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Commerce Between Law and Practice

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The correspondence also illustrates a level of advocacy for the poor, or at least for the provision of relief to them, by officials from their parish of residence, doctors, or even landlords writing to collect rent from the Kirkby Lonsdale parish. Thus, this collection not only portrays the voices of the poor at this time, but also of others around them who were invested in their appeals for aid.

Finally, the editors demonstrate the agency of the poor in their requests for out-parish relief under the Old Poor Law system. Whilst remaining cautious about ascribing agency to the poor, Jones and King rightly assert that it is difficult to find powerlessness in their correspondence. The letters give an insight into the rhetorical devices utilised to gain access to poor relief, such as references to »nakedness«, »starvation« or the writer's belonging within their parish of residence, and the relative success of these devices. By mapping the use of rhetoric, friendliness and familiarity in appeals to the Kirkby Lonsdale Parish, Jones and King show that the poor were not just passive objects of the Poor Law system, but actually had a »formidable armoury of sentiment, linguistic sophistication and community support in their negotiations for relief« (3).

Overall, this collection provides thought-provoking insights into the workings of the Old Poor Law. Jones and King have curated an interesting and comprehensive set of primary sources that not only offers value to those studying the administration of the law, but also offers valuable evidence as to the agency, knowledge and experience of those seeking poor relief, and of the familiarity between those dependent on that relief and those administering it.

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Emily Kadens

Commerce Between Law and Practice*

Legal scholars today talk about contracting in the »shadow of the law«. In other words, contracting parties know that they draw up their private rules against a background of default sales law and remedies that courts will reference and enforce. But in his magisterial study of English commerce and commercial law between 1830 and 1970, Ross Cranston demonstrates that during this formative period of modern commerce, the description needs to be reversed. Lawmaking through courts and legislation happened in the shadow of contract.

While this is a book about commercial law, it centers on the participants in trade. Lawyers and judges and legal doctrine play subsidiary roles serving commodities exchanges and contracting parties.

Cranston's main argument is that commercial law (in its broadest sense) was made through the private ordering of contracting parties and the exchanges that supported and to some extent lightly regulated them. In a legal, political, and cultural atmosphere privileging party autonomy, merchants, agents, producers, manufacturers, and retailers went about their business, developing customs and usages that regularized ordinary trade and innovating to meet new situations. Commodities exchanges eventually used that accumulated practice to draft standard form contracts. Most of this activity was done without reference to the formal law.

Lawyers acted as occasional advisors, whose advice was freely ignored if inconvenient. Courts provided guardrails addressing fraud, protecting vulnerable consumers, or sorting out risk of loss in the event of a party's insolvency. Otherwise, the period was characterized by a largely judicial *laissez*

* Ross Cranston, Making Commercial Law Through Practice, 1830–1970, Cambridge: Cambridge University Press 2021, 483 p., ISBN 978-1-107-19889-0

faire approach. On the whole, judicial decisions supported trade rather than forced commerce into channels set by legal doctrine.

But the courts were not irrelevant to commercial practice. Newly-decided cases – some of which the business community thought wrong – could lead transactors and exchanges to redraft their contracts to reflect or to contract around changes in legal doctrine. Professor Cranston describes this situation as »[c]ommercial practice first, law second«, but the story he tells creates a somewhat more nuanced sense of the development of commercial law as a push-pull between two unequal forces. Contract and commercial practice took precedence, but sometimes it had to respond to external stimuli introduced by the courts.

The structure of the chapters reinforces this push-pull relationship. Each chapter begins and ends with an overview, then discusses the on-the-ground working of trade or finance, often through case studies, before turning to the role of lawyers and courts and how business practice responded to the legal inputs. Thus, while he physically places practice first and law second in his text, he also demonstrates how law responded to practice and practice to law.

After an initial chapter that provides a high-level overview of the sweep of commercial development across the entire historical period he is discussing, Professor Cranston proceeds from institutions (trading organizations) to actors (agents) to sales (contracts) to money (banks). This order builds the story thematically starting with the people who do the deals, then turning to the contracts they use, and ending with their methods of financing those deals. It requires readers to keep the chronological big picture provided by Chapter 1 in mind throughout, and it results in a certain amount of deferring full understanding of practices introduced in earlier chapters until later in the book. With the caveat that the introductory chapter will not be easy reading for those without some pre-existing understanding of commerce and 19th- and 20th-century business history, the structure works well.

The first substantive chapter, Chapter 2, focuses on the mechanics behind the distribution of international commodities such as cotton, grain, sugar, tea, coffee, wool, and spices. It details the organization of and membership in the international commodity exchanges of London and Liverpool and the brokers who made them function, the outgrowth of futures markets from the exchanges, and the development of commodities clearing houses to offset contracting parties' claims and obligations. Consistent with Cranston's overall theme, the courts played little role in regulating the markets, even leaving most of the control of speculation and cornering to the exchanges and their membership contracts. In this, the English commodities and futures markets differed from those in the United States, which were more heavily regulated from the beginning.

Chapter 3 addresses the complex topic of contract intermediaries in international trade. These varied intermediaries were the connective tissue of the distribution networks, but they prove much more difficult to describe than the buyer and seller on either end of the sales contract. Contemporaries used the general term of agent, but agents could take many roles including those who bore the risk like principals, retailers in exclusive dealing arrangements with manufacturers, brokers, and the local actors such as the *comprador* in China or the *banyan* in India. A major theme of the chapter is the way commercial arrangements moved forward in response to the needs of trade regardless of the law's ability to keep up. Most of the time no disputes arose, and no one cared exactly how the intermediary was described. When matters did come before the courts – with Cranston often referencing colonial court decisions in the absence of English ones – the courts tended to respond pragmatically rather than insist on the underdeveloped and narrow common law of agency.

Chapters 4 and 5 concern sales contracts. Chapter 4 deals with the distribution of manufactured goods. The chapter first provides a fascinating discussion of the court imposition of implied warranties of fitness for purpose and merchantability and their subsequent incorporation into the Sale of Goods Act of 1893. Next, Cranston shows how businesses reacted by contracting around these default rules and instead writing contracts with detailed specifications. The remainder of the chapter contrasts how the law treated business-to-business relationships involving the leasing of rail cars and the market-controlling relationships between automobile manufacturers and retailers with the financing of consumer purchases of durables like automobiles, sewing machines, and furniture through hire purchase. While the courts interfered little in the business contracts, the state was more involved in protecting consumers from

abuse of the hire purchase system. County courts in particular criticized hire purchase in the 1930s, and they actively enforced the Hire Purchase Act of 1938, which limited the hirers' ability to snatch back goods for minor defaults.

Chapter 5 sits at the heart of Cranston's thesis that commercial practice dictated the direction of commercial law. The chapter focuses on the drafting of standard form contracts by the exchange markets for the sale of commodities in international trade. According to Cranston, the contractual language came from the exchange committees themselves with only the occasional involvement of lawyers (certain clauses, such as arbitration clauses, excepted). As commerce changed, the exchanges modified existing forms and added new ones. Because disputes were arbitrated by privately-selected arbitrators, with appeal to exchange-provided appeal committees, the courts rarely got involved. But when they did, and the courts' interpretation of the form contracts disagreed with what the exchange members wanted, the exchanges responded by redrafting their forms to contract around the court decisions.

The book may somewhat underestimate the role of solicitors in the development of the standard form contracts. Cranston describes the forms as coming from the traders and observes that some associations based their new forms on those of existing trading houses. This does not obviate the possibility that the trading house had used lawyers or legal form books in drafting their initial contracts. The absence of lawyers may also be an artefact of archival survival – not only are solicitors' archives less common and less accessible, but lawyers may also have given advice orally, and evidence of that would be captured only capriciously.

Regardless of who drafted the contracts, however, one of their signal characteristics was certainty and formality. Professor Cranston describes discussions about proposed individual clauses in which open-ended or discretionary language was rejected. This offers a counterpoint to the approach of the drafters of Article 2 (on sales law) of the Uniform Commercial Code in the United States. Although the work on Article 2 took place between 1945 and 1952 – thus during the period covered by Cranston's book – it rejected formalism and instead gave preference to a flexible standard of commercial reasonableness. Yet as Professor Lisa Bernstein at the University of Chicago has argued,[1] and as Professor Cranston's book demonstrates, commercial parties have shown a preference for formal rules. We might, consequently, ask whether Article 2 represented the way of the future, or a mistaken blip trying to alter a formalist constant of commerce. It is also ironic that just as the drafters of Article 2 were giving precedence to trade usage as a source of governing contract law, in England, »by the 1950s, if not earlier, custom and usage had become a spent force in transposing commercial practices into law« (47).

Chapters 2, 4 and 5 should give advocates of private ordering food for thought. Yes, Cranston portrays what appears to be largely self-regulating markets, and English trade and manufacturing was certainly very successful on an international stage through most of Cranston's period. But those markets were also firmly embedded in social and institutional structures: the commodity exchanges and banks run by and for men of a certain race, social class, and cultural upbringing, supported by lawyers and judges sharing those characteristics, and underpinned by a power structure favoring the merchants in England at the expense of producers, agents, and importers elsewhere. The mostly successful private ordering of 19th- and early 20th-century England may not be replicable under the entirely different conditions prevailing today, and even the close-knit networks of that time did not prevent fraud or abuse of market power.

Finally, Chapter 6 looks at how banks financed trade and industry. Trade finance depended primarily on bills of exchange. These sat atop a common law foundation that was several centuries in the making, and ultimately upon the codification and simplification of the law in the 1882 Bills of Exchange Act. In non-trade finance, by contrast, regulation was absent and the courts as usual

1 Lisa Bernstein, Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms, in: University of Pennsylvania Law Review 144 (1996) 1765–1821; ead., Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions, in: Michigan Law Review 99 (2001) 1724–1790.

followed the lead of the actors and institutions by enforcing the innovative practices structured through contracts.

This is an ambitious, dense book that is obviously the culmination of a lifetime of scholarship and research. Cranston knows and references the secondary literature and the judicial decisions, but it is his use of archival material that is truly exciting. Trade association and company directors' minute books, solicitors' opinions, standard form contracts, contract books, agency agreements, and more provide an in-depth and on-the-ground view. For the study of commercial practice this is incomparably superior to the distorted picture provided by confining oneself to reported decisions and normative legal or commercial treatises. As Professor Cranston points out, a lot of trade occurs without resort to the courts, so that a »case-centred approach neglects […] the types of commercial transaction which have been rarely litigated« (1).

Of course, the book has certain self-imposed limits. It is a study of the sale of goods and trade finance with a focus on commodities. It skips over contracts of carriage, the history of corporations, and most consumer sales. Cranston does not engage with underlying economic conditions beyond mentioning the impact of major wars and the Great Depression. His book takes for granted England's imperial position, but he leaves the study of the interplay between imperial politics and economics and trade to others.

As with any work of history, the story begins at a certain arbitrary point, and the phenomena discussed in the book are sometimes implied to be new. They were not always new, however. Trade associations, agency, long-distance foreign trade, commodities exchanges, bills of exchange, letters of credit, and banks had existed for centuries by the time Professor Cranston picks up his story. Yet by the 19th century, these institutions and practices seem to have grown into quite different things from their earlier permutations. The novelty of legal doctrines addressing many of these practices during the period Cranston discusses raises questions about how they interacted with the law in earlier periods and how the practices themselves changed in the early 19th century. Cranston's book has now told the end of the story, providing a basis from which other historians can work backwards to study the earlier periods.

A final note to the publisher: a large, well-sourced book like this truly needs a bibliography!

Uponita Mukherjee

Insanity, Crime and Responsibility Cases: A View of Common Law from the British Empire*

Catherine Evans' monograph, *Unsound Empire: Civilization and Madness in Late-Victorian Law*, teems with tales of horrific and tragic killings mined from across four archival sites of the British Empire in the 19th century – England, Canada, Australia and India. At the center of the narrative are the men and women apprehended for these criminals acts. Evans tracks them as they were moved in and out of courtrooms and asylums, rendered into objects of legal briefs and medical records, while their psychic status prior to, during, and after they killed their victims, remained uncertain from the perspective of both medical diagnosis and legal deliberation. She narrates their life stories from the perspective of the judges, lawyers, physicians, and social scientists who grappled with

* Catherine L. Evans, Unsound Empire: Civilization and Madness in Late-Victorian Law, New Haven (CT) / London: Yale University Press 2021, 290 p., ISBN 978-0-300-24274-4