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BOOK REVIEW

Making Commercial Law Through Practice 1830–1970

by Ross Cranston. Cambridge: Cambridge University Press, 2021, 483pp (£85 hardback) ISBN: 978-1-107-19889-0

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It is commonly assumed that English commercial law was largely a creation of common law courts. In a superb work of legal history, Professor Cranston convincingly challenges this assumption. English commercial law was, he argues, largely created through the practices of commercial parties, not the decisions of commercial judges. This conclusion is reached through an examination of the transactions of commercial parties over a period of 140 years. Beginning shortly before the reign of Victoria (in 1830) and concluding in 1970 (when Britain's role as a leader in manufacturing had faded) this is a rich history of the commercial transactions necessary to manufacture innumerable products. These transactions are examined within the commercial context in which they arose. The focus of this exploration is thus on the markets, organisations and individuals who traded in raw commodities and the goods manufactured from them rather than the legal doctrines or the barristers, judges and legislators traditionally examined in the development of commercial law. The study thus expands our conception of what law is and how law interacts with human endeavours.

Five substantive chapters examine the main aspects of these processes. At the centre of each aspect is the development of Britain as the world's first industrial nation and the security of the transactions necessary to purchase commodities, arrange their distribution and facilitate the manufacture of goods from these commodities and, finally, to sell and distribute these goods. The monograph provides a new perspective both on the legal structures necessary to facilitate such industrial development within a burgeoning Empire and also on the commercial institutions and actors who created these legal structures. It also explains the adaptive abilities of these actors to receive both common law and civil law into their commercial practices: the, often lasting, global impact of these practices is also touched upon. The chapters are well selected; the only notable omission is the carriage of goods, particularly by sea. The omission is explicable given the voluminous and specialised nature of shipping law and the lack of consideration of this aspect does not detract from those which are considered.

Chapter 2 opens with the international commodity markets of London and Liverpool and the trade in commodities such as grain, cotton, wool, sugar, tea, coffee and spices. These commodity markets traded over both space, from England to the world, and also over time, as traders developed a futures market for commodities. Trade associations and exchanges were private creations and private actors invented a system which constituted their membership rules and governance, controlled access to their markets and devised a system of rules for transactions on these markets, devised standard forms of trade contracts and arbitration procedures to settle disputes. Lawyers were incidental rather than central to the private law of these markets. When this private law came in contact with formal law, these commodity markets were generally dealt with sympathetically by the courts, who tended to take a hands-off approach favouring freedom of contract and legal certainty. State law did not enable these markets, was not relied upon directly by the institutions and actors of these markets and, indeed,

sometimes worked to impede how these actors functioned. This unique development left London its lasting legacy in the modern City's derivatives market and clearing systems.

Chapter 3 analyses how commercial functions worked within and further developed a law of agency. At the outset of the period in question agency was essential to conduct trade at a distance in a world traversed by sail and while technological advances throughout the period changed communication agents proved to be important in many areas. While English law had developed a law of agency by the end of the eighteenth century, this chapter considers how agency practices were often outside the categories of existing legal principles and how English judges often placed to one side their conception of agency in the recognition of the commercial need met by agents.

The next two chapters present new approaches to that staple topic of commercial law courses: the contract of sale. Chapter 4 is concerned with the sale, hire and distribution of manufactured goods and chapter 5 with the international sales of 'soft' commodities such as cotton, wheat, wool and tea. The contract of sale for manufactured goods provides an overview of the development of sales law from the early nineteenth century through an examination of the obligations of quality: how it was legally defined, applied and the remedies available where the goods failed to meet this obligation. The written contracts which enabled these sales were vital, but what happened when the contract was not performed or when the contract was silent were equally important. This study of the contract of sale is accompanied by similar studies of the related contracts of hire and hire purchase which became important from the mid-nineteenth century, along with contracts to distribute manufactured and processed goods. Commercial parties developed these contracts utilising existing law and developing their own innovations (sometimes with the assistance of lawyers) and reduced these innovations to a contractual form which then provided the basis for commercial practices. The commercial techniques from these innovations were only later 'tested' in judicial actions brought about by insolvency or fraud. In most of these instances the general willingness of courts to give effect to the desires of commercial parties in creating a pragmatic set of trade rules prevailed and the commercial innovation became law. Chapter 5 provides a detailed examination of how 'soft' commodities were traded on a global scale through trade associations working from standard form contracts. Sale occurred not in physical markets or auctions but on the basis of these standard form contracts which, as a form of private law making, enabled these trades. This study is focused upon how these standard form contracts were drawn up, how they both accommodated the law (often of other jurisdictions) and also moulded legal developments. Although these contracts were drafted within the framework of English law, and with the increasing involvement of solicitors as the law became more complex, disputes arising from these sales were usually settled through arbitration rather than litigation. On the rare occasions where litigation arose and produced a seemingly contrary result to commercial practice, standardised contracts would then be amended to reach the desired result: 'commercial practice first, law second'[1] was the leitmotif of legal development in this area.

The final chapter of the study is concerned with how banks financed trade and industry. An examination is undertaken of the means by which lending was provided both for the trade and non-trade finance which, in turn, facilitated the commodity transactions, manufacture and distribution of manufactured products considered in the earlier chapters. The focus, once again, is upon the institutions and actors and the various means of finance they employed and the innovative nature of their practices in devising these means. Here, again, law largely followed commerce in facilitating finance. Finance was based upon private contracts, such as bills of exchange or the use of documentary credits. What little legislation existed, such as the Bills of Exchange Act 1882, tended to support existing financial practices. Professor Cranston's conclusion is that regulatory law had little, if any, role in the institutional underpinnings of most aspects of bank finance. While the Bank of England exercised some informal supervision it was contract, or more precisely innumerable private contracts between private parties, which was the prime regulator of financial institutions during most of the period considered. Law and lawyers stopped at the door of private financial institutions made up of members who

[1]R Cranston *Making Commercial Law Through Practice 1830–1970* (Cambridge: Cambridge University Press, 2021) p 375.

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contractually assumed obligations to each other. These institutions governed themselves by a skeletal system of operational rules and maintained their own dispute resolution mechanisms. Law rarely intervened in these arrangements and, when it did, it facilitated rather than curtailed trade.

One of the great strengths of this study as a whole is that it approaches the subjects considered from the bottom up. While there is a rich depth and array of secondary scholarship presented, the study is primarily based upon archival materials with reference to the (largely published) accounts of contemporaries involved in these transactions. The author's conclusions are thus original and provide novel insights into law and the economy. As noted above, the focus is upon commercial transactions and the actors and trade institutions which executed them. Law – both legislative and judicial – is concerned but only in so far as it engages with these transactions. The work is thus important not only for lawyers and legal historians but also for political and economic historians. Commercial law is set in context, a context greatly enlivened with the presentation throughout of photographs, illustrations and quotations from Jules Verne to JB Priestly to Lord Leverhulme. This study is of particular importance in providing an understanding of the what, why and how of what commercial parties were doing: this understanding provides a far greater insight into the development of English commercial law than a study of law reports and legal treatises could achieve.

While the role of lawyers is diminished in this study, one wonders whether this would be such if the records of solicitors were scrutinised to the same extent as those of commercial firms and institutions. The argument is convincingly made that commercial parties shaped commercial law but what exactly were the roles of solicitors in so shaping the transactions of commercial parties? Sir John Hollams, the great nineteenth century solicitor, kept his office in Mincing Lane, London, and must have done so to maintain a presence at his clients' elbows. Solicitors' records are, however, difficult to obtain both because of reasons of privilege and also of physical destruction (deliberate and otherwise).

In this work Professor Cranston has provided a sound basis for further related studies. One is a more explicit examination of the functions of Empire and how the law – private and state – around these commercial actors and organisations shaped the modern world and the nation states within it. Another is a direct engagement with the role of enslavement in the production of the commodities which formed the essential subject matter of these commercial transactions. Yet another is how commercial institutions and actors interacted with the consumers of the day.

The fact that this volume can so act as a basis for further study marks out the significance of the work. It is an important work for the lawyers of today in its historical explanation of commercial law, for legal historians in moving the focus of examination away from judges and jurists and towards the parties and transactions which form the basis of law, and for historians concerned to understand the legal basis of the economic and political histories of the era.

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