Droits romains de l’Université de Paris et le prix Dupin-Aîné. Il donne également une réponse à la question de savoir s’il y aura encore de grands spécialistes du droit romain au troisième millénaire. Depuis, l’auteur est sorti premier du concours d’agrégation. Il y a lieu de féliciter aussi le directeur de thèse, Mme Lefebvre-Teillard. Les Allemands appellent le directeur de thèse un “Doctorvater”, terme qui fait précisément allusion à la parenté adoptive. La maîtrise du droit intermédiaire par la “Doctormutter”, tant des sources que de la pensée juridique, se retrouve chez F.R., qui ne semble donc pas avoir été exclu de la succession. Au-delà des questions d’adoption, de glossateurs et de bibliothécaires, la présente étude doit réconforter les historiens du droit qui regardent avec pessimisme le recul de la connaissance de l’histoire, du latin et de la pensée juridique raffinée. Apparemment rien n’est perdu!

Anvers
Laurent Waelkens

**Lex Mercatoria and Legal Pluralism:** A Late Thirteenth-Century Treatise and its Afterlife, edited, translated and introduced by Mary Elizabeth Basile, Jane Fair Bestor, D.R. Coquillette [and] Ch. Donahue Jr.. Ames Foundation, Cambridge (Massachusetts) 1998. 212 + 2 x 42 + (bibliography and index) 75 p.

The core of this volume is a new edition and translation of a short treatise upon the manner of proceeding in mercantile causes which was copied into the *Little Red Book of Bristol* under the title of *Lex Mercatoria*. It seems to have been written in the last years of the thirteenth century, and the author has undertaken to systematise the correct practice rather than to describe the practice of his own day. The *lex mercatoria* is named *a mercato*, and applies in the five places where markets are held: fairs, cities, seaports, boroughs, and market towns. If either party to a sale or exchange of merchandise with a merchant can be arrested or attached within any of these five places he must answer the other there, and the *lex mercatoria* governs the case unless both agree to plead at common law in places which have courts after the fair tide or market in which the common law is applied. The defendant may not decline the jurisdiction of the court of a market because the cause of action arose outside its boundaries, nor because he holds land distrainable within them, for all those enfeoffed and resident within any of the five places save clerks earls barons bannerets and knights are merchants in law and owe suit to the market court as merchants though they do not deal in merchandise. We are to take the court incident to the market held in a market town to have jurisdiction over the same persons and the same causes as the court of a fair, though it adjourns from market to market rather than from hour to hour and from day to day. The editors point out in their very full introduction and commentary that in 1296 Bereford J. distinguished merchant law, which governed covenants made during the fair and out of the fair overseas between merchants, from market law and borough law. A market court had jurisdiction only during the market day over contracts made on that day in the market. Borough courts were held from week to week according to the custom. Fair courts did deal with causes of action arising out of the fair, within the realm as well as overseas. The power of borough courts to hear actions against ‘foreigners’ if the cause of action arose outside the borough was questionable, for chapter 35 of the first Statute of Westminster (1275) had given an action for double damages to plaintiffs who held nothing within a franchise who were attached while passing through it to answer for contracts covenants or trespasses made or committed elsewhere. Many boroughs dealt with foreigners’ causes in separate courts or distinct sessions of the same court, and the borough court was commonly distinct from the court of the borough market. The author appears to hold that a court held outside market or fair time in the place where a market or fair is held is a court of common law, perhaps because borough courts commonly purported to proceed according to the custom of the borough rather than according to the *lex mercatoria*.
The *lex mercatoria* does not permit a defendant to rebut the testimony of the plaintiff’s suit of witnesses by his law – by his own oath and the oaths of a certain number of compurgators – but though the testimony of three unexceptionable witnesses is sufficient proof of a demand or of an exception, judgment is deferred if the other party gives security to convict his opponent and his witnesses of perjury, which he may do by producing two more witnesses than testify for his opponent either at the first or at the subsequent hearing, at which his opponent may produce further witnesses to ‘afforce’ his suit, if the court finds the testimony of his witnesses more credible than that of the witnesses for his opponent. Though the author terms this procedure an attaint, it does not at all resemble the attaint which lay against an inquest who gave a false verdict upon an issue referred to them by the King’s writ; for the ‘attainted’ witnesses are not said to suffer any penalty, save liability for damages and costs, and there is no evidence that it was ever adopted in practice, or that the maxim that *lex vincit sectam* was unknown to the *lex mercatoria*, though it does appear to have been accepted that by the *lex mercatoria* a defendant might not wage his law against a plaintiff who produced a tally. According to a brief contemporary lecture or note of a lecture, *De legibus mercatorum apud nundinas et alibi*, which the editors print in an appendix, *if a defendant attached by his goods in his absence does not replevy them within a year they are to be delivered to the plaintiff at a valuation. If the defendant is present and absconds they are to be delivered to the plaintiff against security that he will restore them if the defendant can discharge himself of the debt within a year and a day. Though a litigant in 1296 contended that this was *lex mercatoria et consuetudo nundinarum et non consuetudo mercati*, this practice was widely followed in borough as well as in fair courts. Our author holds that *if a defendant attached by his goods fails to appear he is to be repeatedly distrained until no more goods can be found. He is then to be demanded on the two following court days. On the third court day the plaintiff is admitted to prove his case, and if he succeeds the goods distrained are valued, goods to the value of the sum found due to the plaintiff are delivered to him, and the remainder are kept for the defendant, save so much as may be necessary to satisfy the amercement due to the lord of the court. In order that an absent defendant may not lose his goods before he can hear of the proceedings it has been ordained that he shall be allowed a further delay to come in and answer, which varies according to the place where he is alleged to be. There is no trace of any such ordinance, and the editors are unable to say whether this procedure were anywhere followed in practice, though our author’s observation that courts have proceeded too hastily in the past suggests that the defendant was not invariably allowed a year and a day. His decision to write an *ordo judiciarius* leaves it uncertain how far he held the *lex mercatoria* to differ from the common law otherwise than upon questions of process and evidence, though his opinion that merchants are bound by the *lex mercatoria* to answer for their apprentices and under-merchants (another rule not invariably applied in practice) suggests that there may have been other differences between the two systems. It is clear, however, that he held the *lex mercatoria* to be *lex* rather than *consuetudo*, but English rather than international law. The common law was the mother of the *lex mercatoria*, and had endowed her daughter with privileges in certain places, which she should respect for the future. The then Chancellor, Dr. Stillington, identified the law merchant with the universal law of nature which the Chancery claimed to administer as early as 1473, but he was claiming jurisdiction over the causes of foreign merchants for his own court. His observations seem to have been little noticed until the seventeenth century, when the postulate that there was a distinct law merchant which as *ius gentium* was coeval with the common law if not more ancient proved useful both to controversialists who maintained that the common law was co-ordinate with rather than superior to the other laws which applied within England and to merchants who thought their interests would be better protected by mercantile tribunals of the continental type. Our author’s treatise, which survives only in a single not very accurate copy of 1344, was forgotten until its rediscovery