

Making Commercial Law Through Practice, 1830–1970

Making Commercial Law Through Practice 1830–1970 adds a new dimension to the history of Britain's commerce, trade, manufacturing and financial services, by showing how they have operated in law over a crucial period of one hundred and forty years. In the main law and lawyers were not the driving force; state regulation was largely absent; and judges tended to accommodate commercial needs. That left market actors to shape the law through their practices. Using legal and historical scholarship, the author draws on archival sources previously unexploited for the study of commercial practice and the law's role in it. This book will stimulate parallel research in other subject areas of law. Modern commercial lawyers will learn a great deal about the current law from the story of its evolution, and economic and business historians will see how the world of commerce and trade operated in a legal context.

Ross Cranston is a Professor of Law at the London School of Economics and Political Science. His previous books in the Law and Context series are *Consumers and the Law* and *Legal Foundations of the Welfare State*.

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ROSS CRANSTON

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For Hazel

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Preface

Just north of King's Cross railway station in London is a large and innovative development on previously derelict land with open spaces, shops, offices, flats, galleries, bars, restaurants, schools, as well as the world-renowned arts and design college Central Saint Martins. The development was initially centred on the old goods warehouses of the Great Northern Railway, the main building called the Granary. The development now extends well beyond that, on either side of Regent's Canal. During our period, both the railway and the canal linked London with the industrial areas of the north, transporting goods to and from the capital. The railway became a vital link to Scotland and the cause of engineering achievements.

Coal was in huge demand in London for fuel, and this was reflected in one area of the development named the 'Coal Drops', populated (at least until the Covid-19 virus arrived) by high-end shops and restaurants. It opened in the 1850s to receive coal from the collieries of the Midlands, Yorkshire and the north. Coal wagons arrived at one level, the coal being tipped into hoppers at another, bagged at yet another and then despatched by road and canal. The empty railway wagons were moved sideways on a traverser for return on a separate viaduct. But when the history of the Coal Drops was investigated in the early 1990s, its operations were something of a mystery. As with many industrial buildings it had been taken for granted, and during its lifetime it had never occurred to anyone to record the full details.¹

This book explores the functioning of commercial law within the context of commercial practice over the 140-year period from around 1830 until 1970, with an emphasis on the international dimensions. The focus is transactional rather than institutional – commodity markets, agency, the trade in manufactured goods and 'soft' commodities (grain, cotton, tea, etc.), and the financing of trade and industry. As a study in law in context it is not a doctrinal history, although there is a considerable amount of doctrine to digest. A key feature of the relevant doctrinal law is that it furnished a broad framework in which

¹ R. Thorne, 'The Great Northern Railway and the London Coal Trade', in M. Hunter & R. Thorne (eds.), *Change at King's Cross: From 1800 to the Present*, London, Historical Publications, 1990, 114–115. See also P. Darley, *The King's Cross Story*, Stroud, The History Press, 2018, 83–93.

commercial parties could make their own rules and regulations and design their own institutions. The upshot was that in this broad sense commercial practice was the source of commercial law.

Understanding this creative process parallels, in a way, the task of interpreting the King's Cross Coal Drops: aspects of nineteenth- and early twentieth-century commercial practice and the role of law in it are not fully recorded and, in some cases, forgotten. The international commodity markets and auctions in London and Liverpool have disappeared, as have the working docks and warehouses of the period, most of the British-based trading (agent) houses in Asia and elsewhere, and the discount houses of the London money market. Moreover, the history of legacy institutions and practices – the London clearing arrangements for settling accounts in international financial and commodity derivatives, the standard form contracts for the international trade in grain and cotton, and the arrangements for international commodity arbitration – is not, on the whole, appreciated.

That does not mean starting with a blank sheet. First, the law reports of our period throw light on how commercial transactions were effected, although, as every lawyer knows, the litigation process funnels facts to meet procedural, evidential, doctrinal and forensic requirements. It is a surprise that historians have not exploited the law reports more when writing about some of the events covered in the book, especially when litigation was part of the story, the reports throwing more, and in some cases a different, light on it. Secondly, there is the dazzling array of studies by economic and business historians which bear on the topics covered in the book. Given their scholarly interests, accounts of commercial law and practice are harder to come by, but their findings have proved an invaluable foundation for the book.

Thirdly, there are the contemporary accounts of commercial practice, or at least what it should aspire to. Banking was especially favoured. To mitigate the risks facing nineteenth-century banks, by the 1850s there were several accounts of good banking practice and the canons governing it. Imitations were spawned with the founding in the 1870s of Institutes of Bankers in both Edinburgh and London and the subsequent need for intending bankers to obtain their qualifications. There was no comparable professional body in international trade until the Institute of Export was established in 1935. Those in commodities trading, marketing and sales learnt on the job and the knowledge not generally written down for general distribution. In the interwar period, however, Isaac Pitman & Sons and other publishers adopted a policy of actively producing primers aimed at those engaged in these and related activities.

To complement these sources the book draws, fourthly, on a number of business and bank archives to understand more fully the commercial practices of the period and law's role as it relates to them. By good fortune, archives relating to the commodity markets and commodity trading in both London and Liverpool have been preserved. There is also a rich seam of bank archives. Scattered around the country are the archives of trading houses, as well as

those of manufacturers of plant and machinery, railway wagons and motor vehicles. To a limited extent gaps in the British archives have been plugged abroad. As might be expected, the various archives have been utilised by economic and business historians, but their interest has not generally extended to the legal facets of an organisation's operations. Where business and bank archives are available they must be treated with some care. Only parts of these archives have been preserved, and, by themselves, they may paint a fragmented picture. When combined with other sources, however, it is possible to learn a great deal about commercial practice during our period and the role of law (and lawyers) in shaping and being shaped by it.

A few words about what this book is not. During our period the functioning of commodity markets, international trade, manufacturing and sales had a dark underbelly, exploitative and racist. It was a world for the most part of men. Law sometimes reinforced these tendencies; occasionally it was ameliorative. This is not a book about these issues, although there is no getting away from circumstances like slavery and the Liverpool cotton trade in its early days, the Chinese opium trade and Opium wars, and the shameless treatment of labour in the textile mills and industry of Britain and its estates and factories abroad. Nor is it a book about the historians' concerns with matters such as 'gentlemanly capitalism', Empire, or the relationship between manufacturing and finance in Britain's story. And it is not the place for a further instalment in the debate going back to Max Weber, whether law has contributed to, or impeded, economic development, not least because others have tackled the issue so expertly.²

What can be said, in brief, as regards the law–economy nexus is that during our period the hand of state law was largely benign in the field of commercial transactions, absent fraud and egregious market abuse. Regulation was virtually non-existent, and the common law was predominantly facilitative, containing default rules which commercial parties could largely vary at will. State law offered a capacious and flexible framework within which commercial practices could operate and evolve, and the tools for this to occur, notably a pliable contract law, instruments such as bills of exchange and easily workable rules like those for lending short-term and taking security (collateral) as backing. A familiar pattern when matters occasionally reached court was of the common law incorporating a commercial practice as a rule, reshaping existing rules in its shadow, or at the very least conferring its blessing on how things were being done.

² e.g., W. Cornish, S. Banks, C. Mitchell, P. Mitchell & R. Probert, *Law and Society in England 1750–1950*, 2nd ed., Oxford, Hart, 2019, 6–10; *Oxford History of the Laws of England*, Oxford, Oxford University Press, 2010, vol. XI, pt. 1, Ch. 6; vol. XII, pt. 2, Ch. 1 (M. Lobban); J. Getzler, *A History of Water Rights at Common Law*, Oxford, Oxford University Press, 2006; R. Harris, *Industrializing English Law*, Cambridge, Cambridge University Press, 2000, 3–9, 288–293; J. Getzler, 'Theories of Property and Economic Development' (1996) 26 *J Interdisciplinary Hist* 639; R. Kostal, *Law and English Railway Capitalism, 1825–1875*, Oxford, Clarendon, 1994, 5–6, 358–372.

Commercial parties could thus engage in private law-making, drawing their own rules and settling the disputes which arose themselves. The formal legal system furnished the assurance that the private law commercial parties formulated would be enforced by state power if the threat of more immediate, informal sanctions failed to have their salutary effect, sanctions such as exclusion from a market, a refusal to deal with an offending party in the future, trade association ‘fines’ or calling in a loan and enforcing security. None of this meant that commercial parties did not face the occasional legal wrinkle or snag. But on the whole they could pursue profit unbridled by the common law. Indeed, in some cases, as we will see, the common law moulded or developed doctrine to facilitate commercial practice. If economic growth was impeded, as with restrictive trade practices, that was a result of commercial action, not the common law; the law fell in behind commercial practice when the very rare challenge reached the courts. If on occasion the courts were not accommodating to commercial practice, the relevant market, trade association or institution could generally reshape their rules and institutions to accord with the law and proceed unimpeded.

Work for this book began many years ago, its gestation interrupted by an errant career. Over time I have built up many debts to those who have generously assisted me in one way or another: Sonali Abeyratne, Bill Blair, Michael Bridge, Hugh Collins, Joshua Getzler, David Goldblatt, Roy Goode, Michael Lobban, Catharine MacMillan, Charles Mitchell, Pennie Pemberton, Francis Reynolds, James J. Rogers, Mildred Schofield, David Sugarman, William Twining, Philip R. Wood, Lucien Wong and Sarah Worthington. Over several Southern Hemisphere summers Neil and Jenny Cranston generously provided their garden, with its wonderful view over the Derwent estuary, for work on the manuscript.

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Note on Terms and Archives

The term ‘during our period’ refers to the years c. 1830–1970, the period covered by the book. The ‘interwar period’ refers to the years between the First World War (1914–1918) and the Second World War (1939–1945). Original place names are used, with the modern name in brackets. The colony of the Straits Settlements included places like Malacca and Penang, now part of Malaysia, but as indicated in the text the focus is on what was its capital, Singapore.

The following abbreviations are used for the archives from which material has been drawn:

BA&C	Birmingham Archives and Collections, Birmingham Library
CUL	Cambridge University Library (Jardine Matheson Archive)
GRO	Gloucestershire Archives, Gloucester
LI	Lincoln’s Inn Library (Printed cases, judgments and appeal documents, House of Lords/Privy Council)
LMA	London Metropolitan Archives, City of London
LRO	Liverpool Record Office, Liverpool Central Library
MLD	Museum of London Docklands, Port and River Archive
MMM	Merseyside Maritime Museum, National Museums Liverpool
MSI	Museum of Science and Industry Archives, Manchester
NA	National Archives, Kew
NBAC	Noel Butlin Archives Centre, Australian National University
RBS	Royal Bank of Scotland Archives, Edinburgh*
SCA	Sheffield City Archives, Sheffield
SRO	Staffordshire Record Office, Stafford
TA	Tasmanian Archives, Hobart, Tasmania
WMRC	Modern Records Centre, University of Warwick, Coventry

* As a result of corporate rebranding the RBS Archives became the NatWest Group Archives in 2020.

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