in its decision of 7 February 1676 (on which see *supra* in the text): the shipmaster was from Bologna and resided in Leghorn, so he should be excused for his ignorance on Spanish customs. De Comitibus, *Decisiones Inclitae Rotae Senensis et Florentinae* (note 90), vol. 2, pt. 1, dec. 63, p. 22, n. 22: 'Caeterum in casu nostro cessat etiam quaevis culpa, ex quo cum Argenti trasportatio de jure prohibita non sit, prohibitio particularis ex Aedictis Regiis proveniens, tamquam verisimiliter ignota Magistro Navis origine Bononiensis, et incolatu Liburnensi eum ad omni culpa excusat'.

With respect to the merchant insured, held the judges, the behaviour of the shipmaster was simply faulty.⁹² The position of the Florentine court shows the extent to which the fraudulent scheme of the master and the requirement of direct causation overlap. The master would be liable of barratry only if his scheme was designed specifically to cause a loss to the merchant consignor, not if the consignor were to suffer a loss in consequence of that scheme. Otherwise it would not be possible to speak of direct causality – in terms of *praeordinatio ad eventum* – between scheme and loss. Of course it is well possible to envisage a direct causal link between conduct of the master and mishap. But, with regard to the loss of the merchant, that would not be *praeordinatio*. The conduct of the shipmaster gave rise to the mishap, but did not produce it directly. In other words, his conduct was the *occasio* of the *casus sinister*, but not its (direct and immediate) *causa*.⁹³ Unless the mishap was directly caused by the scheme of the master, and the object of that scheme was the insured cargo or vessel, then there could be no barratry, but only fault.⁹⁴ If one were to wonder when, then, would the court consider the master's conduct as properly barratrous, the only example that the same Florentine Rota provided was that of the master who sought fraudulently to take away the cargo from the ship.⁹⁵ This statement, which brings back to barratry as a qualified case of theft and to the early decision of the same Rota of Florence that we have seen previously, would seem to close the discussion. So long as the conduct of the master had a different object and another purpose (fraudulent as that may be), any repercussion on the thing-at-risk would be collateral at best, and so irrelevant.

If smuggling prohibited restricted commodities did not amount to barratry, the simple avoidance of customs (on merchandise that could be lawfully exported) could not either. The *machinatio* was not directed at the merchant consignor, nor was it *praeordinata ad casum* since the loss was not the direct consequence of the scheme of the master. While it is easier to find decisions on barratry for the smuggling of restricted goods (mainly, precious metal), those dealing with the case of unpaid customs reach the same conclusion.⁹⁶

⁹² According to the court, to prove barratry it is necessary 'Una cum probatione doli positivi, machinationis, et fraudis praeordinatae ad casum sinistrum, et proprium lucrum, in individuo [i.e. the shipmaster] ... Hanc autem machinationem, et dolum Domini censuerunt probatum non remanere ex eo, quod Navis Gubernator oneravit Argenta vetata extrahi ex Regnis Hispaniarum ... Ex hoc non resultat aliquis dolus, vel fraus directa, et praeordinata, ad amissionem mercium in Navi existentium, sed aviditas lucri connaturalis Viatoribus, et Navigantibus in evitanda solutione emolumentorum, et vectigalium debitorum pro extractione, vel introductione rerum; ex quo arguitur simplex culpa non ordinata ad casum, pro qua Assecuratores tenentur', *ibid.*, p. 19, n. 9 and 11-12. Cf. Artimini, *Raccolta delle decisioni della ruota fiorentina* (note 90), vol. 3, dec. 204, p. 10, n. 12-13. Considering 'aviditas lucri' as 'connaturalis Viatoribus, et Navigantibus' points again to the same bias against the shipmaster that we have encountered in the previous decision of the Roman Rota on smuggling (*supra*, note 88).

⁹³ Cf. Artimini, *Raccolta delle decisioni della ruota fiorentina* (note 90), vol. 3, dec. 204, p. 10-11, n. 13: 'Haud relevante, quod deperditio Navis, et mercium sequuta ex culpa Navarchi dantis vela ventis cum mercibus illicitis, et prohibitis absque solutione debitorum emolumentorum, et vectigalium, vel absque necessariis expeditionibus sit unus ex casibus, in quibus committitur baratteria ... tali enim casu culpa Navarchi, quae fuit causa, et occasio casus sinistri praejudicare debet assecurato'. See also de Comitibus, *Decisiones Inclitae Rotae Senensis et Florentinae* (note 90), vol. 2, pt. 1, dec. 63, p. 20, n. 11-13.

⁹⁴ Artimini, *Raccolta delle decisioni della ruota fiorentina* (note 90), vol. 3, dec. 204, p. 11, n. 16: 'quod Navarchus commiserit culpam, non vero baratteriam, cum una ab alia longe differat'.

⁹⁵ *Ibid.*, n. 14.

⁹⁶ See especially the decision of the Genoese mercantile Rota of 12 and 20 June 1696, reported in the collection of Jacopo Balducci (1657-1709), *Jacobi Balduccii, Alias Rotae Civilis Serenissimae Reipublicae Genuae ... Auditoris, Decisiones, et Res Judicatae ...*, Parmae, 1703, Typis, et sumptibus Pauli Monti, vol. 1, tit., 1 ('De Assecuracionibus, aliisque Rebus maritimis'), dec. 13, p. 32-38, esp. p. 33-34, n. 5 and 11. Cf. De Luca, *Theatrum Veritatis et Justitiae* (note 49), lib. 8, disc. 106, p. 184, n. 28, and Casaregis, *Discursus Legales de Commercio* (note 12), vol. 1, disc. 10, p. 31, n. 13 (vol. 1, p. 58, in the 1st edn. of 1719).

A different way in which the sea-carrier could violate the law lay not in the quality of the cargo, but in the condition of its owner, who could be forbidden from trading with a specific country. Once again, a good example comes from a decision of the Roman Rota, of 28 January 1697. A ship bound from Smyrna (modern Izmir) to Leghorn was carrying merchandise belonging to some Jews.⁹⁷ The merchandise was not forbidden, nor did it require any special licence. But the Jews were not allowed to trade with Spanish territories.⁹⁸ In proximity of the Sicilian coasts, the ship was captured by some privateers and brought to Messina. The shipowner abandoned the vessel to the insurers (so to be paid in full regardless of what could be recovered),⁹⁹ but the insurers refused alleging the barratry of the master - a risk, once again, excluded from the policy. The case forked in two separate proceedings - one about the lawfulness of the prize, the other on the insurance claim. The prize issue was decided by the Sicilian court, which eventually ruled against its lawfulness: the simple transit of goods belonging to Jews across Spanish territories towards the land of another prince was not forbidden.¹⁰⁰ The insurance claim was heard by the Roman Rota, which rejected the insurers' objection and found for the insured. The decisions of the two courts, it should be noted, were wholly independent from each other. In particular, the Roman court did not reject the accusation of barratry because the Sicilian court had already found against the lawfulness of the prize. Rather, the Roman Rota found for the insured because the insurers failed to produce evidence both on the pre-existing fraudulent machination of the shipmaster and on the causal link between such a machination and the capture of the ship.¹⁰¹

iv. Fraudulent sinking of the vessel. Fraudulent shipwrecks are remarkably common throughout the history of maritime trade. Proving as much, however, was possibly even more difficult than other kinds of barratry.

Shipwreck was a *casus fortuitus* by definition: law courts qualified it as faultless unless proven otherwise, requiring the plaintiff to prove both the shipmaster's fault (despite the *culpa levissima* of the latter) and the causal link between such fault and the wreckage of the vessel.¹⁰² If that was the position for a kind of liability based on fault, the stance of the courts on the accusation of fraud was predictably even more onerous for the plaintiff. But how to prove the deliberate intent of the master to sink his vessel? Rather unsurprisingly, the cases (at least, the reported ones) where the court found the shipmaster guilty of fraudulently sinking the ship are remarkably few, and that was not for want of trying (as it probably was kind of barratry most commonly alleged before law courts). What was needed was a remarkably bad barrator-to-be.

⁹⁷ Balducci, *Rotae Civilis Serenissimae Reipublicae Genuae ... Decisiones* (note 96), vol. 1, tit. 1, dec. 11, p. 28-30. The same decision can be read in *Sacrae Rotae Romanae Decisiones nuperrimae* (note 55), vol. 5, pt. 1 (1696-1697), dec. 192, p. 302-304.

⁹⁸ Balducci, *Rotae Civilis Serenissimae Reipublicae Genuae ... Decisiones* (note 96), vol. 1, tit. 1, dec. 11, p. 30, n. 10.

⁹⁹ On that practice see G. Rossi, *The Abandonment to the Insurers in Sixteenth-Century Insurance Practice: Comparative Remarks*, in A. Cordes, S. Dauchy, D. De ruysscher, H. Philajamäki (eds.), *Understanding the Sources of Early Modern and Modern Commercial Law. Courts, Statutes, Contracts, and Legal Scholarship*, Leiden 2018, p. 87-118.

¹⁰⁰ Balducci, *Rotae Civilis Serenissimae Reipublicae Genuae ... Decisiones* (note 96), vol. 1, tit. 1, dec. 11, p. 30, n. 11.

¹⁰¹ *Ibid.*, n. 12-13: 'Tum quia utrumque depredatio ob allegatam causam subsisteret, cum ex supra animadversis non quamlibet culpam Navarchi, sed solam istius Barattariam ab eorum obligatione Assecutores exceperint. Hanc autem intercessisse non probetur, deficiente, tum praexistenti machinatione Navarchi, tum dolo praeparato ad casum sinistram Navis, rerumque assecurarum, quorum utrumque ad eam committendam requisiti est communis sententia consequens est, ut hac seclusa, quaevis alia Navarchi culpa justa legem assecurationis ipsorum Assecurantium damno cedere debeat'.

¹⁰² Rossi, *The liability of the shipmaster in early modern law* (note 21).

A good example of a very amateurish barrator may be found in a decision of the Civil Rota of Florence of 22 June 1781.¹⁰³

A cargo policy was made on 11 June 1775 in Leghorn for the route Malaga-Naples. The ship left from Malaga, but sank while in proximity to Cartagena. The insured was also the master of the vessel, and that obviously excluded barratry from the insurance.¹⁰⁴ The insurers suspected a fraud; the problem was how to prove it. When sued by the insured, they preferred not to base their defence on barratry and its painfully stringent burden of proof. Instead, the insurers insisted on specific evidence as to the value of the cargo loaded onboard. It is not difficult to follow the logic of this move. If the cargo's value really was what declared by the master, then he would have made no profit by sinking the vessel, all the more since it was not possible to cumulate hull and cargo insurance beyond the value of the ship.¹⁰⁵ So, the insurers might have reasoned, if the mishap was fraudulent then the actual value of the cargo must have been considerably inferior to the declared one.

The position of the court vindicated the strategy of the insurers, who were absolved both by the court of first instance (the Consuls of the Sea of Pisa) and the court of appeal (the Civil Rota of Florence). The Rota demanded the insured to prove in full the value of cargo loaded onboard, but the insured had not planned well his scheme. He relied on the fact that the only witnesses of the mishap would have been himself - as shipmaster - and his crew. Law courts were often reluctant to give much credit to the deposition of shipmaster and crew, since the master had all the interest to hide his fault.¹⁰⁶ If the suspicion of fault was enough for the courts to accept the master's deposition only grudgingly, a case in which the shipmaster was in open conflict of interests - acting both as plaintiff and as witness - made his deposition plainly unacceptable.¹⁰⁷ What documentation the master could produce was ambiguous at best, and self-contradictory at worst.¹⁰⁸ The insurers based their defence on the shady relationship between the master and his business correspondents, and were even able to produce some letters of the same shipmaster in which he alluded to his design to defraud the insurers by loading onboard a remarkably poorer cargo than that declared in the policy and in all related documents.¹⁰⁹ The insurers further managed to cast significant doubts as to the actual position of the shipmaster, who had dismissed all his interests in the vessel shortly before the adventure.¹¹⁰ After all this evidence, in the eyes of the court, the fraud was proven.

The point of this story is somewhat counterintuitive. The insurers were able to avoid payment not because the court was sympathetic to their case, but simply because the shipmaster proved to be a remarkably incompetent fraudster. Not being able to produce sufficient evidence as to the value of the cargo, he could have not recovered in any case. It is not clear how did the insurers manage to come in possession of the incriminating correspondence of the master with his business associates, but clearly that was the nail in the coffin. What this case is really about is a very incompetent swindler and some very competent insurers. Precisely because they were

¹⁰³ *Selectae Almae Rotae Florentinae Decisiones ...*, Florentiae, ex Typographia Antonii Brazzini, 1800, vol. 2, pt. 2, dec. 63, p. 361-409.

¹⁰⁴ *Supra*, §2.2.

¹⁰⁵ Cf. Rossi, *Insurance in Elizabethan England* (note 14), p. 180 ff.

¹⁰⁶ See esp. De Luca, *Theatrum Veritatis et Justitiae* (note 49), lib. 8, disc. 111, p. 192, n. 2, and esp. a widely quoted decision of the late sixteenth century rendered by the Genoese mercantile Rota, reported in Bellonius, *Decisiones Rotae Genvae de Mercatvra* (note 6), dec. 3, fol. 19r, n. 17. See further Lorenzo Cantini and Domenico Nenci, *Tesoro del Foro Toscano, ossia Raccolta delle Decisioni del Supremo Consiglio e delle Regie Ruote Civili delle Prime Appellazioni di Toscana*, Firenze, Stamperia del Giglio, 1825, vol. 14, dec. 4 (Rota of Pisa, 24.8.1833), p. 26-27, n. 1.

¹⁰⁷ *Selectae Almae Rotae Florentinae Decisiones* (note 103), vol. 2, pt. 2, dec. 63, p. 373, n. 16.

¹⁰⁸ *Ibid.*, p. 380-383, n. 27-35.

¹⁰⁹ *Ibid.*, p. 384-385, n. 36-37.

¹¹⁰ *Ibid.*, p. 385-386, n. 37-38.

competent, they hinted at the occurrence of fraud only to discredit the evidence provided by the master as to the cargo's value – not to claim barratry. Had they had based their line of defence on barratry, they would have had to prove it in full. And then the dubious evidence of the master and his shady dealings would have not been sufficient. The best way to persuade a civil law court of barratry, one might be tempted to conclude, was not to bring up the point at all.

v. Insufficient defence of the vessel. A further group of decisions touching on the barratry of the shipmaster consists of cases of capture or damage of the ship at the hands of pirates or privateers, where the insurers refused payment claiming that the lack of sufficient defence constituted barratry of the master. Although in principle not defending the vessel could amount to barratry, law courts would typically dismiss a similar accusation. It is however useful to look at a few of such cases because they often combine the requisite of full proof of fraudulent scheme with that of the intent to gain from the mishap. As both requisites were needed, the lack of evidence on either would lead to the exclusion of barratry.

If proof of fraudulent machination is normally very difficult to provide, in case of surrender of the vessel it becomes even more difficult. A particularly clear example in this sense comes from a decision of the Roman Rota of the end of the seventeenth century. In November 1694 a maritime loan was made in Rome, to cover for both cargo and hull of a ship bound from Venice to Zakyntos, Cephalonia and London. The next month the ship was attacked by French privateers off the coast of Malaga. Master and crew fled without defending the vessel, which was captured by the French. As the insurers refused payment alleging barratry, the shipmaster insured sued them but lost the case for some procedural defects. The insured then appealed before the Roman Rota, which found for him and against the occurrence of barratry with a decision of 4 February 1697.¹¹¹ The main reason why the insurers alleged barratry was that the shipmaster fled without trying to explain to the French privateers that their letters of mart did not extend to friendly nations.¹¹² The Rota dismissed the insurers' objection, stating that the simple fact that the master fled did not amount to wrongful behaviour - neither *culpa* nor (all the more) *dolus*.¹¹³ The insurers however appealed against this decision, and so the matter was further discussed in a decision of 18 April 1698.¹¹⁴ There, the Rota made very clear that finding for barratry required clear and univocal evidence of fraudulent and preordained scheme ('*praedordinata machinatio cum fraude*'), which however did not result from the conduct of the

¹¹¹ Francesco Albizzi (1593-1684), *De Inconstantia in Judiciis Tractatus ... Additis Decisionibus S. Rotae Romanae ... nullibi antea impressis ...*, Romae, Sumptibus Francisci Antonij Galleri, 1698, dec. 57, p. 154-159. The same decision also in Balducci, *Rotae Civilis Serenissimae Reipublicae Genuae ... Decisiones* (note 96), vol. 1, tit. 1, dec. 15, p. 43-49, and in *Sacrae Rotae Romanae Decisiones nuperrimae* (note 55), vol. 5, pt. 1 (1696-1697), dec. 205, p. 322-327. Cf. Delle Site (note 64), p. 145-146

¹¹² Albizzi, *De Inconstantia in Judiciis Tractatus* (note 111), dec. 57, p. 156-157, n. 21-23. The argument, in effect, would appear somewhat specious - few privateers would have behaved so politely. Another but minor point raised by the insurers was that the master did not report the mishap before the closest court - that of Malaga - but went to Cadiz instead (*ibid.*, p. 157, n. 24). The shipmaster was under duty to notify of the mishap the closest court, but few judges were strict on the point: cf. Rossi, *The liability of the shipmaster in early modern law* (note 21). Indeed the Roman Rota took no account of that.

¹¹³ Albizzi, *De Inconstantia in Judiciis Tractatus* (note 111), dec. 57, p. 158, n. 41-42.

¹¹⁴ *Sacrae Rotae Romanae Decisiones nuperrimae* (note 55), vol. 5, pt. 2 (1698), dec. 445, p. 132-133.

master.¹¹⁵ Much on the contrary, the court concluded, the attack of pirates or privateers would remove any suspicion of barratry.¹¹⁶

A further difficulty to qualify the lack of resistance of the shipmaster as barratrous was the need to prove that the master stood to gain something from it. A good example comes again from the Roman Rota, in a decision rendered about 25 years before the last one.¹¹⁷ On 24 January 1671 an insurance was made for a cargo bound from Leghorn to Smyrna. The ship set sail shortly thereafter, but it was soon intercepted and spoiled by pirates. The insurers refused to pay alleging the lack of active defence of the shipmaster, and claiming that this amounted to barratry. The insured sued the insurers before the Consuls of the Sea of Pisa. There, despite some testimonies attesting the lack of defence of the vessel, the court found for the insured and condemned the insurers to pay. The insurers however brought the case before the Roman Rota,¹¹⁸ which decided on 20 May 1673. The Rota acknowledged the fault of the captain in not defending the ship, but dismissed the accusation of barratry. Even if the causality link between shipmaster's behaviour and mishap was clear and direct, explained the court, that was not sufficient to find for barratry for two reasons. First, because the surrender of the ship to the pirates was not premeditated.¹¹⁹ Second, because the master did not stand to gain anything from his conduct. Barratry, explained the court, consisted in a fraudulent machination made with the intent to gain something. As such, without hope of profit, there could be no fraud.¹²⁰

The Roman Rota gave another and probably more elaborate decision on the subject on 28 June 1697.¹²¹ The ship *Golden Star* ('Stella Dorata') was insured in Rome for the voyage from Venice to Lisbon and thence to London. As it normally happened for the case of hull policies, barratry was excluded from the risks.¹²² Having just passed Sardinia, however, the vessel suffered some damage. Thereafter the master saw some ships approaching. Fearing that they were Turkish, master and crew abandoned the vessel and fled. The convoy however was Dutch, and the Dutchmen carried the ship with them to the port of Palermo in Sicily. Having realised his mistake, the shipmaster went there to claim back the ship. When the Dutch found her, however, the ship was abandoned: that entitled them to claim one-third of her value. The master duly paid the sum, but then asked the insurers for reimbursement. Upon the (predictable) refusal of the insurers, the insured sued them before the Roman Rota, which found for him and condemned the insurers.

¹¹⁵ *Ibid.*, p. 132, n. 5: 'talis praeordinata machinatio cum fraude, super qua totum momentum defensionis informantibus pro debitoribus constitutebant, visa fuit insubsistens ex integra facti serie funditus ponderata, nec ab actibus antecedentibus, aut concomitantibus, et subsequitis depromitur; quando adeo detestabile crimen nunquam a lege praesumendum exquisitas, et concludentissimas probatione requirit'.

¹¹⁶ '[A]d effectum submovendi in assecuratis omnem, et quamcumque praeordinatae fraudis suspicionem', *ibid.*, p. 133, n. 8.

¹¹⁷ *Sacrae Rotae Romanae Decisionum Recentiorum a Joanne Baptista Compagno ... selectarum* (note 9), vol. 19, pt. 1 (1677-1678), dec. 369 (20.5.1673), p. 425-430. Cf. Delle Site (note 64), p. 148-149.

¹¹⁸ Likely, on the basis of the policy being made in Rome.

¹¹⁹ *Sacrae Rotae Romanae Decisionum Recentiorum a Joanne Baptista Compagno ... selectarum* (note 9), vol. 19, pt. 1 (1677-1678), dec. 369 (20.5.1673), p. 429, n. 65-66: 'In iure remanent sublata omnis difficultas ex eo, quod admissa negligentia capitanei in paranda necessaria defensione, ad effectum subtrahendi navem a periculo depraedationis, ista potius erit denominanda simplex culpa quam baratteria, dum evenit ex repentino accidenti sine dolo aut machinatione eiusdem capitanei, quae non fuerit exceptuata in apocha assecurationis, sed tantummodo pura, et mera barattaria' (emphasis added).

¹²⁰ *Ibid.*, p. 428-429, n. 56-57: 'nullo intercedente dolo, aut fraude, vel machinatione, non potest dici ipsum [Navarchum] commisisse Barattariam, sine qua esse non potest, et inspicitur semper, an quis per calliditatem operatus fuit, et de similibus officialibus dicitur solum illam commisisse, quando privato aliquid recipiat'.

¹²¹ Balducci, *Rotae Civilis Serenissimae Reipublicae Genuae ... Decisiones* (note 96), vol. 1, tit. 1, dec. 8, p. 18-22. The decision may also be read in Albizzi, *De Inconstantia in Judiciis Tractatus* (note 111), dec. 64, p. 173-181, and in *Sacrae Rotae Romanae Decisiones nuperrimae* (note 55), vol. 5, pt. 1 (1696-1697), dec. 336, p. 571-574.

¹²² *Supra*, §2.2.

The reason why the case is interesting is that there was no doubt that the shipmaster was liable, as he abandoned the ship for an imaginary threat. While the insurers held the shipmaster's behaviour as barratrous,¹²³ the court qualified it as faulty but not fraudulent: 'if [the shipmaster] fled abandoning the ship, but the flight was not fraudulently done in execution of a premeditated scheme, then it is incorrect to call it barratry'.¹²⁴ The lack of a premeditated fraudulent design of course does not exclude the blameworthiness of the master's conduct. But such a blameworthy conduct fell within the scope of *culpa*, for which the insurers remained liable.¹²⁵ Unless proven that the blameworthy conduct of the master was part of a premeditated fraudulent scheme, the shipmaster could not be accused of barratry.¹²⁶ In the present case, the court ruled out barratry for two reasons. First, lack of premeditation. Looking at the subsequent behaviour of the shipmaster, the court concluded that the mishap could not have been the result of a premeditated scheme.¹²⁷ Secondly, lack of profit. The profit element, we have already seen, is an integral feature of barratry. Even if the insurers had been able to prove the premeditation element, they should have also proven that the motive of such scheme was an illegal - and possibly, substantial - profit. And the fact that the shipmaster had to pay a fairly large sum (425 scuds) to recover his ship was more than sufficient for the court to rule out that motive.¹²⁸

If we think back to Casaregis' definition of barratry, we might recall how the scheme of the shipmaster was described as 'premeditated deceit [*dolus*] ... preordained to the mishap, with the intention to embezzle money or goods belonging to someone else'.¹²⁹ The intent to embezzle the cargo was therefore not an additional element to be proven in addition to *dolus*, but rather an integral feature of that same *dolus*. This is particularly explicit in *ius commune* literature on legal presumptions: in the absence of some gain (or at least of the hope to make a gain), *dolus* could not be presumed.¹³⁰ Suffering a loss, therefore, would point to the absence

¹²³ Barratry aside, two further reasons for the insurers' refusal to pay were the change of voyage and the delay in setting sail. The first was because the Master, coming from Venice, called at Zakyntos before continuing towards Portugal - and so clearly going in the opposite direction (Balducci, *Rotae Civilis Serenissimae Reipublicae Genuae ... Decisiones* (note 96), vol. 1, tit. 1, dec. 8, p. 20, n. 13). The court dismissed the point both because it was a minor and customary deviation and because the insurance policy allowed the ship to change route so long as it did not change voyage (*ibid.*, p. 20-21, n. 14 and 17 respectively). The other objection was that, spending time in Sicily, the shipmaster let the good season pass by and then had to sail in wintertime (*ibid.*, p. 21, n. 18). The objection was dismissed as clearly specious, since the master had to go to Sicily in order to recover his vessel (*ibid.*, p. 21, n. 19).

¹²⁴ '[S]i Navim deferendo fugae se commiserit, quae [fuga] cum ad dolum praeordinata non fuerit cum praexitenti machinatione perperam appellatur Baratteria', *ibid.*, p. 22, n. 28.

¹²⁵ '[D]ici potest turpis quaedam animi prosternatio, quae includitur sub generali promissione cujuscumque periculi ab Assecuratoribus facta, quaeque proinde illos [assicuratores] a stipulata obligatione non liberat', *ibid.*

¹²⁶ '[N]isi concurrat culpa ad dolum praeordinata, nempe formalis Baratteria ex ejus [navarchi] facto, Assecurati damnum pati non tenentur, sed illius emendatio pertinet ad Assecuratores', *ibid.*, p. 21, n. 24.

¹²⁷ '[M]anifestum sit ex actibus subsequutis, ex quibus praeordinatio culpae ad dolum penitus excluditur', *ibid.*, p. 22, n. 28.

¹²⁸ '[E]t propterea cum ex Navis desertione nullum idem Navarchus consequutus fuerit compendium, emicat inde ejus animi compendium, emicat inde ejus animi candor, et bona fides, et removetur suspicio assertae Baratteriae, quae nunquam sine spe magni lucri committi solet', *ibid.*, p. 22, n. 30.

¹²⁹ *Supra*, § 2.2, text and note 58.

¹³⁰ To mention only a few among the most widely known authors on probatory issues, see e.g. Josephus Mascardus (Giuseppe Mascardi, c.1540-1585), *Conclusiones Probationum Omnium Quibusvis in vtroque Foro versantibus*, Francofurti, Impensis Joan. Syberti Heyl, Typis Nicolai Kuchenbeckeri, 1661, vol. 2, concl. 271, p. 446, n. 22: 'dolos non praesumitur ex actu a quo quis commodum non sensit'; Jacobus Menochius (Giacomo Menochio, 1532-1607), *De Praesumptionibus, Conjecturis, Signis, et Indiciis, Commentaria ...*, Genevae, Sumptibus Leonardi Chövet et Socij, 1686, vol. 2, lib. 5, praes. 3 (on *dolus*, *fraus* and *culpa*), p. 653, n. 18: 'Ita quoque multo minus dolus praesumitur, quando alioqui dolus ille, nullum ei adfertet lucrum et commodum'. More in general, on the cases in which it is possible to presume *dolus* see again Mascardi, *loc. cit.*, vol. 2, concl. 532, p. 69-82.

of *dolus*.¹³¹ Requiring proof as to the (hope to make a) gain, it should be noted, meant that the plaintiff did not have to prove the simple *fraus*, but the more specific *dolus malus*: not just the intent to deceive, but also the intent to gain from the deceit.¹³² The point should not be underestimated, all the more given the considerable discretion of the bench in deciding on the occurrence of *dolus*.¹³³

In this sense, an even better example comes from the Civil Rota of Florence a decade after this last case. With a decision of 10 May 1709, the court excluded barratry for the lack of any gain of the master. A ship carrying wine from Leghorn to London was robbed by French pirates. The insurers alleged that the master had fled at the mere sight of the pirates, but from several depositions it appeared that the case was the opposite - the master did put up a strenuous defence.¹³⁴ While this point was the main bone of contention between the parties, the court took very little interest in it. Even if the master did flee without opposing any resistance whatsoever to the threat of the pirates, in the eyes of the judges that would still fall short of barratry.¹³⁵ Dishonourable as it may be, such a conduct was aimed at saving one's life, not making some gain.¹³⁶ Thus, the element of premeditated scheme was absent from the facts of the case, which might at the most point to the shipmaster's fault.¹³⁷ In particular, the court ruled out barratry because the alleged scheme of the master did not result in any financial gain for him. To find for barratry, the court argued, it is necessary that the barrator stood to make a considerable gain. But in the present case there was no trace of any gain.¹³⁸ To prove the point even further, the court took into account the financial hardship of the master after he lost his vessel: 'henceforth, he always lived in misery'.¹³⁹

Taking the requisites for barratry seriously, one should conclude that no action of the master, foolish and irresponsible as it might be, could have ever been qualified as barratrous unless it was possible to prove that it was done with the expectation to receive a substantial financial gain. Even the strong suspicion of fraud would not do. For it would also be necessary to link the actual fraudulent behaviour to a pre-existing scheme, and moreover to show how the

¹³¹ See for instance Menochius, last note, vol. 2, lib. 5, praes. 3, p. 653, n. 19.

¹³² E.g. Dominicus Tuschus (Domenico Toschi, 1535-1620), *Practicarvm Conclvsionvm Ivris ... Dominici TT. S. onyphrii S.R.E. Presbyt. Card. Tvschi*, 3rd edn., Lvdgvi, ex Officina Ioannis Pillehotte, sumpt. Ioannis Caffin, et Francisci Plaignard, 1634, vol. 4, concl. 476, p. 477, n. 1: 'Fraus est, quando volo alium decipere sine meo commodo. Dolus autem est, quando decipio alium cum damno suo, et meo commodo, et fraus non est sine dolo; imo est species doli. Dolus autem potest esse sine fraude'. Cf. *supra*, § 2.2, text and note 52.

¹³³ Tuschus, last note, n.6: 'Declara tamen, quia dari non potest certa regula, qualiter fraus et dolus probentur, vel etiam praesumantur; quia satis difficile est probare fraudem. Idcirco arbitrarium est iudici considerate qualitate factorum.'

¹³⁴ Artimini, *Raccolta delle decisioni della ruota fiorentina* (note 90), vol. 3, dec. 205, p. 23-25, n. 16 and 18; de Comitibus, *Decisiones Inclitae Rotae Senensis et Florentinae* (note 90), vol. 2, pt. 2, dec. 64, p. 28, n. 16 and 18.

¹³⁵ Artimini, *Raccolta delle decisioni della ruota fiorentina* (note 90), vol. 3, dec. 205, p. 23, n. 13; de Comitibus, *Decisiones Inclitae Rotae Senensis et Florentinae* (note 90), vol. 2, pt. 2, dec. 64, p. 27-28, n. 13.

¹³⁶ 'Talis omissio defensionis a timore mortis proveniens, potius culpa quam baratteria denominari posset, quae semper exclusa remanet, quoties non constet, fugam dolose, et animo defraudandi fuisse praemeditatam, immo docetur de contrario, quod nempe fuga, et desertio Navis provenerit pro paranda sibi, et Nautis superstitibus incolumitate, vel ex alia simili causa, ut caeteris relatis in individuo prosequitur' (Artimini, *Raccolta delle decisioni della ruota fiorentina* (note 90), vol. 3, dec. 205, p. 26, n. 26; de Comitibus, *Decisiones Inclitae Rotae Senensis et Florentinae* (note 90), vol. 2, pt. 2, dec. 64, p. 29, n. 26).

¹³⁷ Artimini, *Raccolta delle decisioni della ruota fiorentina* (note 90), vol. 3, dec. 205, p. 27, n. 27; de Comitibus, *Decisiones Inclitae Rotae Senensis et Florentinae* (note 90) vol. 2, pt. 2, dec. 64, p. 30, n. 27.

¹³⁸ 'Planum autem est, baratteriam nunquam censeri commissam, imo exclusam remanere deficiente magno, et considerabili lucro'. Artimini, *Raccolta delle decisioni della ruota fiorentina* (note 90), vol. 3, dec. 205, p. 24, n. 17, and de Comitibus, *Decisiones Inclitae Rotae Senensis et Florentinae* (note 90) vol. 2, pt. 2, dec. 64, p. 28, n. 17.

¹³⁹ Artimini, *Raccolta delle decisioni della ruota fiorentina* (note 90), vol. 3, dec. 205, p. 24-25, n. 18; de Comitibus, *Decisiones Inclitae Rotae Senensis et Florentinae* (note 90) vol. 2, pt. 2, dec. 64, p. 28, n. 18.

behaviour would lead to a substantial gain for the culprit. In short, there was little hope to prove barratry.

On very rare occasions, however, the fraudulent conduct of the master was so blatant that the court wanted to find him guilty of barratry despite the stringent requirements for its occurrence could not be proven in full. One of such cases is about a master fleeing before a threat (actual or presumed one) without putting up a fight. The decision was rendered by the Roman Rota on 2 March 1674.¹⁴⁰ The court of first instance had already found for the occurrence of barratry; in appeal, the Rota confirmed as much. Admittedly, the case looked suspicious. The insurers were not even aware of the true conditions of the ship, which was in such a sorry state to cast serious doubts as to its seaworthiness.¹⁴¹ As soon as the shipmaster saw a vessel approaching, he immediately decided to abandon the ship, without checking whether they were friends or foes,¹⁴² and then he sought to cash the insurance money. The insurers refused. In the ensuing litigation, both the number of impartial witnesses (the abandonment of the vessel took place in proximity to the coast)¹⁴³ and, especially, the bad reputation of the shipmaster¹⁴⁴ persuaded the court to qualify the master's behaviour as barratrous.

The interest of the case lies first of all in the absence of any proof about the fraudulent scheme. The intent to make a gain was perhaps implicit in the insurance of a ship of very poor quality, and this suspicion might have been strengthened by other circumstantial evidence as to the reputation of the shipmaster and his conduct. Still, it remains the fact that no evidence - not even circumstantial - was brought forth as to the fraudulent scheme requirement. It is possible that the qualification of the shipmaster by other public authorities as *ribaldus* (a figure closely associated to that of barrator)¹⁴⁵ might have helped the court to reach its decision. But that, alone, could hardly be sufficient. No proof was made of the fraudulent machination at the expense of merchant consignor. Nonetheless, interestingly, the master was condemned as a barrator and the insurers absolved from any liability.

Comparing this decision with others rendered by the same Roman Rota, it is difficult to dismiss the impression that the judges of the Rota wanted to find for the occurrence of barratry despite the extreme difficulty to do that. In other words, the judges might have not wanted to let a thug get away with something that he had likely committed but that could not be fully proven. In the first example that we have seen of this kind of barratry (the decision of 4 February 1697), the Roman Rota was very clear: the insurers could not refuse payment simply alleging barratry. If the plaintiff (the insured) sued on a contract, the counterparty (the insurers) could not simply allege a fraud to avoid their contractual obligations, but had to prove that alleged fraud in full.¹⁴⁶ In the case of the *ribaldus* shipmaster, however, the court did otherwise. Had the court not taken a flexible approach to the law for once, even that *ribaldus* would have most likely been able to recover.

If there is a lesson that we might take from this case is that the courts were aware that the requirements imposed for barratry might have resulted in an exceedingly difficult standard of proof, and were prepared (very occasionally) to be more flexible when there was little doubt as to the occurrence of barratry. But such decisions are a rarity: more than questioning the

¹⁴⁰ *Sacrae Rotae Romanae Decisionum Recentiorum a Joanne Baptista Compagno ... selectarum* (note 9), vol. 18, pt. 1 (1673-1674), dec. 247 (2.3.1674), p. 290-1.

¹⁴¹ *Ibid.* p. 290, n. 3: 'navis assicurata nullo modo erat navis'.

¹⁴² *Ibid.* p. 290, n. 7: 'confestim absque consilio [magistrum] reliquisse Pincum [i.e. the ship] indefensum ex sola apparitione navis, absque eo, quod recognosceret, an in ea essent inimici'.

¹⁴³ *Ibid.*, p. 290-291, n. 8-9.

¹⁴⁴ The court had received some letters from the port authorities of Leghorn attesting that the master was a notorious thug (*ribaldus*), *ibid.*, p. 290, n. 7.

¹⁴⁵ Rossi, *Barratry of the Shipmaster in Early Modern Law: Polysemy and Mos Italicus* (note 8), (2019), ***

¹⁴⁶ Albizzi, *De Inconstantia in Judiciis Tractatus* (note 111), dec. 57 (4.2.1697), p. 158, n. 43-44.

stringent approach of civil law courts to the subject, they would seem the proverbial exception to the rule.

2.4. Barratry, qualified theft and the problem of *contrectatio*

To conclude on the position of Italian law courts, barratry was almost a chimera. At least judging from the printed decisions, the number of cases where the courts found for barratry is a marginal fraction of those where barratry was alleged. In many of those instances a merchant would have had no hesitation in speaking of barratry, and this perhaps explains why the parties (who were merchants themselves) often found the issue considerably more worth debating than the court, which was often remarkably quick in dismissing it. This is not because law courts had a high opinion of most shipmasters. The obstacles were legal ones.

Unlike a normal theft, barratry required to prove the premediated fraudulent scheme, its causal link with the mishap, and the intent to enrich oneself from it. The difficulty was therefore to prove both a strict causal link between conduct and mishap, and the fraudulent intent behind that conduct.¹⁴⁷ It may well be that such a high burden of proof derived, at least in part, from the historical development of barratry - especially from its connection with the crime of extortion, strengthening the progressive interpretation of barratry as a qualified case of theft.¹⁴⁸ And barratry could not be considered as a 'standard' theft for the obvious reason that the shipmaster would not simply steal, but embezzle.

The most obvious difference between theft and barratry lies in the relationship between the perpetrator of the crime and the thing. In theft, the thief has (usually) no relationship with the thing, nor (typically) with its owner. Much on the contrary, in the case of barratry the shipmaster is entrusted with the thing, which he undertakes to carry safely at destination.¹⁴⁹ The most obvious difference between the two cases, therefore, lies in the element of handling (*contrectatio*). At least by the early modern times, *contrectatio* is not any handling of the thing, but it designates malicious handling. Hence the problem with embezzlement. *Contrectatio* is necessary to have *furtum*,¹⁵⁰ but the shipmaster started handling the cargo in a perfectly lawful manner – in execution of the charter-party. The difficulty to identify a specific moment in which that *contrectatio* occurred led to two alternative positions among civil lawyers. The first was denying that embezzlement could amount to theft: the (initially) lawful *administratio* of

¹⁴⁷ It is only from the early nineteenth century that some - few - authors began to consider the fraudulent scheme aiming at prejudicing the merchant and the intent to make a gain as alternative. See e.g. Luigi Piantanida, *Della giurisprudenza marittima-commerciale antica e moderna*, Milano, Dalla Stamperia e Fonderia di Gio. Giuseppe Destefanis, 1806, vol. 1, p. 166, n. 144: barratry is 'the delict that the master of a ship commits when – through preordained scheme, without any need and of his own free will - he causes the partial or total loss of his ship or of the cargo with any means, to the detriment of anyone interested in them *or* to the purpose of appropriating the merchandise entrusted to him' ('il delitto che un comandante di nave commette lorquando con preordinata macchinazione senza necessità e di spontanea volontà, con qualsivoglia mezzo procura la perdita totale o parziale della sua nave o del carico, a danno di chiunque abbia interesse nelle predette cose, *od* al fine di appropriarsi le merci ad esso lui confidate'), emphasis added. This definition is interesting in that it is not to be found earlier: for the whole early modern period, eighteenth century included, both elements (fraudulent scheme and embezzling) had to be present (and proven) in order to have barratry.

¹⁴⁸ Rossi, *Barratry of the Shipmaster in Early Modern Law: Polysemy and Mos Italicus* (note 8), (2019), ***

¹⁴⁹ See esp. Targa, *Ponderationi Sopra la contrattatione Marittima* (note 59), ch. 74, p. 305.

¹⁵⁰ See e.g. Tuschus, *Practicarvm Conclvsionvm Ivris* (note 133), concl. 552, p. 64, n. 9: 'Proprie furtum est contrectatio rei alienae fraudulenter, et animo lucrandi inuito domino, et vbi non conuenit haec diffinitio, non cadit furtum'. More in general, on the proof required for theft see esp. Mascardi, *Conclusiones Probationum Omnium* (note 130), vol. 2, concl. 829, p. 540-544, and in particular concl. 830, p. 541-544.

the thing 'removes the condition of *contractatio*', as Prospero Farinacci (1554-1618) had it.¹⁵¹ There is a certain elegant logic in this position: the person embezzling the thing (usually, money) was already contractually bound to account for it. Hence embezzling might well be considered as breach of contract, for which the counterparty had already an action available. Thus, in the words of Aimone Cravetta (1504-1569), the contractual obligation to return the thing 'excuses from the crime of theft'.¹⁵²

The second position consisted in changing the qualification of that handling from lawful *administratio* to unlawful *contractatio* when the mental intent to defraud the counterparty entered the picture. Failing to return what one is contractually bound to, argued for instance Pietro Cavallo (Petrus Caballus, 1550-1616), amounts to theft. In such a case, very significantly, the action of keeping (*retinere*) the thing is described as 'retine[re] et contracta[re] apud se rem alienam'.¹⁵³ Such a position is far from isolated among early modern jurists.¹⁵⁴ With specific regard to the subject of barratry, however, it is perhaps best appreciated looking briefly at a case discussed by the Mantuan Rota in the middle of the sixteenth century. That case must have been a high-profile one, for it led to the condemnation of the treasurer of the Duke of Mantua for embezzlement. The Rota could speak of theft because it identified the change in the mental element – and so the shift from *administratio* to *contractatio* – in the *conversio* of the money into a different use than that agreed upon (the defendant sought to pocket the money he was supposed to administer). The defendant, 'handling [*contractando*] that money and changing [*convertendo*] its use, is said to have committed theft'.¹⁵⁵ If we think back to Casaregis' definition of barratry, we may see the same approach: the intention of pocketing the thing (or its value) is described in terms of change of use of the thing - from that initially agreed upon to a different and unlawful one. So in Casaregis the barrator's *dolus* is identified in his 'intentio [...] convertendi in proprios usus alienas pecunias, seu merces'.¹⁵⁶ It was necessary to speak of *conversio* (and indeed Casaregis is hardly an isolated example in that regard)¹⁵⁷ because the initial *usus* was legitimate.

Although the point is normally left implied among jurists and law courts alike, the closest parallel with this *conversio* was that of *furtum usus*. Only, in that case the change of *usus* was plainly visible, and that change pointed to the mental element. The problem with barratry was that the shipmaster would do his best to hide that *conversio* orchestrating something that appeared as *vis maior* (thereby exonerating him from his contractual obligation to deliver the

¹⁵¹ 'Velamen enim administrationis temperat furtum, quia ex administratione tolli videtur qualitas contractationis, sine qua furtum non committitur', *Dn. Prosp. Farinacij ... Consilia siue Responsa atque Decisiones Cavsarum Criminalium*, Coloniae Allobrogvm, Excudebat Philippvs Gamonetvs, 1649, vol. 1, cons. 96, p. 583, n. 20.

¹⁵² Cravetta, *Consiliorvm Aymonis Cravettae ...*, pars prima et secvnda, Venetiis, Apud Cominum e Tridino Montisferrati, 1566, pt. 2, cons. 244, fol. 52r, n. 8 (a case of 1535): 'furtum tamen non committitur qui considerandum est in initio receptionis pecuniarum quod fuit licitum et sine vitio et quia obligatus est ex contractu ad restituendum pecunias deponenti seu eius haeredibus, quae obligatio excusat a crimine furci.'

¹⁵³ Petrus Caballus, *Resolvtionvm Criminalium Petri Caballi ...*, Venetiis, Apud Matthaem Valentinum et Socios, 1607, casus 136, p. 304, n. 18: 'furtum committit, qui scienter, inuito domino retinet, et contractat apud se rem alienam, quae ab initio bona fide ad eum peruenit'.

¹⁵⁴ Cf. e.g. Iohannis Maria Vermiglioli de Vermigliolis (Giovanni Maria Vermiglioli, 1570-1657), *Ioannis Mariae Vermiglioli de Vermigliolis Pervsini ... Consilia Criminalia ad Defensam ...*, Romae, Ex Typographia Io. Petri Collinij, 1651, cons. 271, p. 372, n. 13. See further Iohannis Petrus Surdus (Giovanni Pietro Sordi, d.1598), *D. Ioannis Petri Svrdis ... Decisiones*, Francofurti, apud Andreae Wecheli heredes, Claudium Marnium, et Ioan. Aubrium, 1598, dec. 304, p. 817, n. 16, and Tuschus, *Practicarvm Conclvsionvm Ivris* (note 133), concl. 553, p. 65, n. 25.

¹⁵⁵ 'dictum thesaurarium ... illam [pecuniam] contractando, et in alium usum conuertendo, dicitur furtum commisisse', Carlo Ruini (1456-1530), *Caroli Rvini .. Responsorvm sive Consiliorvm*, Venetiis, 1579, vol. 5, cons. 143, fol. 174v, n. 3.

¹⁵⁶ *Supra*, note 58.

¹⁵⁷ Cf. e.g. Rocca, *Disputationes Juris Selectae* (note 63), vol. 2, disp. 97, p. 23, n. 16: 'Vel quoties merces in alium usum convertit, quam demandatum'.

thing safely at destination). As such, the mental intent had to be inferred from other circumstances. Since that mental intent had to amount to *dolus malus*, however, those circumstances had to be stringent enough to amount to full proof. Thus, while the progressive separation between real and fictive *contractatio* allowed the modern developments of theft and, in particular, the emersion of the legal category of embezzlement,¹⁵⁸ it also required a very high standard of proof, for *dolus* could not be found *in re ipsa*. The stringent requirements imposed by the law courts would therefore appear a consequence of the conceptual framework within which they operated.

3. Early modern common law courts

The main difference between civil and common law courts on barratry is a rather obvious one: at common law, the decision as to the occurrence of a fact was not entrusted to the bench but to the jury. Obvious as it is, this difference proved of crucial importance to the development of the subject, for the jury typically consisted of merchants. Scholarly literature on English juries is bountiful, but the specific point that we are interested in has perhaps received less attention that it deserves. Some branches of commercial law developed along very different lines in England and on the Continent – this of course is hardly new. What is less studied is the chronology of such a development. Timing, however, is not of secondary importance, if only because the approach of law courts may well vary significantly over time.

The moment civil law courts started to decide on maritime affairs, they typically replaced one system (mercantile customs) with another (civil law – or rather, their own geographical variant of it). Customs of course did not disappear overnight. But the simple fact of being considered as *ius particulare* changed their position with a rapidity otherwise difficult to explain. Moreover, few learned judges were knowledgeable about mercantile customs.¹⁵⁹ On a practical level, this often had far greater weight than any other consideration. Because even if the judge sought to keep a customary rule (and not, as it often happened, simply to replace it with its closest civil law equivalent), the whole system surrounding that rule changed. Despite the insistence of some scholars as to the mutually beneficial relationship between mercantile customs and learned law, most evidence seems to point to a swift, inexorable erosion of the first to the advantage of the second.¹⁶⁰

At common law, the passage from customary to legal rules was remarkably slower, and far more gradual. At least in our subject - but perhaps also beyond it - this could well depend on the simple fact that panels of merchants no longer decided in a semi-autonomous way (as mercantile courts), but as panels of jurors acting within the ordinary procedure of common law courts. This statement would however imply two things: first, minimal influence from the

¹⁵⁸ The distinction between *vera* and *ficta contractatio*, often credited to Carpzov, can in fact be traced as early as Azo, who distinguished between true (*vera*) and constructive (*interpretativa*) *contractatio*: ‘Contractatio ideo ponitur in diffinitione: quia sine ea furtum esse non potest, licet voluntas vel verbum vel scriptura interueniat ... Contractatio autem exigitur vera vel interpretatiua, vt si falsus procurator volens indebitum exigere alij delegauerit soluendum se presente ...’ (Azo, *Summa Codicis, ad C.6.2, Lugdunum [1533], fol. 223va, n. 1*). Azo’s distinction sought to stretch the notion of *contractatio* enough to cover also those cases described in the sources where the culprit did not even touch the thing, especially the *falsus procurator* who sought to obtain an undue payment by delegating someone else to receive it (and so, not touching the money himself). The novelty introduced by Carpzov was to widen the scope of the *ficta contractatio* to those cases where some handling did occur, but the mental element materialised only at a later stage, thereby famously including in this constructive *contractatio* also the case of *translatio ad alium usum, contra voluntatem domini et promissionem datam*. See in particular F. Battaglia, *Furtum est Contractatio. La definizione romana del furto e la sua elaborazione moderna*, Padua 2012, ch. 1, esp. p. 9-14, 24-29 and 74-75.

¹⁵⁹ Cf. Rossi, *The liability of the shipmaster in early modern law* (note 21), p. 28-29

¹⁶⁰ Cf. Rossi, *Insurance in Elizabethan England* (note 14), p. 6-8.

bench; second, that many juries called to decide on barratry cases were staffed with merchants. While neither point may be proven, both would seem probable.

Until the end of the seventeenth century we know precious little of barratry in the law courts. The few known insurance cases were usually tried at *nisi prius*: all that we know is whether the jurors found for barratry or not.¹⁶¹ Only from the early eighteenth century the bench is known to have given more precise directions as to what should count for barratry (this, incidentally, explains why this part of the work will focus on a period slightly later than that covered for civil law courts). Of course it may not be excluded that in some unreported cases the bench did take a more proactive approach earlier. But, if that happened, it would not be unreasonable to find mention of such cases (even just some indirect references to them) among the reported ones, whereas there is none. It seems therefore perhaps more likely that the substantive issue remained almost entirely in the hands of the jury. This would also explain why did the tension between customary and legal notions of barratry become fully visible so late in common law – and so, in turn, why was it solved even later.

While traditionally there was no entitlement to a jury of merchants, this is increasingly attested during the eighteenth century,¹⁶² after that common law courts consolidated their jurisdiction on most commercial matters, maritime ones included.¹⁶³ Quite revealingly, most of the eighteenth-century (reported) cases on our subject, almost all heard by the King's Bench, were tried at *nisi prius* at the Guildhall. This, given the subject matter, would suggest that the jurors were mainly merchants. There is of course no proof that this happened on a regular basis,¹⁶⁴ but the contrary would be somewhat surprising – all the more since many such cases were decided under Mansfield CJKB. As such, there is a very good chance that the juries called to decide on the occurrence of barratry based their choice not just on common sense, but on maritime customs. As Oldham observed, 'Mansfield did not invent either the special jury or its frequent composition, especially in London, of merchants. What Mansfield did was to perceive how the special jury might be used instrumentally to establish legal principles by identifying mercantile practices and folding those practices into the common law.'¹⁶⁵

3.1. Competing notions of barratry

The shift from a mercantile notion of barratry towards a more legally-minded one focused mainly on the element of fraud. Towards the close of the middle ages, the increasingly widespread use of insurance led to the progressive shift in maritime customs from imputability to intentionality. This meant that when the insurance policy excluded barratry and covered only negligence, the insurers would not answer for the loss caused by intentional conduct.¹⁶⁶ In England, where insurance became widespread only much later than in the Mediterranean, this

¹⁶¹ *Ibid.*, p. 430.

¹⁶² Cf. esp. J. Oldham, *English Common Law in the Age of Mansfield*, Chapel Hill 2004, p. 16 ff., esp. 22-27; Id., *The Varied Life of the Self-Informing Jury*, London 2005, p. 24-31; Id., *Jury Research in the English Reports in CD-ROM*, in J.W. Cairns and G. McLeod (eds.), "The Dearest Birth Right of the People of England". *The Jury in the History of the Common Law*, Oxford-Portland 2002, p. 130-153, at 134-145; Id., *The Origins of the Special Jury*, *University of Chicago Law Review* 50 (1983), p. 137-221, at 173-175 and 210.

¹⁶³ Specifically with regard to maritime insurance, see Rossi, *Insurance in Elizabethan England* (note 14), p. 61-88.

¹⁶⁴ In principle, there was no entitlement to a jury of merchants. The statute on special juries of 1730 simply endorsed the practice of empanelling them without however providing any definition nor qualification as to its necessity for mercantile litigation. Indeed, occasionally it is even possible to find juries composed of 'gentlemen of fortune' for mercantile disputes: Oldham, *English Common Law in the Age of Mansfield* (note 162), p. 23.

¹⁶⁵ *Ibid.*, p. 368.

¹⁶⁶ Rossi, *Barratry of the Shipmaster in Early Modern Law: Polysemy and Mos Italicus* (note 8), ***

shift probably happened during the sixteenth century. In the early decades of that century barratry was still defined as ‘mysordres of the master’;¹⁶⁷ forty years later it was described as ‘wickedness unjustness or folly of the said master’.¹⁶⁸ By the close of the century, however, the position was different. The customary compilation on insurance written in London in the 1580s described barratry, as customary rules typically did, by highlighting its core case: a shipmaster refusing to discharge the cargo at the agreed destination and selling it elsewhere against the will of the merchant insured.¹⁶⁹ This conduct amounted to an intentional breach of duty for personal gain. The difficulty was defining as much in legal terms. One would naturally think of fraud, but in law fraud has a very specific meaning.

At a customary level, the intentionality needed to qualify the conduct as barratrous was still broadly understood in terms of blameworthiness. Barratry meant blameworthy conduct presumed to be intentional. This presumption ultimately depended on the deviation from the usual *modus operandi*: while a loss occurring in the normal course of events would be presumptively considered as involuntary (and so, either faultless or negligent at the most), a mishap occurring while the shipmaster was doing something unusual would look suspicious. This distinction between intentional and non-intentional loss, it is important to remember, was elaborated within the umbrella of blameworthiness. A blameworthy and intentional conduct was more serious than a blameworthy but unintentional one. But they both derived from the same concept. Any breach of the charter-party not plainly due to *vis maior* was (at least, *prima facie*) blameworthy. At a customary level, the recoverability of the loss due to barratry depended on whether the insurers undertook to bear the consequences of extreme blameworthiness or not.

The accent on blameworthiness in the customary notion of barratry is key to understanding its development in the common law. So far, the accent was on blame and not on fraud. To a lawyer, fraud is the first thing that comes to mind when thinking of barratry. Speaking of fraud, however, entails a significant conceptual shift from blameworthiness. The evolution of the common law on barratry deals precisely with this shift. Among merchants, barratry was a blameworthy violation of the charter-party done intentionally. For a lawyer, barratry was fraud.

No clear definition of barratry in a maritime sense may be found among common lawyers before the late eighteenth century.¹⁷⁰ Not only was there no attempt to shape barratry after larceny (the closest common law equivalent to civil law *furtum*), but even the boundaries between fraud and fault remained considerably flexible. In his *De jure maritimo et navali* of 1676, Charles Molloy (1646-1690) made one of the earliest attempts to explain – but not to define – barratry. Molloy did not provide a definition of barratry, but rather a detailed list of things that the master was not supposed to do. Some of those things might be described as fraudulent, others just faulty.¹⁷¹ It was only eighty years later that the *Universal Dictionary of*

¹⁶⁷ London policy of 16.5.1523, transcription in Rossi, *Insurance in Elizabethan England* (note 14), Appendix IV, doc. 1, p. 723-725.

¹⁶⁸ London policy of 8.1.1566, HCA, 24/39/20 (*De Moucheron c Sadler*), transcription in R.G. Marsden, *Select Pleas in the Court of Admiralty*, vol. 2, A.D. 1547-1602, London 1897, p. 52-53.

¹⁶⁹ London, British Library, MSS Harleian 5103, art. 52, *fols.* 168v-169r, and Additional 48023 [art. 58], *fol.* 261r, transcription in Rossi, *Insurance in Elizabethan England* (note 14), p. 570-571. See further *ibid.*, p. 274-279.

¹⁷⁰ The main definitions of barratry remained similar to the description of the ‘common barretor’ in Coke’s reports (on which see Rossi, *Barratry of the Shipmaster in Early Modern Law: Polysemy and Mos Italicus* [note 8], *** note 2). A century after Coke, for instance, William Hawkins (1673–1746) gave the very same meaning to barratry: ‘a Barrator is a common Mover, Exciter, or Maintainer of Suits or quarrels, either in Courts, or in the Country.’ W. Hawkins, *A Treatise of the Pleas of the Crown ...*, In the Savoy [London], printed by E. and R. Nutt, and R. Gosling ... for B. Nutt ..., 1716, lib. 1, ch. 81, p. 243.

¹⁷¹ Charles Molloy, *De jure maritimo et navali, or, A treatise of affairs maritime and of commerce in three books*, London, printed for John Bellinger ... George Dawes ... and Robert Boulter ..., 1676, lib. 2, ch. 2, n. 1-15, p. 197-202. Interestingly enough, in the first edition of the treatise the term barratry was not even present. It appeared

Trade and Commerce of Malachy Postlethwayt (1707-1767), a work published in the middle of the century (it appeared between 1751 and 1755) and much cited by law courts also on our subject, began to describe the barratrous ‘male practices’ of the shipmaster in terms of fraud.¹⁷² With hindsight, the trend was probably set¹⁷³ - but it was far from linear, or swift. John Weskett's *Complete Digest* of insurance (published in 1781), for instance, defined barratry as ‘the negligence or misconduct of the master and crew’.¹⁷⁴ Similarly, at the end of the century, another work of great repute, *The Ship-Master's Assistant* of David Steel (1763-1803), still described barratry in terms of fraud or gross negligence.¹⁷⁵ The contemporaneous (1787) treatise of James Allan Park (1763-1838) provided a definition of barratry that would have perfectly satisfied any sixteenth-century merchant: ‘Barratry implies something contrary to the duty of master and mariners, in the relation in which they stand to the owners of the ship’.¹⁷⁶ The ambiguity between fraud and negligence, although progressively clarified, lingered on for a surprisingly long time.¹⁷⁷ The 1906 Marine Insurance Act still defined barratry as including ‘every wrongful act wilfully committed by the master or crew to the prejudice of the owner’.¹⁷⁸

3.2. Cases of barratry: fault, fraud and breach of duty

only in the third edition (London, printed for John Walthon Jr and J. Wotton, 1722, lib. 2, ch. 2, n. 1, p. 229). Even so, however, the substance changed little: the chapter remained a list of things to avoid.

¹⁷² Malachy Postlethwayt, *The Universal Dictionary of Trade and Commerce*, 4th edn., London, printed for W. Strahan *et al.*, 1774, vol. 1, s.v. ‘Baratry’: ‘In marine commerce, barratry signifies the stealing, imbezzling, or any ways altering of merchandizes, by the master or company of a ship; and, in general, all the tricks, frauds, or male practices, which they pretty often use, in order to defraud the owner of the ship's cargo, or other persons concerned in it. ... Baratry, in a marine sense, is in England, when the master of a ship, or the mariners, cheat the owners or insurers, whether by running away with the ship, sinking her, deserting her, or imbezzling the cargo.’

¹⁷³ E.g. William Selwyn, *An Abridgment of the Law of nisi Prius*, Albany, published by E.F. Backus, 1811, vol. 2, ch. 25, para 4, n. 4, p. 969.

¹⁷⁴ John Weskett, *A Complete Digest of the Theory, Laws, and Practice of Insurance*, London, Printed by Frys, Couchman and Collier, 1781, ch. 13, p. 230.

¹⁷⁵ The third edition of Steel's work (of 1790) did contain a definition of barratry that was exclusively focused on fraud (‘Barratry, or barrety, in a marine sense, is when a master of a ship defrauds the owners or insurers, whether by carrying the ship a different course from their orders, or by sinking her, deserting her, or embezzling the cargo. The same is applicable to the mariners also, when they breed dissensions, and are guilty of any thing injurious to the ship and cargo.’). That definition was however in a footnote (David Steel, *The Ship-Master's Assistant and Owner's Manual ...*, 3rd edn., London, Printed for David Steel, at the Navigation-Warehouse ... Little Tower-Hill [London], 1795 ch. 11, p. 103, note ‡). The moment the author decided to move it to the main text, quite revealingly, he re-worded it slightly, widening the scope so as to include also gross negligence (‘From a review of the decisions on this subject, it appears, that any act of the master, or of the mariners, which is of a criminal nature, or which is *grossly negligent*, tending to their own benefit, to the prejudice of the owners of the ship, *without their consent or privity*, is barratry’ (*ibid.*, 6th edn., ch. 16, n. 5, p. 200, emphasis in the text).

¹⁷⁶ James Allan Park, *A System of the Law of Marine Insurances*, London, printed by His Majesty's Law Printers for T. Whieldon, 1787, ch. 5, p. 103.

¹⁷⁷ Legislation offered little help. The main source in this respect is a statute of the early eighteenth century, which qualified barratry as a capital offence. The shipmaster would ‘suffer death as a felon’ if he were to ‘wilfully cast away, burn, or otherwise destroy the ship unto which he belongeth, or procure the same to be done, to the prejudice of the owner or owners thereof, or of any merchant or merchants that shall load goods thereon’, 1 Anne 2, c.9 (1707). A few years later the provision was broadened so as to encompass also the insurers among the victims of the conduct: ‘If any owner of, or captain, master, mariner, or other officer belonging to any ship, shall wilfully cast away, burn, or otherwise destroy the ship of which he is owner, or unto which he belongeth, or in any manner direct or procure the same to be done, to prejudice any person or persons that shall underwrite any policy or policies of insurance thereon, or of any merchant or merchants that shall load goods thereon, he shall suffer death’ (4 Geo I, c.12). The provision was then slightly revised a few years later (12 Geo I, c.29), without however much change as to the scope of barratry itself.

¹⁷⁸ Marine Insurance Act of 1906, First Schedule, Rules for Construction of the Policy, n. 11. Cf. G. Pitts, *Barratry as a Covered Risk in Marine Insurance: Problems and Perspectives*, *Journal of Maritime Law & Commerce* 14 (1983), p. 131-158, at 141.

The exam of English case law seeks to follow the same order as that used to group the Italian cases, insofar as viable. Not all the groups of barratrous conducts often found in civil law courts were discussed before common law courts. In particular, contraband and voluntary change of voyage are the main kinds of barratry to be found before the common law courts, while fraudulent sinking of the vessel and lack of defence, judging from the reported cases, are virtually absent. The order in which the cases will now be discussed also takes into account substantive elements. The underlying issues are not necessarily (and not always) the same as those faced by civil law courts, because the approach itself to barratry was different, and its evolution from the old customary understanding of barratry was considerably more gradual and complex. Lastly, the number of reported cases is also considerably inferior, and concentrated mostly in the eighteenth century. This, together with the fact that nearly all of them come from a single court - the King's Bench¹⁷⁹ - explains the comparatively shorter account.

An obvious case of barratry was the flight of the master with the whole cargo. In this case, common law courts did not entertain the slightest doubt on the occurrence of barratry.¹⁸⁰ A master who fled with the cargo would have had a rather hard time explaining to a jury the subtle reasoning so dear to civil law courts. The same applied when the master sold the cargo and sank the ship feigning a mishap - another quintessential case of barratry.¹⁸¹

The change of voyage was more problematic. Just as their Continental colleagues, also the English merchants considered it an obvious case of barratry. As late as the end of the eighteenth century, for instance, the already mentioned *Ship-Master's Assistant* listed the voluntary change of voyage as the first and main case of barratry - without however providing any further explanation.¹⁸² So long as the change was not a forced one (typically, due to extremity of weather), and it was not agreed with the owner of the cargo, then no merchant would have doubts as to its barratrous nature. A judgment based on common sense, however, was not often sufficient in a court of law - at least in southern Europe. Was England different?

Among the earliest reported cases, mention should be made of a Chancery decision of 1677. Despite that the case was a rather convoluted one,¹⁸³ the Chancellor found easily for barratry and condemned the master. The reasons behind the decisions in Chancery are not generally reported, and so it is not surprising that we do not know why did the Chancellor reach his conclusion. This however does not mean that the decisions of law courts are necessarily more

¹⁷⁹ The present article does not take into account records coming from the Admiralty. The reason is twofold. On the one hand, one of the main purposes of this work lies in comparing the approach of civil law courts in Italy with that of common law courts in England, and the Court of Admiralty did not follow the common law. On the other, and moreover, the jurisdiction of the Admiralty was increasingly restricted during the early modern period, during which time Common law courts swiftly asserted their jurisdiction on the sea-carrier's liability. Cf. Rossi, *Insurance in Elizabethan England* (note 14), p. 67-75, and Oldham, *English Common Law in the Age of Mansfield* (note 162), p. 178-179 (respectively for the late sixteenth and the seventeenth centuries).

¹⁸⁰ The only doubt arose for the case the master assigned his interest in the ship to the bottomry creditor (i.e. the creditor who lent money to the master against security on the ship) and then escaped to the West Indies. In law, the master was still the owner of the vessel - so he could not commit barratry against himself. Unsurprisingly, the issue went to the Chancery, where Hardwicke C found for the plaintiff and against the shipmaster: 'Barratry - he noted - is an act of wrong done by the master against the ship and goods'. *Lewin v Suasso*, 16 Geo 2 (1743), Park, *A System of the Law of Marine Insurances* (note 176), ch. 5, p. 106-108, at 107.

¹⁸¹ On the point, the earliest reported case comes from Chancery: *Pole v Fitzgerald*, Amb. 214 (1754).

¹⁸² Steel, *The Ship-Master's Assistant*, 3rd edn. (*supra*, note 175), ch. 11, p. 110-111.

¹⁸³ Anonymous, Mich. 29 Car. 2 (1677), 2 Cases in Chancery 238, Postlethwayt, *Universal Dictionary* (*supra*, note 172), vol. 1, s.v. 'Baratry'. A shipmaster made a long detour before arriving at the agreed destination (Barcelona). As a consequence, his cargo of perishable goods (fish) arrived utterly spoiled. The factor of the merchant sued the master before the Admiralty court of Barcelona, which condemned the defendant for barratry. While the litigation continued in Barcelona, the owner of the ship brought an action of *trover* for the vessel in London. The merchant sought to stop the suit by suing the shipowner in Chancery.

detailed. Almost thirty years later, Holt CJKB could well say that what constitutes a (barratrous) change of voyage – as opposed to a (faulty) change of route – is to be determined according to mercantile usages.¹⁸⁴ This was possible because it was up to a jury to find for the occurrence of barratry. Progressively, however, the bench had to take a more proactive approach. The voluntary change of voyage entailed the termination of the policy,¹⁸⁵ releasing the insurers from liability for any mishap that might happen thereafter. If barratry was included in the policy, however, the insured had all the interest to qualify the change of voyage as barratrous: in that case the insurers would remain liable for the ensuing mishap.¹⁸⁶ The point was discussed in some length in a few eighteenth-century cases, which we are going to see now in connection with a third case of barratry – lack of licence and smuggling.

An important - and often quoted - case on lack of licence is *Knight v Cambridge* (1724).¹⁸⁷ In itself, the case was quite straightforward: a shipmaster did not pay the port duties before departure and his ship was seized by the authorities. The insured – just as it was customary among merchants – alleged barratry (a risk covered in the policy) and sought recovery for ‘fraud and negligence’ (*per fraudem et negligentiam*) of the shipmaster. The insurers however pointed out that fraud and negligence were much broader terms than barratry, and so refused payment. Condemned to pay in the Court of Common Pleas, they brought a writ of error (before the King's Bench) on the basis of the difference between fault and fraud: if the insured alleged the negligence of the master, they argued, then he could not speak of barratry as well.¹⁸⁸ The justices of the King's Bench were unanimous in confirming the previous decision. In so doing, however, the bench did not distinguish between fraud and fault, but highlighted the breadth of the scope of the concept of barratry.¹⁸⁹ At the same time, however, the court fully realised that insurance against barratry was a way to extend one's protection in case something went wrong. Playing on the ambiguity of expressions long in use could have created ‘loopholes’ leading to the very opposite result, the judges maintained.¹⁹⁰ In arguing as much, they made a sensible

¹⁸⁴ *Bond v Gonsales*, 2 Salk. 445 (1704), *per* Jolt CJKB. Cf. also Charles Viner (1678–1756), *A General Abridgment of Law and equity, Alphabetically digested under proper titles with Notes and References to the Whole*, Aldershot, 1743, vol. 16, p. 408.

¹⁸⁵ This course meant that, when the change was due to *vis maior*, the deviation does not void the policy. On the point, a particularly complex case was *Elton v Brogden*, 2 Str. 1264 (1747). In that case, the change of voyage was voluntary – but it was the choice of the crew, to which the master sought to oppose himself. The point is interesting with regard to the *vis maior* argument: in contract, the master (*qua* ordinary carrier) would have probably been considered still liable: cf. Rossi, *The liability of the shipmaster in early modern law* (note 21).

¹⁸⁶ See e.g. *Pelly v The Governor and Company of the Royal-Exchange Assurance* (1757), in Steel's *Ship-Master's Assistant*, 3rd edn. (*supra*, note 175), ch. 11, p. 116 (a case of fire onboard, which would have fallen within the scope of the insurance, had the shipmaster not changed voyage beforehand and so, held the King's Bench, voided the policy – which, most likely, excluded barratry). See also and moreover *Ross v Hunter*, 4 T.R. 33, 35 (1790): the change of voyage avoids the insurance policy, but when that same change is due to barratry then the insurers remain liable. The idea that the voluntary change of voyage, and so an intentional breach of contract, constitutes barratry can be found very clearly stated even in much later case law. See e.g. *Mentz, Decker & Co v Maritime Insurance Company* [1910] 1 K.B. 132, 133 (*per* Hamilton J).

¹⁸⁷ 2 Ld. Raym. 1349; 1 Str. 581; 8 Mod. 231. The case is discussed very clearly in John Millar (1735-1801), *Elements of the Law relating to Insurances*, Edinburgh, printed for J. Bell and G.G.J. & J. Robinson, London, 1787, pt. 2, ch. 2, p. 156-158. Cf. also *Archangelo v Thompson*, 2 Camp. 621 (1811), *per* Ellenborough CJKB.

¹⁸⁸ 2 Ld. Raym. 1349: ‘if the word baratry should import fraud, yet it does not import neglect and the fact here alledged is, that the ship was lost by the fraud and neglect of the master’.

¹⁸⁹ *Ibid.*, 1349-1350: ‘he that commits a fraud, may properly be said to be guilty of a neglect, viz. of his duty. Baratry of a master is not to be confined to the master's running away with the ship; and the general words of the policy ought to be construed to extend to losses of the like nature as those mentioned before: now losses arising from the fraud of the master, are of the same nature as if he had run away with the ship, supposing baratry was to be confined to that, which it is not, because it imports any fraud.’

¹⁹⁰ 1 Stra. 581-582: ‘The end of insuring is to be safe in all events, and it would be very prejudicial, if we were to be making loop-holes to get out of these policies. The insurer knows the master, and whether he can trust him;

choice – but missed a good opportunity to clarify the precise scope of barratry and its legal features.

Some decades later, the situation had not changed much. Let us take for instance the important case of *Vallejo v Wheeler* (1774). Any work touching on the history of insurance mentions it, but often for a different reason: in *Vallejo*, Mansfield CJKB made clear that barratry could well happen against the merchant charterer, and not just the owner of the ship. If the merchant hired the whole vessel, then to the purposes of that specific voyage he ought to be considered the owner of the vessel.¹⁹¹ The case is often mentioned also because there Lord Mansfield spoke about the nature of barratry more openly than elsewhere. Still, he did not say anything new. Rather, and especially from a comparative viewpoint, the case seems of particular interest for another reason: the very different approach of common and civil law courts. The counsel for the defendant (John Alleyne) said exactly what a Continental law court would have said: in order to have barratry, the conduct of the shipmaster must result in ‘a direct injury to the owners’, done ‘with a direct intention to commit that injury.’¹⁹² The facts of the case were quite simple: the shipmaster made a detour to take onboard some brandy, the ship ran into a storm and the cargo was lost. Had the same case been discussed before a civil law court, it would have been painfully difficult for the insured to recover – there was no direct causality, and especially no machination to harm the merchant. As the counsel for the defendant put it, ‘the intention [of the shipmaster] was only to get a little money himself, without injuring’ the merchant.¹⁹³ The counsel for the plaintiff (Francis Buller) sought to shift the focus from the mishap actually occurred (storm hitting the ship because of the change of voyage) to what could have happened (seizure of the ship for contraband). Seeking to smuggle brandy, the plaintiff argued, the shipmaster put the whole cargo at risk of being seized, whether or not that risk eventually materialised.¹⁹⁴ Much unlike the stringent definition provided by the defendant, the plaintiff recalled *Knight v Cambridge* and stressed that ‘fraud means not only a crime, but any wilful fault or evil design and even neglect, provided it be *crassa negligentia*, will amount to barratry’.¹⁹⁵ Whether or not the master was scheming to defraud the merchant insured, therefore, his behaviour was clearly barratrous. It is difficult to imagine an approach more distant from the civil law one: not only the scheme of the shipmaster did not lead to the specific risk of seizure, but the scheme itself was not made with malice either.

The bench, however, agreed with the plaintiff – and possibly even went beyond him. Mansfield CJKB qualified the breach of duty as barratry, and on that basis considered the change of voyage at large – and not just the contraband – as barratrous: the merchant insured, argued Mansfield, ‘trusts he will set out immediately; instead of which the master goes on an iniquitous scheme, totally distinct from the purpose of the voyage to Seville: that is a cheat, and a fraud on [the merchant], who thought he would set out directly’.¹⁹⁶ As such, barratry happened in the very moment the contract was breached: ‘the moment the ship was carried from its right course, it was barratry’.¹⁹⁷ This qualification of barratry – highlighting the breach of contract and downplaying the criminal intent – had clear implications also on the causality link. Indeed, continued Mansfield, ‘whether the loss happened in the act of barratry, that is, *during* the

and he that insures against his running away with the ship, never imagined he might or would be guilty of any other fraud.’

¹⁹¹ *Vallejo v Wheeler*, 1 Cowp. 143, 153-156 (1774). Cf. *Soares v Thornton*, 1 Moore K.B., 373 (1817), and *Boutflower v Wilmer*, Trin. 21 Geo. 2 (unreported, cited in Selwyn, *An Abridgment of the Law* (note 173), vol. 2, ch. 25, n. 4, p. 971, note c). See further *Nutt v Bourdieu* (1786), *infra*, note 203.

¹⁹² *Vallejo v Wheeler* (1774) 1 Cowp. 143, 150.

¹⁹³ *Ibid.*, 151.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*, 145.

¹⁹⁶ *Ibid.*, 155.

¹⁹⁷ *Ibid.*

fraudulent voyage or *after*, is immaterial; because the voyage is equally altered, even though there is no other iniquitous intent.’¹⁹⁸ The puisne judges agreed.¹⁹⁹ Among them, the position of Aston J is worth noting. When speaking of barratry in abstract terms, Aston described it in terms of fraud.²⁰⁰ But when looking at the specific case to see whether barratry had or not occurred, he seemed to consider barratry ultimately as a breach of duty.²⁰¹

The same attitude is ultimately visible also in another famous case decided by Lord Mansfield, *Nutt v Bourdieu* (1786).²⁰² As with *Vallejo*, also this case focused on whether it was possible to qualify the fraud of the shipmaster against the merchant as barratry – and, especially, to consider the shipowner as accomplice to that fraud. In 1775, an English merchant obtained a judgment from the Parliament of Bordeaux (22 August 1775) against both shipmaster and shipowner for barratrous change of voyage. The King’s Bench however did not recognise the judgment.²⁰³ At common law, maintained the King’s Bench, barratry can be committed only by the shipmaster towards the owner. In that case, the owner of the ship was the instigator of the master’s barratry: while this amounted to fraudulent conduct, the judges argued, it could not be qualified as barratry.²⁰⁴ To our purposes, the case is interesting because it would seem to strengthen the conclusions reached in *Vallejo*. Mansfield CJKB agreed with the counsel for the defendant (serjeant-at-law Samuel Heywood): as barratry can be found only against the owner, if the shipmaster is acting under the owner’s direction he may not be found guilty of barratry. ‘[B]arratry cannot be committed against the owner with his consent: for though the owner may become liable for a civil loss by the misbehaviour of the captain, if he consents, yet that is not barratry.’²⁰⁵ The position of the defendant, however, is not fully matching that of the court. To highlight the difference with the French understanding of barratry, the defendant insisted that, at common law, barratry was a crime, not just any negligence.²⁰⁶ Mansfield

¹⁹⁸ *Ibid.* (emphasis in the text).

¹⁹⁹ Ashurst J held that ‘the act of the master is a fraudulent act; and if the loss is consequential upon such fraudulent act, it is barratry against which the party is insured: and therefore the insurers shall not object upon a fact which is itself a forfeiture of the policy’ (*ibid.*, 156). Willes J simply remarked that ‘if the ship had proceeded on her first intended course, she would have escaped the storm’ (*ibid.*).

²⁰⁰ Barratry, argued Aston J, ‘is not confined to the running away with the ship, but comprehends every species of fraud, knavery or criminal conduct in the master, by which the owners or freighters are injured’ (*ibid.*, 155-156).

²⁰¹ So, according to Aston J, the conduct of the shipmaster amounted to barratry ‘for he was acting for his own benefit, and without the consent, or privity, or any intended good to his owner’ (*ibid.*, 155).

²⁰² 1 T.R. 323.

²⁰³ While not frequent, this practice is attested for the King’s Bench (and not only in the Admiralty) also in the previous century: see e.g. *Jurado v Gregory*, 1 Vent. 32 (1669). In that case, however, the decision of the foreign court seems to have been just interlocutory: cf. 1 Lev. 267.

²⁰⁴ The case is particularly well explained in Millar, *Elements of the Law relating to Insurances* (note 187), pt. 2, ch. 2, n. 10, p. 171-177. The decision in *Nutt v Bourdieu* however does not take into account the case where the merchant would charter the whole vessel. On the point see *supra*, note 191.

²⁰⁵ 1 T.R. 323, 330 *per* Mansfield CJKB. Cf. the position of Serjeant-at-law Heywood: ‘In barratry, the captain must commit a fraud upon *his owner*: but if the *owner* be guilty, it then ceases to be barratry, and becomes some other crime for which he is answerable to the party injured. There can be no doubt in this case against him whom the fraud was committed (*ibid.*, 329, emphasis in the text). At the same time, however, the consent of the owner to the unlawful conduct of the shipmaster may not be presumed and must be proven by the plaintiff. Doing otherwise would amount to ‘presume fraud in another person’ (*Ross v Hunter*, 4 T.R. 33, 38 [1790], *per* Buller J).

²⁰⁶ ‘[I]n France barratry is any *neglect* whatsoever on the part of the master; but in *England* the act must partake of the nature of a *crime* to constitute barratry’ (1 T.R. 323, 328, emphasis in the text). In France, the *Ordonnance de la Marine* of 1681, lib. 3, tit. 6, art. 28 (a provision then kept in the *Code de Commerce* of 1807, art. 353) substantially merged together fault and barratry, providing that the insurers would be answerable for the fault of the shipmaster only if the policy included also barratry. From now on, it was no longer possible to fully distinguish fault-based liability of the master from his liability for fraud. I hope to come back to this - very peculiar - point in the near future with a specific study.

however did not make any distinction between crime and fault, but – just as in *Vallejo* – described barratry in terms of violation of the duties of the shipmaster in respect to the shipowner. ‘Barratry – he said – is something contrary to the duty of the *master* and *mariners*, the very terms of which imply that it must be in the relationship which they stand to the *owners of the ship*.’²⁰⁷ Ultimately, it is precisely because of this qualification of barratry that the bench refused to find for its occurrence against the merchant when the shipowner was in full agreement with the shipmaster. The duty of the shipmaster is first and foremost towards the shipowner, and barratry is a breach of that duty.²⁰⁸

3.3. Breach of duty vs. fraudulent intent: towards the construction of barratry as fraud

The ambiguity as to the precise nature of barratry had obvious consequences on its scope. But it was only after Lord Mansfield retired from the bench that the tension between the qualification of barratry as ‘simple’ breach of duty and as fraudulent breach of duty fully emerged. If this tension became more visible especially after Mansfield, however, its origins predated him. The crucial element was whether acting for the benefit of the shipowner was always sufficient to exonerate the master from the accusation of barratry. If barratry was as an intentional breach of duty of the master, then no shipmaster acting in the interest of the owner could be found guilty of it. But if barratry was first of all a crime, then the simple pursuing of the owner’s interest might not always be sufficient to avoid it.

An important case, possibly the earliest (among the reported ones) where this issue clearly emerged was *Stamma v Brown* (1742).²⁰⁹ In that case, the shipmaster did not go from London directly to Marseille (as he was supposed to), but took a long detour and called at Genoa, Leghorn and Naples first. On her way back to Marseille, the ship was intercepted by a Spanish vessel. The mishap was clearly due to the long detour. Despite the shipmaster’s insistence that it was ‘no more than a deviation’,²¹⁰ the detour clearly looked like a change of voyage. But could it be considered as barratry when it was done in the interest of the owners? Unlike most of the other cases dealing with barratry, here the only wrongdoing was the breach of the charterparty. As such, the counsel for the defendant insisted that, whether simple deviation or actual change of voyage, the shipmaster’s conduct ‘cannot be called a crime in the master, when he is acting all the while for the benefit of his owners’.²¹¹ The bench seemed to agree, at least in principle. Lee CJKB instructed the jury not to find for barratry if they found that the deviation of the voyage took place for the benefit of the shipowner and not for the private advantage of the shipmaster.²¹² Accordingly, the jury found against barratry.²¹³ As Lee remarked, ‘to make it barratry there must be something of a criminal nature, as well as a breach of contract’.²¹⁴ Lee’s views on what this ‘something’ should be, however, would seem rather strict: ‘barratry – he is reported to have said – must be *ex maleficio* with intent to destroy, waste, or embezzle, the goods’.²¹⁵ This statement seems revealing of the inner tension between breach of duty and

²⁰⁷ 1 T.R. 323, 330 (emphasis in the text).

²⁰⁸ This is consistent with the possibility of finding for barratry against the merchant where he chartered the whole ship. For the purposes of that voyage, the master would be considered as owner, and so the duty of the shipmaster would be first and foremost towards the merchant. See the cases mentioned *supra*, note 191.

²⁰⁹ 2 Stra. 1173.

²¹⁰ *Ibid.*, 1174.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ It should be added that, prior to the commencement of the voyage, the merchant consignor came to know of the planned change of voyage, and it is not entirely clear whether he obtained any reassurance on the point. As such, it was argued before the bench that the merchant was aware of the change of voyage before loading the cargo onboard. 2 Stra. 1173, 1174.

²¹⁴ *Ibid.*, 1174-1175.

²¹⁵ These words may be found in the manuscript of John Ford, as reported by Ellenborough CJKB in *Earle v Rowcroft*, 8 East 126, 137 (1806). On the identity of the author of the Ford’s manuscript see recently J. Oldham,

actual fraud: even if the shipmaster did not act for the benefit of the shipowner, so long as he did not commit any crime the simple change of voyage could not amount to barratry. This implicit tension in the understanding of barratry did not emerge in full in *Stamma*, probably because during the trial it appeared that the merchant consignor had been aware of the planned change of voyage from the very beginning - even before loading the cargo onboard the ship. This, clearly, closed the matter.²¹⁶ In point of law, therefore, the problem remained unsolved: had the merchant insured not known of the planned change of voyage, would the fact that the change was meant to the exclusive benefit of the shipowner suffice to exclude barratry?

The issue was not solved under Mansfield, and his successor – Lord Kenyon – did not always show the same sensibility of his predecessor towards commercial law issues. Still, the progressive shift towards barratry as fraud was clearly visible. In *Ross v Hunter* (1790)²¹⁷ the change of voyage was coupled with a clear fraud. The shipmaster sought to supplement his income not just with some brandy but with a far more lucrative trade – slaves. While things did not go as planned (some Spanish ships patrolling the area forced him to flee before he could conclude his shady business), there was little doubt as to his fraud. What made the case interesting, however, was the fact that the master did not change the voyage to commit it: he intended to sell the slaves in the same place of arrival as that of the rest of the merchandise (New Orleans). But he deemed prudent to cast the anchor away from the port and make some discrete enquiries as to potential buyers first. Thereafter, realising the danger, he fled. This peculiarity might have encouraged a more in-depth discussion at trial as to barratry and the change of voyage. When exactly is the change of voyage barratrous? In the words of Kenyon CJKB: ‘when did the barratry commence? It commenced when [the shipmaster] first went out of the due course of his voyage in violation of his duty’.²¹⁸ On the face of it, Kenyon’s answer would not strike as very different from the position of Mansfield in *Vallejo*.²¹⁹ Among the puisne judges, however, Buller J went beyond that, and made an important point: ‘In one sense of the word [barratry] is a deviation of the captain *for fraudulent purposes of his own*; and that is the distinction between *deviation*, as it is generally used, and *barratry*.’²²⁰ To qualify as barratry, in other words, the breach of duty had to be a fraudulent one – a simple breach of the charter-party would not do.

Most of the times, the fraudulent conduct of the shipmaster would also entail the violation of his duties towards the owner. So, for instance, a year before *Ross* the King’s Bench found for barratry when the contraband of the shipmaster (this time, just ‘innocent’ brandy) led to the seizure of the ship. Here as well Kenyon CJKB argued that the shipmaster ‘in defiance of his duty took on board certain commodities which subjected the ship to seizure.’²²¹ But this time the breach of duty clearly consisted in a fraudulent activity - contraband. More problematic, however, is the case where the shipmaster did something clearly unlawful, but only to pursue the interests of the owner – just like *Stamma v Brown*. In such cases the tension between breach of duty and fraud emerged clearly, but was not readily solved.

An important – if somewhat indirect – case in this respect was *Robertson v Ewer* (1786).²²² A shipmaster sought to force an embargo, but without success: the ship was intercepted, brought

The Indispensability of Manuscript Case Notes to eighteenth-century barristers and judges, in A. Musson and C. Stebbings (eds.), *Making Legal History: Approaches and Methodologies*, Cambridge 2012, p. 30-52, at 45.

²¹⁶ 2 Stra. 1173, 1174. The point is surprisingly ignored in most literature mentioning the case, despite that it was highlighted by Lord Mansfield in the important case of *Vallejo v Wheeler*, 1 Cowp. 143, 154.

²¹⁷ 4 T.R. 33.

²¹⁸ *Ibid.*, 37.

²¹⁹ *Supra*, §3.2.

²²⁰ 4 T.R. 33, 37 (emphasis in the text).

²²¹ *Havelock v Hancill*, 3 T.R. 277, 278 (1789).

²²² 1 T.R. 127.

back to the port, and forced to stay there for some time after the embargo was lifted. The dispute focused mainly on the recoverability of the damage to the hull and of the crew's wages and provisions – which the King's Bench eventually excluded. To our purposes, however, the importance of this decision does not lie much in what it said, but in what it did not say. The damage was not caused by enemies or pirates, but by the King's navy. The only way to insist on its recoverability was therefore to stress the unlawful conduct of the shipmaster, which gave rise to those damages.²²³ But the counsel for the defendants (Erskine, the future Chancellor) pointed out that barratry had to be excluded for the simple reason that the master acted for the benefit of the owners, not to defraud them.²²⁴ While the insurers were eventually absolved from any liability, the bench found for them mainly on other grounds.²²⁵ Thus, the specific question of whether acting to the benefit of the insured was sufficient to avoid barratry was not discussed in much detail, and so the point remained unclear.

Few years later another case, *Moss v Byrom* (1795),²²⁶ was more specific on the point. At the time, many British sailors in Bermuda were persuaded that the enemy ships patrolling the area would have captured any vessel that had no letters of mart, and so they were reluctant to enlist. To entice them, the owners of a ship took out letters of mart. But they did so with the only purpose to get a crew, not to start privateering. Indeed, the shipowners did not even ask for the certificate of clearance, which was necessary to engage in privateering in times of war. The shipmaster, however, took the letters of mart more seriously, and started to chase enemy vessels. While carrying a prize back to Bermuda, the ship was driven ashore in a storm and the insured cargo was lost. The problem was whether the behaviour of the shipmaster could be qualified as barratrous. The defence insisted on the simple fact that the shipmaster acted in the interest of the owners. That, however, failed to persuade the bench. While Kenyon CJKB found for barratry on the simple basis that chasing after enemy vessels amounted to a change of voyage,²²⁷ Lawrence J was more specific: 'though the captain might conceive that what he did was for the benefit of the owners, yet if he acted contrary to his duty to them, it was barratry.'²²⁸ While not fraudulent, and in the interest of the owners, the conduct of the shipmaster was nonetheless regarded as barratrous because it clearly amounted to a breach of duty - the master went against the express instructions of the owners. A breach of duty, however, that could not be construed as fraudulent.

Later decisions insisted more on the need of the fraudulent purpose of the shipmaster in order to find for barratry. However, most of them did so to distinguish between faulty and barratrous behaviours, not to provide a definition of barratry. The inner ambiguity of construing barratry as a breach of duty is probably one of the reasons why the bench progressively insisted on the

²²³ *Ibid.*, 129.

²²⁴ *Ibid.*, 130: 'the act of the master did not amount to barratry, because what he had done had been intended for the benefit of the owners; much less could the loss'.

²²⁵ Mainly, although the policy was silent on the issue, hull insurance customarily did not include crew's wages and provisions, not to mention that the damage to the ship (caused by the Royal fleet in forcing the vessel back to the port) was below 3%, and so possibly below the usual threshold for recoverability (the so-called *de minimis* rule); besides, the same damage could not be qualified as *factum principis* either (for the *princeps* in question was the insured's own sovereign, not a foreign one). See further Rossi, *Insurance in Elizabethan England* (note 14), p. 178 ff. (on hull policies), p. 262 ff. (on *factum principis*) and p. 351, note 96 (on the *de minimis* rule).

²²⁶ 6 T.R. 379. On the point see esp. G. Pitts, *Barratry as a Covered Risk in Marine Insurance: Problems and Perspectives*, *Journal of Maritime Law & Commerce* 14 (1983), p. 131-158, at 134.

²²⁷ According to Kenyon CJKB, the shipmaster's conduct 'was barratry in the captain, because it was contrary to his duty to his owners. It was contrary to his duty, and to the prejudice of his owners, because they stipulated by the charter-party that the ship should sail directly to Liverpool; and therefore they were liable to the freighters for any damage that might happen in consequence of that deviation' (6 T.R. 379, 382-383).

²²⁸ *Ibid.*, 383. Cf. also the *obiter* of Parker CJ in *Wiggin v Amory*, 14 Mass. Rep. 1. Cf. Weskett, *A Complete Digest* (note 174), ch. 13, p. 232.

element of fraud. A particularly good example is *Phyn v Royal Exchange Assurance Co* (1798).²²⁹ Strong currents brought a ship bound to Jamaica towards Santa Cruz. The shipmaster decided to call there, but shortly thereafter it arrived news that Spain was at war with Britain (the beginning of the Anglo-Spanish war), and the ship was seized. The question was whether calling at Vera Cruz entailed a barratrous change of voyage. The stay could not be considered as necessary for the ship (the master went to Vera Cruz for ‘temporary refreshment for [himself] and his company’).²³⁰ As such, it was a voluntary act, but one from which the master would not stand to gain anything. Because of that, a first trial found against the occurrence of barratry: the jury held that no fraud had been committed. The insured, however, filled a motion for new trial, seeking to shape as barratry the simple breach of duty: the shipmaster acted wilfully, they claimed, knowing that his actions could prejudice the owners. The obvious obstacle to this reconstruction was that the shipmaster clearly meant no fraud. To make up for it, the counsel for the insured divided fraud in its two key components: criminal design and intent to gain. The intent to gain was present, they argued, for the master acted to his own advantage, although not in a pecuniary sense.²³¹ The other and main element of fraud was the most interesting aspect of the insured’s reconstruction, for they sought to qualify the breach of duty as criminal intent. ‘Criminality in the sense used in the books on this subject – argued the insured – means only criminal in respect of the duty which the captain owes to his owners: in which sense any wilful act in disobedience to their orders or manifestly to their prejudice is an act of criminality.’²³²

Not surprisingly, the bench was not particularly persuaded. The jury had found against the occurrence of – proper – fraud, and the judges did not see the reason for granting a new trial.²³³ The most important statement was made by Lawrence J. In a way, his statement was prompted by the fact that the insured recalled a statement made by the same Lawrence in another and slightly earlier case (which we have already seen, *Moss v Byrom*). There, Lawrence J seemed to suggest that the shipmaster’s breach of duty towards the owner was barratry – seemingly, without the need that such a breach amounted to fraud.²³⁴ Lawrence J therefore sought to clarify his previous statement: ‘there is no case I know of in which it was said that the act of the captain is barratry merely because it is against the interest of the owners, unless it be done with a criminal intent.’²³⁵

While Lawrence J’s statement is not often reported in later cases, the inner ambiguity of barratry as breach of duty was progressively coming to light and requiring clarification. This seems to be the main reason why, from the eve of the nineteenth century, the bench was

²²⁹ 7 T.R. 505.

²³⁰ *Ibid.*

²³¹ *Ibid.*, 506.

²³² *Ibid.*, 507.

²³³ ‘[A]s it seems admitted that there must be fraud to constitute barratry, and as the jury have expressly said that there was no fraud in this case – held Kenyon CJKB – I am of opinion that there was no barratry’ (*ibid.*). Similarly, Grose J held that ‘the plaintiffs’ counsel do not say that the captain did any thing fraudulently for the purposes of his own against the interest of his owners: and it is enough for me to say that I do not see that any fraud was committed, that we cannot presume fraud, and that the jury have negatived fraud’ (*ibid.*, 508).

²³⁴ *Supra*, text and note 228.

²³⁵ 7 T.R. 505, 508. As Lawrence J had it, ‘Some stress has been laid on an expression of mine in *Moss v Byrom*, where it is supposed I gave an opinion that fraud was not a necessary ingredient in barratry, in saying “*Whatever was done* by the captain to defeat or delay the performance of the voyage was barratry in him, it being to the prejudice of his owners”: but what fell from me there must be taken with a reference to the case then in judgment before the Court, where there were strong circumstances to shew a criminal intention in the captain; and the words said to have been used by me must be understood thus, “*Those things that were done by the captain in that case* to defeat or delay the voyage constituted barratry” etc.’ (*ibid.*, emphasis in the text).

increasingly firm – and clear – in requiring not just a violation of the master’s duties in respect of the owner, but that such a violation amounted to actual fraud.

A clear case in this sense is *Earle v Rowcroft* (1806),²³⁶ a decision often cited but seldom put in relation to the tension between breach of duty and fraud in previous case law. In fact, this decision provided a clear confirmation of barratry as a criminal breach of duty to the detriment of the owner. In this case, the shipmaster sought to act in the interest of the owner and according to their instructions: reaching the African coast to barter the cargo locally as swiftly as possible.²³⁷ Not finding good merchandise in the British settlements, the master opted for the Dutch ones (fort D’Elmina). At the time, however, Britain was at war with the Netherlands. The moment the ship went out of the Dutch fort, she was intercepted by a British vessel and taken as prize for trading with the enemy. Could the shipmaster’s behaviour be qualified as barratry? Just as *Moss v Byrom*, the shipmaster had nothing to gain from his conduct. Further – and unlike *Moss* – he did not contravene the instructions of the owners either. Much on the contrary, the mishap occurred because the shipmaster took those instructions to the letter. Still, in doing so he committed a crime – without the consent of the owners. Even if the crime was hardly aimed against the owners, the bench construed the criminal conduct in terms of fraudulent breach of duty against them.²³⁸ In so doing, Ellenborough CJKB stated clearly that, in order to qualify as barratry, the breach of duty had to be fraudulent: ‘for unless they be accompanied with fraud, or crime, no case of deviation will fall within the true definition of barratry, as above laid down.’²³⁹

While fraud was increasingly considered as a necessary element to find for barratry, its concrete definition remained remarkably broad. It would seem that the bench used this requirement mainly to restrict the barratrous breach of duty to the wilful prejudice to the interests of the owners. So, for instance, in *Heyman v Parish* (1809)²⁴⁰ the irresponsible – but intentional – conduct of the shipmaster (setting sail late, with unfavourable wind, contrary to the directions of the pilot, and even cutting the anchor that the crew had cast to stop the ship) was found to be barratrous. When the counsel for the defendant objected that the alleged conduct of the shipmaster might have been negligent but it could not be considered as fraudulent, Ellenborough CJKB replied that proper fraud was ‘not necessary. It has been decided - he continued, alluding to *Earle v Rowcroft* - that a gross malversation by the captain in his office is barratrous.’²⁴¹ Similarly, in *Pipon v Cope* (1808),²⁴² after the third time that the ship was seized for contraband, the failure of her shipmaster to control his crew was deemed barratrous. Allowing ‘these repeated acts of smuggling by the crew’, held the bench, amounted to ‘*crassa negligentia*’.²⁴³ The bench, it might be noted, was not looking for fraudulent or criminal features

²³⁶ 8 East 126. Cf. Weskett, *A Complete Digest* (note 174), ch. 13, p. 233-234.

²³⁷ Barter was normal practice for trading with regions where currency was not in use, so much so that it was expressly taken into account in some insurance compilations dealing with the evaluation of cargo for return voyages (where the outbound cargo insured would be traded with different merchandise for the inbound leg of the journey). Cf. Rossi, *Insurance in Elizabethan England* (note 14), p. 357, note 130.

²³⁸ As Ellenborough CJKB had it, ‘where [the owners’] instructions [to the shipmaster] are silent, he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage: because in the absence of express orders to the contrary, obedience to the law is implied in their instructions. Therefore the master of a vessel, who does an act in contravention of the laws of his country, is guilty of a breach of the implied orders of his owners. I cannot, therefore, for a moment suffer it to be supposed that a captain is not guilty of a breach of trust to his owners, who, in contravention of the law, the observance of which, nothing being expressed to the contrary, is implied in their orders, does an act which is injurious to them’ (8 East 126, 133).

²³⁹ *Ibid.*

²⁴⁰ 2 Camp. 149

²⁴¹ *Ibid.*, 150.

²⁴² 1 Camp. 434.

²⁴³ *Ibid.*, 436, *per* Ellenborough CJKB. During the third seizure by the authorities, the ship was moored in Weymouth harbour. Due to the force of the tide, however, another ship was driven against her causing much

in the master's conduct, but rather for intentionality. And his clear state of *culpa lata* led the judges to presume as much.

Other cases insisting on the need of criminal conduct often did so to distinguish negligence from intentionality.²⁴⁴ This way, the position of the common law courts ultimately became what described in passing by Buller J in 1785: barratry is 'a wilful act of the captain to the injury of the owners.'²⁴⁵ A century later, the same position was eventually accepted in the already mentioned Marine Insurance Act of 1906 – a 'wrongful act' committed intentionally ('wilfully') to the detriment of the owner.²⁴⁶

4. Conclusion

To conclude this comparison between Italian and English courts on the barratry of the master, we might go back to the problem of causality. While much has been said on the approach of Italian courts to causality, the English cases we have seen are almost entirely silent on the matter. It is one of those cases where silence speaks volumes. Much unlike civil law courts, qualifying barratry as a breach of duty dispensed with the need to ascertain a direct causal link between the shipmaster's conduct and the loss: the distinction between direct and indirect causation, so dear to civil law judges, found little place in the common law courts' approach to barratry. It seems rather telling that there is no (reported) case where the common law courts raised any objection as to the recoverability of the loss once barratry was ascertained.²⁴⁷ This does not mean that English judges took a particularly wider stance on causality in insurance cases.²⁴⁸ The extremely narrow approach of civil law courts was entirely their own doing. This

damage. The owner sought to recover from the insurers, who objected that the damage was due to barratry (which was excluded from the policy).

²⁴⁴ See for instance (to mention also some cases in the Common Pleas) *Everth v Hannam*, 6 Taunt 375 (1815). A shipmaster brought his vessel too close to the coast of Norway at a time where that country was under a blockade by Sweden, causing its seizure. The insured pleaded that the shipmaster's conduct was barratrous, but Gibbs CJCP dismissed the claim: '[t]he master cannot be fixed with barratry, unless he acts criminally' (6 Taunt. 375, 386). Cf. also S. Hodges, *Cases and Materials on Marine Insurance Law*, London-Sydney 1999, p. 513.

²⁴⁵ *Saloucci v Johnston*, Trin. 25 Geo 3 (1785); Park, *A System of the Law of Marine Insurances* (note 176), ch. 5, p. 415-417, at 416. That case focused mainly on whether the master of a neutral vessel was under obligation to allow vessels of belligerent countries searching it. In that occasion the master refused, not least because of the suspicious conduct of the other ship (which changed its colours – from British to Spanish – in proximity of Barbary). The other ship, it turned out, was truly Spanish, and brought the British ship as prize to Spain. The bench considered the conduct of the master as justified by the circumstances. Moreover, it found against the duty of the neutral ship to allow being searched. However - and, to our purposes, more importantly - the same Buller J also added that the shipmaster's conduct 'would have been barratry, if it had been an act, which forfeits the neutrality [of the ship]' (*ibid.*). In that case, following Buller J's reasoning, the shipmaster's conduct would have been barratrous because he would have intentionally caused a prejudice to the owner, regardless of any fraudulent or criminal element in the shipmaster's conduct. On this (for other reasons) famous case see esp. A. Addobbati, *The capture of the Thetis. A Cause célèbre at the Madrid Council of War (1780-1788)*, in A. Alimento (ed.), *War, Trade and Neutrality. Europe and the Mediterranean in the Seventeenth and Eighteenth Centuries*, Milan 2011, p. 146-159.

²⁴⁶ *Supra*, text and note 178.

²⁴⁷ The only case touching on causation is *Lockyer v Offley*, 1 T.R. 252 (1786), a typical case of seizure of the ship due to her master's contraband of brandy. The seizure of the vessel, however, occurred nearly a month after the arrival at destination (the ship arrived on the Thames on the first of September 1785 and was seized by the authorities on the 27th of that month). The problem was whether the insurers would be liable for a mishap occurred after the completion of the voyage, but due to a cause (smuggling) accruing during the voyage. The bench (Willes J) observed that hull policies are concluded 24 hours after the ship arrives at the port of destination (as it was customary in hull insurance: Rossi, *Insurance in Elizabethan England* [note 14], p. 317-18). Even if the loss was ultimately due to barratry, therefore, the fact that it materialised only after the insurance was over was sufficient to discharge the insurers of any liability. 1 T.R. 252, 259-261.

²⁴⁸ On the point see esp. *Jones v Schmoll*, 1 T.R. 130, note a (1785). The case was a rather brutal one – centred on the repression of a revolt of a cargo of slaves onboard, leading to the death of about fifty of them and the

stark contrast between civil and common law courts is a direct consequence of the civilians' classification of barratry as a form of aggravated theft – or in any case as a delictual figure closely associated with theft (through the crime of extortion). As barratry could be explained only by association with recognised delictual figures, it had to be qualified as a specific sub-category of one of the main delicts. All the elements required to find for those broader delictual figures, therefore, were also needed for barratry. But condemning a thief was considerably easier than explaining the conduct of a shrewd shipmaster in terms of theft. Not following the same path, common law courts saw no reason to narrow their ordinary approach to causation. Much to the contrary, so long as barratry remained a breach of duty, finding a sufficient causal link between master's conduct (i.e. his breach) and loss was very easy. For the English judges, the main issue was another: deciding whether the plaintiff had to prove only the breach of duty or also the fraud. This discussion ultimately led the bench to require an intentional breach of duty. But this intentionality had little to do with causation: it could be proven by examining the conduct of the shipmaster, and siding with the most probable explanation. When that conduct did not seem just negligent but clearly appeared wilful, barratry was proven.

Confronted with something new, civil law courts had necessarily to recur to old schemes. A conduct was punishable only insofar as it could be classified within a specific category. Qualification meant therefore first and foremost classification, and classification operated within a closed normative system. A system of discrete categories has always gaps: the only way to fill them is to stretch the boundaries of those categories. But, in order to do so, it is necessary to apply the features that identify the categories also to what lies outside them. Stretching the boundaries of those categories is always a Procrustean operation. This Procrustean approach is particularly clear when looking at the progressive absorption of mercantile usages within the civil law. The problem was not just about single provisions, it was on what exactly counted as a provision. Extending their jurisdiction on mercantile issues, civil law courts were confronted with a pre-existing normative framework different from their own. For the civil lawyers, the problem with mercantile customs was ultimately not the absence of specific rules, but their flexibility: among merchants, most definitions were not meant to circumscribe a specific conduct and isolate it from close-by (and so, fairly similar) ones. They were meant to explain the conduct on the basis of what most merchants would do in that case. Much on the contrary, for a civil lawyer the primary function of legal rules was to circumscribe specific conducts and crystallise them into definitions. Thus, applying a definition thought for a specific conduct to a different one would necessarily lead to distortions. Seeking to describe that different conduct with definitions extraneous to it led to the imposition of requirements not fully compatible with it. The result was the exceedingly narrow scope of barratry that we have seen.

Had the common law courts started to decide on issues of barratry a couple of centuries earlier, the result might have been comparable to what happened in civil law courts. The stricter approach of earlier common law to the forms of action might have required some discussion on procedural issues, but the result would have probably affected the substance (in the sense of *materielles Recht*) just as much. The fact that most substantive issues were left to the jury to decide without much intervention (even in the form of specific guidance) from the bench for a long while is of great significance. Because when the common law courts did intervene, their intervention focused only on specific, limited points. The greater flexibility of the English

serious wounding of many more. In point of law, the issue was whether the depreciation of the cargo (the death of some slaves and the wounding of others) could be recoverable. The bench, and especially Mansfield CJKB, ruled for its non-recoverability due to the remoteness of damage. In so doing, the bench detached itself from the (older) customary position, which excluded the recoverability of such a loss not because the damage was remote, but in order to limit the risk of the insurers (and, in so doing, implicitly acknowledging that the loss would have been recoverable). Cf. again Rossi, *Insurance in Elizabethan England* (note 14), p. 167-168.

approach was partially due to the absence of any *stare decisis* rule (which, as it is well known, appeared only after the hierarchical re-organisation of the courts in the nineteenth century), whereas in the Continent many high courts progressively hardened their *stylus curiae* into semi-binding precedents. Moreover, English courts did not have to 'squeeze' the conduct of the master into a specific 'box'. The greater flexibility offered by the jury system is something that is not often put in relation to the development of case law, especially in a comparative perspective. While this might appear a truism, it is crucial in understanding the transition from mercantile usages to legal terms, and especially why did this transition lead to such different outcomes in civil and common law.

What remains to be seen is yet another truism. Whenever the facts of the case were clearly pointing to the barratrous conduct of the shipmaster, the King's Bench had little difficulty in finding for barratry. That was hardly the same with the Italian courts, which found for its occurrence only in extremely rare cases. Narrowing the scope of the barratry of the master had the obvious result of widening the scope of his fault. While the insurance policy could easily exclude barratry, however, it could not rule out fault. If most cases of fraud of the master came to be classified as fault, it follows that the ultimate effect of the narrow approach of the Italian courts was to make the insurers liable for most cases of barratry, even when the policy had explicitly excluded barratry from the risks insured against. Did this have any effect on the insurance market? Did it contribute to the success of the London market (which attracted an increasing number of Continental underwriters and policies)? Was the position of other civil law courts similar to that of the Italian ones? Was any legislative reform introduced as a reaction against this position?²⁴⁹ Such (and similar) questions clearly fall beyond the scope of this work. But they might be worth asking.

Civil law courts struggled with barratry. This would seem another platitude, but it becomes more interesting if we think that barratry was not an isolated case. Rather, barratry may well be considered just an example of the difficulty experienced by civil law courts to find a place for offences that would not fit in with their system of discrete categories - whether contractual, delictual and even criminal. A good example for instance comes from the offence of 'hamesucken' in Scots law, likely of Germanic origins,²⁵⁰ which could be roughly explained as the crime (or, indeed, the delict) of assaulting a person in his or her own house. Given the overlaps with several other wrongdoings, finding for the occurrence of *hamesucken* – and, especially, distinguishing it from the other crimes and delicts that might have resulted from the very same conduct – was anything but straightforward for the courts.²⁵¹ In the case of barratry, however, there was an obvious candidate: *locatio-conductio* itself. A Roman lawyer would have placed the fraud of the shipmaster within the *locatio-conductio* scheme: an intentional breach of contract triggering a contractual remedy. Early modern civil law courts did not - at least in Italy. It might well be that they focused more on the delictual nature of barratry taken

²⁴⁹ Suffices to think of the French *Ordonnance de la Marine* of 1681, forbidding to separate the liability of the insurers for the fault of the shipmaster from that for his fraud: either the insurers covered both fraud and fault, or they would not answer for any damage arising from the shipmaster's conduct. *Ordonnance de la Marine*, lib. 3, tit. 6, art. 28: 'Ne seront aussi tenus les Assureurs de porter les pertes et dommages arrivez auz Vaisseauz & Marchandises par la faute des Maitres & Mariniers, si par la Police ils ne sont chargez de la Baraterie de Patron.' The provision was also kept in the 1807 *Code de Commerce* (art. 353).

²⁵⁰ The similarity between *hamesucken* in Scotland, *heimsucken* in the German territories and *Homosokn* in Sweden has long been noted. See already L.A. Warnkönig, *Flandrische Staats- und Rechtsgeschichte bis zum Jahr 1305*, vol. 3:1, Tübingen 1842, p. 242-3.

²⁵¹ On the subject see esp. J.W. Cairns, *Hamesucken and the Major Premiss in the Libel, 1672-1770: Criminal Law in the Age of Enlightenment*, in R.F. Hunter (ed.), *Justice and Crime*, Edinburgh 1993, p. 138-179, esp. 147-153. See also, with regard to a specific and important case (*Macgregor's case* of 1752, on the overlap between *hamesucken* and rape), p. 153-166 and 173-179.

in isolation from the contractual relationship between the parties. But it might also be that they were increasingly conscious of the structural limits of a system based on nominate contracts. This is a point that would deserve considerably more attention. The progressive shift from discrete contractual categories (and so, specific and circumscribed remedies) towards the unitary concept of contract has been analysed in several important works.²⁵² This shift is predominantly studied with regard to general issues, or at least typical contractual scenarios. To what extent the same happened in specific fields such as the commercial one is less clear.²⁵³ In any case, this shift has been examined with exclusive regard to learned jurists – including those with little interest for practical issues such as humanist jurists and moral theologians – to whom great attention has been paid. Of course it was important to do so. The problem is that nearly all the scholarly efforts focused on those writers, to the neglect of the more practice-minded ones. Moreover, what the law courts thought of that process of unification remains virtually unexplored. Even if one were to assume that the discussions of the learned jurists determined the development of law courts (a very doubtful assumption to make), that would not be enough. Few learned jurists looked at specific, practical cases. Their discussions tended to remain abstract, and most of their examples hypothetical. Learned jurists did not look at the many facets and the subtle nuances distinguishing one practical case from the other. And the devil has an annoying tendency of hiding in the detail. Allowing in abstract terms for the possibility of a unitary contractual remedy, in other words, did not automatically entail the application of that unitary remedy to the solution of specific, actual legal issues.

²⁵² Suffices to think, for instance, of K.-P. Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. Bis 18. Jahrhundert*, München 1985; I. Biocchi, *Causa e Categoria Generale del Contratto. Un problema dogmatico nella cultura privatistica dell'età moderna*, vol. 1, *Il Cinquecento*, Torino 1997. More recently see also e.g. A. Massironi, *Nell'officina dell'interprete. La qualificazione del contratto nel diritto comune (secoli XIV-XVI)*, Milan 2012; W. Decock, *Theologians and Contract Law. The Moral Transformation of the Ius Commune (ca. 1500-1650)*, Leiden 2013. The movement ultimately leading to the unification of contract law can ultimately be traced to the medieval discourse on 'naked' and 'clothed' pacts, on which see e.g. R. Volante, *Il sistema contrattuale del diritto comune classico. Struttura dei patti e individuazione del tipo. Glossatori e Ultramontani*, Milan 2001.

²⁵³ For the case of insurance, see e.g. G. Rossi, *Civilians and Insurance: Approximations of Reality to the Law*, *Tijdschrift voor Rechtsgeschiedenis* 83 (2015), p. 323-364, esp. 362-364.