1

Commercial and Legal Contexts

1.1 Introduction

Those seeking to understand the role of commercial law in a society will not get far without an appreciation (at least in broad outline) of the relevant legal doctrines. These contain the categories which the law has invented, and which provide the framework in which commercial practices and institutions can operate. Law in context must begin with the law and a knowledge of doctrine. Focusing on the doctrine alone, however, tells only part of the story of how commercial law has worked in practice and the ends pursued within its remit. A case-centred approach neglects, for instance, the types of commercial transaction which have been rarely litigated. The common-law system depends on parties bringing cases to court. Commercial parties characteristically seek to avoid entanglement in the law, decidedly so among some well-organised commercial groups able to sustain their own dispute resolution mechanisms.

Even if matters have arisen in legal proceedings, a focus on doctrine misses out on the impact of legal decisions (and legislation), which has often been mitigated by commercial parties redrafting contracts and market rules, by deals being restructured and by the modification of existing institutions or the creation of new ones. An overabundant concern with doctrine also neglects the reality that commercial parties have never been devoted to its purity or rational development when pursuing profit. Nor have their lawyers at the expense of winning a case. For both commercial parties and their lawyers, law has generally been a framework and malleable resource to be used instrumentally to achieve commercial ends.

This book is about English commercial law over the period of about 140 years, from about 1830 to 1970, with an emphasis on its international reach. As a study of commercial law the focus, in the main, is on commercial transactions, in particular those involving the sale and supply of goods and related financial services.[1] So it is not primarily concerned with business organisations

[1] C. Twigg-Flesner & G. Villalta Puig, 'Introduction: Boundaries of Commercial Law', in C. Twigg-Flesner & G. Villalta Puig (eds.), *Boundaries of Commercial and Trade Law*, Munich, Sellier European Law Publishers, 2011, 1. cf. the wider approach in R. Goode, *Commercial Law in the Next Millennium*, London, Sweet & Maxwell, 1998, 8–9, and Lord Wright's institutional

https://doi.org/10.1017/9781108182836.002 Published online by Cambridge University Press

such as companies; utilities such as the railways; or the constitution, operation and insolvency of either.[2] Nor is it about transport (the carriage of goods) or insurance. Further, as a study of commercial law, it is primarily about transactions between commercial parties, not those between commercial parties and consumers.[3] Consequently, the emphasis is on raw materials and commercial not consumer goods, and attention in the distribution of goods is given to the channels between producers and retailers, not between retailers and consumers.

With the focus on commercial transactions, the chapters deal with where and how they occurred during our period – the commodities markets, where parties entered spot, forward and futures transactions for sale, purchase and speculation (Chapter 2); intermediaries, such as agents, brokers, distributors and financial institutions, whose prime function was to facilitate the transactions of others – to market their products and services or, in the case of banks, to marshal finance for this (Chapters 3 and 6); sale and related techniques such as hire and hire purchase, employed for the marketing and distribution of manufactured goods (Chapter 4); the international trade in products and commodities (Chapters 4 and 5); and the backing of banks through trade finance and advances to manufacturers for products to be supplied both at home and abroad (Chapter 6).

As an account of commercial law in context, the book cannot be a full legal history.[4] As indicated, however, the substantive law is often a key, since understanding how particular aspects of trade and commerce worked demands a knowledge of the legal framework within which they were conducted. So there are accounts of doctrine in the following chapters. However, the legal parts of the book are far from comprehensive and in the main cover only the bare bones necessary to understand law's relationship with commercial practice. There are other reasons for referring to legal decisions. One is to determine the extent to which the courts moulded legal doctrine, if at all, to accommodate commercial need. Another is to mine from the case reports the factual findings about how commercial transactions during our period were conducted. As well as the case law, reference is made to the work of economic and business historians, which is essential to understanding the broader context in which commercial law operated.

approach, 'Some Developments of Commercial Law in the Present Century', Presidential Address, Holdsworth Club, Faculty of Law, University of Birmingham, 17 May 1935, 1 (the law dealt with in the Commercial Court).

[2] e.g., R. Kostal, *Law and English Railway Capitalism 1825–1875*, Oxford, Clarendon, 1994; R. Harris, *Industrializing English Law: Entrepreneurship and Business Organization 1720–1844*, Cambridge, Cambridge University Press, 2000.

[3] cf. C. Scott & J. Black (eds.), *Cranston's Consumers and the Law*, Law in Context series, Cambridge, Cambridge University Press, 2000.

[4] cf. W. Cornish, J. Anderson, R. Cocks, M. Lobban, P. Polden & K. Smith, *Oxford History of the Laws of England*, Oxford, Oxford University Press, 2010, vol. XI–XIII (hereafter, *Oxford History of the Laws of England*).

The book also draws on business and bank archives to understand, in a more complete way than can be derived from these other sources, how commercial parties perceived and used the law during our period. This is the counterpart to modern-day empirical studies of the law in action. Despite the ravages of time, there is a plethora of business and bank archives relevant to the topic. Those referred to are roughly representative of the different aspects of commercial law covered (trade associations/markets, agents, merchants, manufacturers, financiers and banks), although I have only scratched the surface of what is available. The petering out of these archives by the 1960s is one reason that the story is drawn to a close in 1970. Another is that by 1970 London and Liverpool as world centres for trade had faded, as had Britain's role as a leader in manufacturing – activities which, during our period, were central to the story of commercial law as the law of transactions.

This introductory chapter provides an overview of both the commercial and legal context of the book. Part 1.2 paints a picture in outline of the markets, techniques and institutions of the industrial age associated with trading commodities, distributing manufacturing products and financing both. This context is revisited in different ways in the course of the book. Then in part 1.3, the chapter turns to the legal context. Relevant bodies of commercial law appear in later chapters. At this point the aim is to explore the general principles which framed the body of transactional law later examined. It was within this framework that commercial parties constructed through private law-making the markets, techniques and institutions which appear in the narrative.

1.2 Commercial Context: Markets, Organisations and Players

> There were only a dozen passengers all told, for this was primarily a cargo boat. One of these fellow travellers caught Mr Golspie's eye, nodded, and then came nearer … 'This port of London's a bit of an eye-opener to me,' Mr Golspie remarked.
>
> [Mr Sugden] Ever been all round it? Tremendous – oh tremendous! There's the West India Docks further up here, and then Surrey Commercial on the other side. You never saw such a place. It's a hard day's work looking round the Surrey Commercial. . . .
>
> And where do you live when you're at home?
>
> St. Helens. That's where my firm is, and that's where I live. (J. B. Priestley, *Angel Pavement*, 1930)[5]

The setting for Priestley's 1930 novel is the City of London and its commercial dealings, but in the closing pages, as the fraudulent timber agent, Golspie, leaves by ship for South America, the author draws on other aspects of Britain's

[5] London, William Heinemann, 1930.

https://doi.org/10.1017/9781108182836.002 Published online by Cambridge University Press

commercial life at the time – the port of London through which the vessel initially passes, and the industrial Midlands and north of England, represented by Mr Sugden, whose firm is based in St Helens, Lancashire. This was part of the context in which commercial law worked and developed during our period. As the first industrial nation, Britain's dominance in manufacturing was gradually forfeited in the years prior to the First World War with the growth of Germany and the United States, and in relative decline after that.[6]

The other side of the coin was Britain as a great trading nation, and the size of its ports like London, as Golspie and Sugden observed. These handled the manufactured goods for export, but also the huge imports – raw materials for manufacturing, food for the new middle classes and workers in the factories and service industries, and timber for building. Domestic production of grain, wool and timber was inadequate, and these needed to be obtained from abroad. Raw materials like cotton, jute and rubber were only available from more conducive climes. Rising prosperity and changing tastes meant a greater demand for commodities such as tea, coffee, sugar, rice and spices.[7]

Against this backdrop of imports, it should not be surprising that commodity markets emerged. Nor should it be surprising that these markets should occasion trade associations with a mission of bringing order – through establishing standards for goods, laying down rules and regulations for dealings, and drafting standard form contracts to govern individual transactions. Associated with Britain as the leading trading nation, and these markets, were London's banks and sterling as the world's reserve currency, the advanced state for the time of its communications network with the rest of the world, and the country's shipping and marine and general insurance business. By the end of the nineteenth century Britain was the world leader in all these, with the added advantage that clustered in the City of London they were greater as a whole than as individual institutions.[8] Not to be forgotten in all this was British

[6] K. Harley, 'The Legacy of the Early Start'; M. Kitson & J. Michie, 'The De-Industrial Revolution: The Rise and Fall of UK Manufacturing, 1870–2010', in R. Floud, J. Humphries & P. Johnson (eds.), *The Cambridge History of Modern Britain Growth and Decline 1870 to the Present*, vol. II, 2nd ed., Cambridge, Cambridge University Press, 2014; J. Tomlinson, 'De-industrialization Not Decline: A New Meta-narrative for Post-war British History' (2016) 27 *Twentieth Century British Hist* 76; N. Broadberry, *The Productivity Race: British Manufacturing in International Perspective, 1850–1990*, Cambridge, Cambridge University Press, 1997; B. Elbaum & W. Lazonick (eds.), *The Decline of the British Economy*, Oxford, Oxford University Press, 1986 (chapters by Lazonick, Lewchuk); P. Mathias, *The First Industrial Nation*, London, Methuen, 1969, 340–341, 380.

[7] M. Turner, 'Agriculture, 1860–1914', in R. Floud & P. Johnson (eds.), *The Cambridge Economic History of Modern Britain*, *Economic Maturity 1860–1939*, Cambridge, Cambridge University Press, 2004, vol. II, 150–151; C. Harley, 'Trading 1870–1914', in ibid., 166–167.

[8] S. Mollan & R. Michie, 'The City of London as an International Commercial and Financial Centre since 1900' (2012) 13 *Enterprise & Society*, 538, 543–544, 576. Among contemporary accounts, see F. Jackson, *Lectures on British Commerce Including Finance, Insurance, Business and Industry*, London, Pitman, 1912 (chapters by Owen and Bisgood).

military, especially naval, power, its large merchant marine fleet and its Empire, with the economic resources which that afforded.[9]

Although by the First World War Britain had been overtaken by the United States in industrial production, it remained the largest trading nation. Trade was still a matter of exporting manufactured goods and importing food and raw materials. Britain had been an important entrepôt, but as that declined it had become a centre for organising trade elsewhere.[10] Until the middle of the nineteenth century textiles had been the dominant export, but after that machinery and other capital goods became a significant component of total exports.[11] Trade demanded a network of agency and other arrangements both in Britain and abroad to facilitate transactions, as well as sound financial backing. This was furnished by a sophisticated system of trade finance arranged by the merchant (and later the joint stock) banks in the City of London. There has been a long debate whether this was matched by an equally effective system for financing British industry.[12]

1 Markets, Trade Associations and Standard Form Contracts

Organised markets in commodities like grain, cotton, sugar, tea and rubber were established in London and Liverpool in the nineteenth and early part of the twentieth centuries. They were a product of the rising volume of international trade as Britain became the first industrial nation, a major importer of these commodities for the needs of its factories and population, and a centre for arranging their distribution elsewhere. Added stimulus to trade was provided in the second half of the nineteenth century with the improvements in communications and infrastructure. The telegraph meant parties could more easily garner information about, and order, commodities, and the railways, the steamship lines, and the ports and docks meant improved productivity, more efficient flows and cheaper prices.[13] World prices were struck as a result of the numerous transactions by brokers on the London and Liverpool commodities markets.[14]

[9] K. O'Rourke, 'From Empire to Europe: Britain in the World Economy', in R. Floud, J. Humphries & P. Johnson (eds.), *The Cambridge History of Modern Britain Growth and Decline 1870 to the Present*, 2nd ed., Cambridge, Cambridge University Press, 2014, 70–72.

[10] R. Michie. 'The City and International Trade', in D. Platt, A. Latham & R. Michie (eds.), *Decline and Recovery in Britain's Overseas Trade 1873–1914*, London, Macmillan, 1993.

[11] S. Chapman, *Merchant Enterprise in Britain: From the Industrial Revolution to World War I*, Cambridge, Cambridge University Press, 1992, 3–4, 7.

[12] 376–377 below.

[13] E. Williams, 'Thirty Years in the Grain Trade' (July 1895) 161 *North American Review* 25.

[14] e.g., S. Topic & A. Wells, *Global Markets Transformed 1870–1945*, Cambridge, MA, Harvard University Press, 2012, 48–50, 62–64, 84–92; K. O'Rourke, 'The European Grain Invasion, 1870–1913' (1997) 57 *J Econ Hist* 775; S. Mercier, 'The Evolution of World Grain Trade' (1999) 21 *Review Agricultural Econ* 225; C. Harley, 'Transportation, the World Wheat Trade, and the Kuznets Cycle 1850–1913' (1980) 17 *Explorations Econ Hist* 218; W. Malenbaum, *The World Wheat Economy 1885–1939*, Cambridge, MA, Harvard University Press, 1953.

Chapters 2 and 5 pursue in greater detail these international commodity markets, the brokers dealing on them, the trade associations and their work in formulating standards, rules and standard form contracts – and the role of law as the framework for all three activities. What follows is a background sketch. The key commodity markets are outlined, along with the brokers who worked there and the role of auctions in the process of commodity dealings (although that role was limited in time and scope). There is then an account of the trade associations, which played a pivotal role in designing the standards, rules and standard form contracts for commodity trading and of the institutional underpinning.

(i) Commodity Markets, Brokers and Auctions

The London and Liverpool commodities markets started life as informal meetings of merchants interested in foreign commodities trading based at the London coffee houses, the Royal Exchange and the docks.[15] The Baltic Exchange traces its origins to 1744, when the Virginia and Maryland coffee house changed its name to the Virginia and Baltick, to reflect the fact that the merchants and shipowners who gathered there had business in both North America and the Baltic Sea region. The formalisation of the Baltic Exchange in 1823, by the adoption of rules for membership, was a reaction against the extreme speculation in tallow on the Baltic Walk of the Royal Exchange.[16] Initially, commodity dealings on the Baltic Exchange took place in tallow, linseed, flax and hemp.[17]

The sharp increase in grain imports in Britain after the repeal of the Corn Laws established a world market.[18] Wheat came initially from the Black Sea region of Russia and from the Continent, then from the 1860s from the United States and India. In the 1890s there were new entrants such as Canada, Argentina and Australia.[19] From the middle of the nineteenth century large-scale transactions in grain cargoes from abroad took place between brokers on the Baltic Exchange, which continued to be a major venue for grain trading into the twentieth century.[20] In the late 1920s the Baltic was said to be the most

[15] B. Lillywhite, *London Coffee Houses*, London, Allen & Unwin, 1963. See also B. Cowan, *The Social Life of Coffee: The Emergence of the British Coffeehouse*, New Haven, Yale University Press, 2005, 134, 165.

[16] H. Barty-King, *The Baltic Exchange*, London, Hutchinson Benham, 1977, 58–60, 70.

[17] Tallow was an important lubricant in the early nineteenth century and a source of light in the form of candles until the arrival of the kerosene oil lamp and gas. Linseed oil was used for finishing surfaces (varnish; paint). Hemp was used for making rope, bags and cloth.

[18] Note that corn was the English expression for grain; it was not confined to maize or American corn.

[19] M. Ejrnæs, K. Gunnar Persson & S. Rich, 'Feeding the British: Convergence and Market Efficiency in the Nineteenth-Century Grain Trade' (2008) 61 *Econ Hist Rev* 140, 146; M. Atkin, *International Grain Trade*, Cambridge, Woodhead Publishing, 1992, 18; P. Herlihy, *Odessa: A History 1794–1914*, Cambridge, MA, Harvard Ukrainian Research Institute, 1986, 105, 204–206.

[20] D. Kynaston, *The City of London. The Golden Years 1890–1914*, London, Pimlico, 1995, 19, 23, 258–263; *The City of London. Illusions of Gold 1914–1945*, London, Pimlico, 1999, 252–255; R.

important European market for grain, with transactions in a single day sometimes amounting to over £2,500,000.[21]

Brokers in the grain trade in the 1930s did a considerable business for customers in continental Europe. Customary brokerage in that trade was 1½ pence per quarter,[22] but more was charged when cable and telephone expenses were high, or as a premium to cover del credere risk.[23] Over time, the concentration of millers and their vertical integration with the large bakers, coupled with government encouragement of home cereal production, led to changes in the structure of the grain trade and the role of intermediaries.[24] There was not the same level of activity for them after the Second World War, although grain was still being traded on the Baltic in the 1960s. At the end of our period the transnational grain traders like Cargill, Bunge, Garnac, Continental and Louis Dreyfus – names known though important cases in the law reports – were acting as principals.[25] The Baltic continued as a leading shipping market, where shipowners and charterers could charter and buy and sell vessels.

The Baltic Exchange was for grain; the venue for trading other commodities was elsewhere. Early on there were printed conditions for the sale of commodities by public auction at places like Garraway's Coffee House and, after their opening in Mincing Lane in 1811, the London Commercial Sale Rooms.[26] By the middle of the nineteenth century brokers were buying and selling sugar, coffee, tea, spices and other 'foreign and colonial' produce in Mincing Lane.[27] Mincing Lane continued to provide the venue for the markets for these and other commodities like rubber, which arrived later in the century. By the early twentieth century there could be sixty commodity auctions a day at the Commercial Sale Rooms – tea, sugar, coffee, cocoa and spices, as well as other produce such as jute, shellac, tortoiseshell and mother-of-pearl.[28] No samples of the commodities being sold were permitted at the Commercial Sale Rooms, and they had to be inspected at the warehouses, wharfs and docks where they were stored, at brokers' offices or, after trade associations were

Michie, *The City of London: Continuity and Change 1850–1990*, Basingstoke, Macmillan, 1992, Ch. 2.

[21] S. Dowling, *The Exchanges of London*, London, Butterworth & Co, 1929, 180–181, 155.

[22] A quarter in imperial measurement is 28 lbs.

[23] A. Hooker, *The International Grain Trade*, 2nd ed., London, Pitman, 1939, 38. On del credere commission, 157–161 below.

[24] *Report on the Marketing of Wheat, Barley and Oats in England and Wales*, London, Ministry of Agriculture and Fisheries Economic Series, No. 18, 1928, 130; G. Rees, R. Craig & D. Jones, *Britain's Commodity Markets*, London, Paul Elek Books, 1972, 161, 168.

[25] D. Morgan, *Merchants of Grain*, London, Weidenfeld and Nicolson, 1979; W. Broehl, *Cargill Trading the World's Grain*, Hanover, NH, University Press of New England, 1992.

[26] Garraway's closed in the middle of the nineteenth century.

[27] Anon, *The City; or, the Physiology of London Business*, London, Groombridge, 1852, 157.

[28] G. Rees, *The History of the London Commodity Market*, London, Commodity Analysis Ltd, 1978, 15.

formed, where they kept them.[29] Plantation House in Mincing Lane became the location of rubber and tea auctions.

Ubiquitous in the commodity markets until the First World War were the brokers, acting as agents for others or in some cases as principals for themselves. Brokers from the beginning of our period traded with each other and issued bought and sold notes containing the basic terms of a sale.[30] They also conducted auctions, and over time the management of these became a sophisticated business.[31] Brokers organising and participating in commodity dealings formed themselves into associations. The terms established by the London General Produce Brokers' Association, which dated from 1878, covered trading in a number of commodities.[32]

As well as the London General Produce Brokers' Association, there were associations of brokers for specific commodities, such as the Tea Brokers' Association of London (for selling brokers, who auctioned the tea, and guaranteed payment to their principal) and the Tea Buying Brokers' Association (as the name suggests, for buying brokers).[33] While Britons were not great coffee drinkers, London was an important centre for coffee dealing from the nineteenth century because of the banking, insurance and shipping services located there.[34] The rules of the Coffee Trade Association of London governed some sales in Mincing Lane.[35]

Separate from dealings in other commodities were the auction sales for wool from Australia, New Zealand and South America. These were conducted in London from the first part of the nineteenth century, after 1875 at the Wool Exchange in Coleman Street in the City of London. Prior to the First World War European and American buyers took around half the quantity sold there.[36] As with other commodity auctions, catalogues were prepared for each sale, briefly describing the lots to be auctioned and stating the dock or warehouse where they could be inspected. From the late nineteenth century auctions conducted in wool-producing countries like Australia and New Zealand assumed greater importance. It was the same story with tea – auctions

[29] Ibid., 61–62. [30] 296–299 below.

[31] See Port of London Authority, Dock & Traffic Manager's Office, *Tenth Report of Research Committee*, 1934, 85–98, Appendix 9.

[32] US Department of Commerce, Bureau of Foreign and Domestic Commerce, *Market Methods and Custom and usages in London*, Special Consular Reports No. 86, Washington, 1923, 66. *Willers Engel & Co* v. *E. Nathan & Co Ltd* (1928) 30 Ll L Rep 208 turned on the association's invoicing back terms. For the counterpart association in Liverpool: *Aune* v. *Cauwenberghe & Fils* (1938) 60 Ll L Rep 389.

[33] Monopolies and Restrictive Practices Commission, *Report on the Supply of Tea*, London, HMSO, 1956, 10–11.

[34] S. Topik, *The World Coffee Market in the Eighteenth and Nineteenth Centuries, from Colonial to National Regimes*, Department of History, University of California, Irvine, Working Paper No. 04/04, 2004, 26.

[35] cf. *Jurgenson* v. *F.E. Hookway & Co Ltd* [1951] 2 Lloyds Rep 129.

[36] J. Clapham, *The Woollen and Worsted Industries*, London, Methuen, 1907, 97.

being held in producer countries like Ceylon (Sri Lanka) and India – although important auctions continued to be held in London. In the twentieth century faster transport and communications, the development of grading and standards for commodities, and the growth of larger, integrated businesses all led to the decline of the London commodity auctions. After 1945 London's place as a world centre for trading physical commodities was past.[37]

(ii) Trade Associations, Standard Form Contracts and Market 'Plumbing'

None of the Baltic Exchange, the London Commercial Sale Rooms, Plantation House or the other London commodity exchanges set the rules for trading in commodities. They provided the venue and, in the case of the Baltic, regulated membership. It was the trade associations, formed from the last quarter of the nineteenth century, which developed (or indorsed) standards, drew up rules and regulations and drafted the standard form contracts to govern commodity trading. In addition, traders, trade associations and others like the banks were responsible for institutional developments such as the establishment of clearing systems, which are the essential 'plumbing' for any sophisticated market. Of prime importance was the London Produce Clearing House (LPCH), which initially cleared futures dealings in coffee and sugar, later wheat, maize, pepper, rubber, raw silk, silver and indigo. After several metamorphoses it is, today, the LCH Group, which is an international multi-asset clearing house covering financial products and commodities.[38] The counterpart for clearing payments was the London Bankers' Clearing House (Chapter 6, 6.4).

The London Corn Trade Association (LCTA) was formed in 1878, and by the early twentieth century most international dealings in grain were on the standard form contracts which it drew up and according to the standards which it collected or endorsed for reference purposes in the case of disputes.[39] LCTA's membership was drawn from the wide range of parties concerned with the international grain trade – brokers, importers, shippers and millers. In its work it was in close contact with other interests, shipping, insurance and banking, but government rarely.[40] By the early twentieth century LCTA also had standard form contracts for dealing in grain futures, although the internationally significant grain futures market of the interwar period was in Liverpool.[41]

Following LCTA there was a profusion of trade associations, including the London Cattle Food Trade Association (1906), the London Oil and Tallow

[37] R. Hartley, *No Mean City*, London, Queen Anne Press, 1967, 101. [38] 89 below.

[39] 302–308, 312–313 below.

[40] J. Sgard, 'The Simplest Model of Global Governance Ever Seen? The London Corn Market (1885–1914)', in E. Brousseau, J-M. Glachant & J. Sgard (eds.), *The Oxford Handbook of Institutions of International Economic Governance and Market Regulation*, Oxford, Oxford University Press, 2019. Sgard notes the membership of Dreyfus Freres, the leading French grain dealer of the day. But see the role of the National Federation of Corn Trade Associations: 302n below.

[41] 81–82 below.

https://doi.org/10.1017/9781108182836.002 Published online by Cambridge University Press

Trades Association (1910), the London Copra Association (1913) and the Rubber Trade Association (1913).[42] The Rubber Trade Association had standard form contracts, a certification process (before rubber could be considered good tender on a contract, its standard had to be certified) and rules for the settlement of forward dealings.[43] There were four trade associations for sugar, reflecting its different origins (beet, cane sugar) and condition (raw, refined sugar). All four comprised buyers and sellers. For raw sugar the Beetroot Sugar Association and the Sugar Association of London were established in 1882; they later amalgamated.[44] All associations had their own rules and regulations. Along with rules for beetroot sugar contracts were those for storage, clearing and futures dealings in the commodity. The Refined Sugar Association followed in 1891.

By contrast with London, the two leading trade associations in Liverpool, for cotton and grain, did not rely on other organisations to house their trading activities. Eventually, they had their own venues: the Liverpool Cotton Exchange in Exchange Flags and the Liverpool Corn Exchange in Brunswick Street.[45] A special market for cotton developed relatively early and was the main exemplar for the development of international commodity markets in Britain.[46] Liverpool had become the most important cotton port in Britain, with the major cotton (textile/spinning) mills within sixty or eighty miles in Manchester and Lancashire connected to it by canals, rivers and later rail. Its pre-eminence as a port of entry was guaranteed once the United States became the major supplier to Britain of raw cotton. The industry comprised mainly small manufacturers who faced prices for cotton which fluctuated considerably with commercial circumstances, movements in fashion, rumour and war.

The Cotton Brokers' Association, formed in Liverpool in 1841, gradually functioned to regulate cotton trading. Until 1863 the association had no written rules and the thriving market was based on accepted practice, what lawyers would characterise as custom and usage. The massive speculation in cotton accompanying the American Civil War promoted the adoption of the first edition of 'The Constitution, Law, and Usages of the Liverpool Cotton Brokers Association'. A further version followed in 1869, and by 1878 there were printed contracts, with rules on the back, for American cotton.[47] The Cotton Brokers' Association merged with a rival Liverpool Cotton Exchange to

[42] H. Barty-King, Food for Man and Beast, *op cit*, 39–43; A. Coates, *Commerce in Rubber*, Singapore, Oxford University Press, 1987, 186. The Timber Trade Federation was already in existence: for its standard form contracts drawn up around this time: B. Latham, *History of the Timber Trade Federation of the United Kingdom*, London, Benn, 1965, 37, 54. See 304n below.

[43] US Department of Commerce, *op cit*, 63–64.

[44] Beetroot Sugar Association, *Rules and Regulations*, 4th ed., London, 1892, Constitution, II. (Kindly provided by D. G. Moon, Sugar Association of London.) The objects were 'to provide for the proper conduct [of the beetroot sugar trade], and particularly to provide rules for sampling, weighing, analysing, and for the supervision of these operations; and for the settlement of all differences that may arise in carrying out of Contracts'.

[45] 11, 363 below. [46] S. Chapman, Merchant Enterprises in Britain, *op cit*, 76.

[47] 301 below.

become the Liverpool Cotton Association Ltd in 1882.[48] In the early 1920s the Liverpool cotton market was said to provide the central world market for raw cotton.[49] By 1939, however, the British cotton industry had collapsed, with exports a fifth of 1913 levels.[50]

After the American Civil War Liverpool became an important centre for imported grain as well as for cotton, for a period becoming the largest grain port in Europe. What became the Liverpool Corn Trade Association was formed in 1853 and in 1886 amalgamated with the Liverpool Corn Exchange.[51] It drew up standard form contracts and rules. More important in the interwar period were its future contracts. At its height in the 1930s, Liverpool had the leading international market in wheat futures. Trading was carried on in the association's newsroom. Although much smaller than the futures exchanges for grain in the United States, the Liverpool wheat market was acknowledged in American circles as having an international character compared with the largely domestic reach of their own markets.[52]

In addition to these markets for so-called soft commodities, the London Metal Exchange offered an organised market for trading in some of the 'hard' commodities, by then in great demand as a result of the Industrial Revolution in Europe and North America. Metal trading had occurred at the Royal Exchange in previous centuries, although in domestically produced copper and tin. The increasing volume of international trade during the nineteenth century was associated with the emergence of new metal broking firms. As in other markets forward dealings developed. In 1869 a specialised exchange for metals was agreed, which grew out of the regular meetings of metal dealers. The London Metal Exchange, as it became known, had its first meeting in 1877. It issued formal rules in July 1881, concerned largely with the constitution and conditions of membership. These were elaborated in the pre–First World War years.[53] With fluctuating success in the twentieth century, the London Metal Exchange is now said to be the largest futures exchange in metals in the world.[54]

The London and Liverpool markets facilitated the distribution of commodities not only through space with spot transactions for prompt delivery but also through time with forward and futures contracts. The telegraph in the second half of the nineteenth century, and the telephone from the early twentieth

[48] 'The Exchange', *Liverpool Review*, June 11, 1887, 10.
[49] J. Smith, *Organised Produce Markets*, London, Longmans Green & Co, 1922, 31.
[50] A. Kidd, *Manchester*, 3rd ed., Edinburgh, Edinburgh University Press, 2002, 187.
[51] *Liverpool Corn Trade Association 1853–1953*, Liverpool, Liverpool Corn Trade Association, 1953, 9, 11. See also G. Broomhall & J. Hubback, *Corn Trade Memories*. Liverpool, Northern Publishing, 1930, 1–19.
[52] 81 below.
[53] Economist Intelligence Unit, *A History of the London Metal Exchange*, EIU, London, 1958, 16, 31–36; R. Gibson-Jarvie, *The London Metal Exchange*, 2nd ed., Cambridge, Woodhead-Faulkner 1983, 9–13.
[54] J. Park & B. Lim, 'Testing Efficiency of the London Metal Exchange: New Evidence' (2018) 6 *Int'l J Fin Stud* 32, 32.

century, allowed international sales and the shipping to transport commodities to be organised from London and Liverpool offices.[55] Hedging on the markets enabled the producers of commodities in various parts of the world, and the manufacturers using them in Britain and further afield, to secure protection from risk. Although open to abuse, speculation in futures worked to level out the prices of commodities on and between markets.[56]

The international physical markets in London and Liverpool, and the brokers working there, tailed off after the Second World War with the changed pattern of international trade.[57] However, they left a legacy – infrastructure (at least in London) for the international futures and derivatives markets in commodities, as well as financial products, and the machinery for standard setting and dispute resolution in the international trade in grain, animal feed and cotton.[58] The contracts of LCTA's successor, the Grain and Feed Trade Association (Gafta), still govern international trading which is not conducted on private or in-house terms.[59] Despite the cotton industry's decline, the Liverpool Cotton Association also remains an international standard setter for trading through its Bylaws & Rules, but under the nomenclature adopted in 2004, the International Cotton Association.[60]

2 Agents, Trading Houses and Supplying Goods and Services

> [T]ransactions so extensive between persons removed at great distances from each other could not be managed either so conveniently or so beneficially without the intervention of some third party between the principals in the contract. To conclude bargains with advantage, it is necessary to be always on the spot, to catch the favourable turns in the market; whilst on the other hand the superintendence of a large establishment forbids the frequent absence of the proprietor. Again, in foreign trade it is desirable, if not indispensably requisite, to have agents resident abroad, to receive consignments of goods exported, to dispose of them advantageously for the owner, to purchase and ship off such foreign commodities as he may want in return, and to make and receive the necessary payments and remittances. It may readily be supposed, therefore, that mercantile agents have long constituted a separate and important class. (*Law Magazine*, 1829)[61]

[55] R. Michie, 'The International Trade in Food and the City of London since 1850' (1996) 25 J *European Econ Hist* 369, 382. See also B. Lew & B. Cater, 'The Telegraph, Co-Ordination of Tramp Shipping, and Growth in World Trade 1870–1910' (2006) 10 *European Rev Econ Hist* 147.

[56] 87 below.

[57] D. Hill, 'The Impact of Trade Usage on Commercial Agency at Common Law', in *New Directions in International Trade Law*, Dobbs Ferry, New York, Oceana, 1977, vol. II, 530–531.

[58] 295 below. [59] 317 below.

[60] A. Quark, *Global Rivalries: Standards Wars and the Transnational Cotton Trade*, Chicago, University of Chicago Press, 2013, 193–200.

[61] (1829) 1 *Law Magazine*, at 261–262.

Around the middle of the nineteenth century the consignment pattern for sales of imported commodities and exported textiles, mentioned in this extract, began to disappear.[62] No longer were trading houses simply consigned parcels of goods to sell on commission, at least to the same degree as previously. Rather, they were more involved in the sale and purchase of specific orders, acting to a greater extent on their own account, as well as performing additional functions such as conducting shipping, insurance and banking agencies, and managing as agents estates, mines and factories. In broad terms the changes coincided with the spread of new technology (communications, railways, steamships), institutional transformation (the growth of some overseas agents into larger trading houses) and the advent of new methods of financing trade, in particular the documentary credit.

Agency law was of almost equal importance to contract law as a legal device facilitating commercial activity during our period.[63] Occupying a range of different roles, agents were central to the functioning of commercial life and agency relationships were ubiquitous. What agents did and the functioning of agency law are explored at greater length in Chapter 3; what follows is an outline of the commercial picture.

(i) From Sale on Consignment to the Agency House and Beyond

In the first part of the nineteenth century agency came to the fore as a form of business organisation. Trading in raw cotton and cotton textiles is illustrative. Liverpool merchants obtained cotton from the United States either from those who forwarded it to them for sale on commission or through having agents purchase it on their behalf, perhaps on joint account. Commission-based imports to Liverpool declined from the 1860s with the improvements in communication brought about by the Atlantic cable. Instead of cotton being consigned for sale on commission, firm offers could be cabled to Liverpool merchants by their American branches or agents, or by independent sellers.[64] There was no longer the same need for expert advice from agents on prices, since the information was now more widely distributed by cable and business publications. In the cotton-growing areas of the southern United States, 'growers sold their cotton directly to merchants or mill agents,

[62] N. Miller, 'Bills of Lading and Factors in Nineteenth Century English Overseas Trade' (1957) 24 *U Chi LR* 256, 265–266.

[63] W. Müller-Freienfels, 'Law of Agency' (1957) 6 *Amer J Comp L* 165, 165.

[64] S. Beckert, *Empire of Cotton*, London, Penguin, 2015, 231; N. Hall, 'Liverpool's Cotton Importers c.1700–1914' (2017) 54 *Northern Hist* 79, 87–89; S. Chapman, Merchant Enterprise in Britain, *op cit*, 104–106, 151; S. Marriner, *Rathbones of Liverpool, 1845–73*, Liverpool, Liverpool University Press, 1961, 61–62, 110–112; A. Ellis, *Heir of Adventure: The Story of Brown, Shipley & Co., Merchant Bankers, 1810–1960*, London, Brown, Shipley 1960, 54–55; N. Buck, *The Development of the Organisation of Anglo-American Trade, 1800–1850*, New Haven, Yale University Press, 1925, 37–39, 41.

or even to foreign buyers, instead of entrusting it for sale to a factor in a distant port'.[65]

As the global trade in cotton was increasingly dominated by the large cotton exchanges in places like Liverpool, New York and New Orleans, the role for the old-fashioned importer, broker and factor diminished.[66] Accounts in the first part of the twentieth century identified three broad categories of intermediaries for getting the raw cotton to the textile mills of Lancashire: agents acting between the Southern exporters and the Liverpool importers; the Liverpool houses selling to the mills as principals or through brokers; and the brokers engaged by the spinning mills on commission to obtain suitable samples from which purchases could be made.[67] That picture was muddied in various ways: for example, cotton could also pass through Manchester brokers on its way to the mills, and some of the larger cotton mills bought directly from importing merchants or from US exporters through Liverpool brokers.

The other side of the coin from importing the raw cotton was the export of the manufactured cloth and shirtings (cloth for making shirts). In the first part of the nineteenth century the textile mills often marketed their products by sending consignments to various parts of the globe for sale through agents acting on commission. The methods in the 1840s of the Calcutta (Kolkata) firm Mackinnon Mackenzie & Co. offer an example. It had consignments of cotton and textiles – along with pig iron, iron rails and iron plates – forwarded to it by its associate firms, Wm Mackinnon & Co. in Glasgow and Mackinnon Frew & Co. in Liverpool. The goods were sent on a commission basis, but also on the firm's own account or on joint account with others.[68] A sideline to our story, but a crucial part of the subcontinent's history, was the devastating impact which the importation of machine-made cotton goods had on the livelihoods of the traditional Indian weavers.

By the middle of the nineteenth century, British exporters moved away from supplying textiles on consignment to places like India. Trading houses in those markets purchased on their own account as principals for onward sale, becoming independent intermediaries in the chain of distribution.[69] Better communications also transformed the dynamics of importing commodities to Britain from abroad. The head of a large Manchester firm, with a network of branches

[65] S. Beckert, Ibid., 318. [66] Ibid., 320.

[67] M. Copeland, *The Cotton Manufacturing Industry of the United States*, Cambridge, MA, Harvard University Press, 1912, 354–355; A. Garside, *Cotton Goes to Market*, New York, Frederick A. Stokes, 1935, 116.

[68] J. Munro, *Maritime Enterprise and Empire. Sir William Mackinnon and his Business Network 1823–93*, Woodbridge, Suffolk, Boydell Press, 2003, 21, 24–26, 29–32. The firm also arranged for produce such as jute to be exported, some in vessels it owned, on the return voyage. This would be sold on commission by Mackinnon Frew & Co. in Liverpool or other firms such as Scott Bell & Co. in London. See also C. Jones, *International Business in The Nineteenth Century: The Rise and Fall of a Cosmopolitan Bourgeoisie*, Brighton, Wheatsheaf, 1987, 61–62.

[69] S. Chapman, Merchant Enterprise in Britain, *op cit*, 69–67, 85, 88–89, 98–99, 109–110, 136–138, 165, 298; S. Cunyngham-Brown, *The Traders*, London, Newham-Neame, 1971, 37–38;

Figure 1.1 Landing goods in Calcutta (Kolkata), India, 1860s ((c) The British Library Board).

in India, told a Royal Commission in 1887 that as a result of the telegram there were very few 'Manchester' (cotton) goods shipped to India for sale on consignment. He explained:

> We look from day to day at the price we can get for the produce in the currency of the country in which we sell it. We have everyday fluctuations in the rupee price, the rate of exchange and the rate of freight, and as the whole thing is worked by telegram, of course we practically stop operations if the margin is against us, until one of the three things gives way.[70]

Agency was not, however, eliminated. It still had a role in the sale and distribution of textile products in the early twentieth century, albeit to a decreasing degree. In one contemporary account a cloth agent selling the entire product of a spinning mill received 1 per cent commission, but 1½ or 2 per cent if it guaranteed the account. If it had only a partial agency, the agent received 2 per cent without a guarantee and 4 per cent with a guarantee.[71]

As with cotton, the arrangements for importing other commodities could also involve agency. Liverpool importers of wheat from California – for a time a key source for British millers – appointed agents, with a preference for exclusive agents, although in the case of firms like Balfour, Guthrie & Co. Ltd a branch was also opened in the state.[72] At one point coffee had been sent to London and Liverpool for sale by agents on consignment, but from the second half of the

[70] *First Report of the Royal Commission to Inquire into the Recent Changes in the Relative Values of the Precious Metals*, London, HMSO, 1887, 114, quoted in R. Ray, 'Asian Capital in the Age of European Domination: The Rise of the Bazaar 1800–1914' (1995) *Modern Asian Stud* 449, 478.

[71] M. Copeland, The Cotton Manufacturing Industry of the United States, *op cit*, 364–365.

[72] R. Paul, 'The Wheat Trade between California and the United Kingdom' (1958) 45 *Mississippi Valley Hist R* 391, 406–407.

https://doi.org/10.1017/9781108182836.002 Published online by Cambridge University Press

nineteenth century importers had increased market power and appointed agents abroad who were able to control the market and set the prices where it was produced.[73] In London, commodity brokers acted as agents for foreign producers, and importers might appoint their own agents abroad, having authority to buy up to a certain limit and to supervise the shipping arrangements.[74]

(ii) The Trading Firm ('Agency' House) and Managing Agent

The term 'agency house' was used in some parts of the world to reflect how trading firms (trading houses) bought and sold goods on commission, as well as providing other agency services such as shipping, insurance and banking. '[T]he Agency House ... though primarily a trading house, also acted as bankers, bill-broker, ship-owner, freighter, insurance agent, purveyor etc.'[75] As well as acting as agent, these trading firms acted on their own account. In 1863 most of the Calcutta (Kolkata) trading firms had agency arrangements with London merchants. Twenty-six were also directly linked to business outside London through agencies in Liverpool, Manchester and Glasgow.[76]

Advances on sales might be made to manufacturers by a trading firm abroad or its British agent accepting bills of exchange drawn on them for payment. Once accepted, the bills could be discounted in the market with the proceeds used to pay the manufacturer's invoice.[77] Advances were relatively safe since the trading firm or its agent would have control of the goods through possession of the shipping documents, notably the bill of lading, which was the document of title representing the goods.[78] By the early twentieth century the larger trading houses would have departments for goods (perhaps styled 'Imports' for European manufactured goods; 'Produce' for exports). There would then be separate departments for agency business in shipping, insurance and banking.[79]

[73] S. Topik, *The World Coffee Market in The Eighteenth and Nineteenth Centuries, From Colonial to National Regimes*, Department of Economic History, London School of Economics and Political Science, Working Paper No. 04/04, 2004, 27.

[74] S. Dowling, The Exchanges of London, *op cit*, 156.

[75] M. Greenberg, *British Trade and the Opening of China 1800–42*, Cambridge, Cambridge University Press, 1951, 144. On shipping agents, e.g., S. Jones, *Two Centuries of Overseas Trading: The Origins and Growth of the Inchcape Group*, London, Macmillan, 1986, 45–46, 243–244; S. Ville, 'James Kirton, Shipping Agent' (1981) 67 *Mariners Mirror* 149; P. Davies, *Henry Tyrer : A Liverpool Shipping Agent and his Enterprise, 1879–1979*, London, Croom Helm, 1979; F. Hyde & J. Harris, *Blue Funnel : A History of Alfred Holt and Company of Liverpool from 1865 to 1914*, Liverpool, University Press, 1956.

[76] *Thacker's Bengal Directory 1863*, Calcutta, 1863, Part IX, Commercial, cited in J. Munro, Maritime Enterprise and Empire. Sir William Mackinnon and His Business Network 1823–1893, *op cit*, 16.

[77] e.g., *Swire* v. *Redman & Holt* (1876) 1 QBD 536. See Chapter 6.2, 1.

[78] R. Steffen and F. Danziger, 'The Rebirth of the Commercial Factor' (1936) 36 *Colum LR* 745, 769.

[79] e.g., Gray Mackenzie & Co, merchants and agents in the Persian Gulf: see 'Administrative History', LMA, CLC/B/123–31, Gray, Mackenzie and Company Ltd.

On the eve of the First World War a writer for the *British Export Gazette* explained that buying agents (sometimes called 'home commission agents'), working on commission, were frequently employed by trading firms abroad to obtain manufactured goods from Britain and elsewhere in Europe. The orders (indents) either specified the name of the manufacturer (say) from whom the goods were to be purchased or were open orders for specified goods, to be obtained from the best source.[80] In the interwar years London commission (or indent) houses still acted for foreign buyers in placing orders with British manufacturers.[81] In the late 1950s trading houses in Malaya (Malaysia) and Singapore still described themselves as 'general merchants and agents'. The merchant side comprised the import of construction and building materials, consumer items, estate supplies, engineering and electrical goods; the agency side included shipping, airlines, insurance, estates, mines and export sales.[82]

Another reason that the term 'agency house' survived was because British trading firms took on the role of managing businesses as agents. The managing agent system was a crucial, if now a largely forgotten, aspect of British services and investment funds being supplied abroad.[83] Managing agents had begun early on, as British merchants in India began investing in plantations of indigo, an important source of cotton dye, retaining tight control of the business even when there were other investors in the company being managed.[84] Later, estates growing tea, cotton and rubber; mines; cotton mills and factories; and utilities – all featured in the managing agent's repertoire.[85] The managing agent system became the prevalent feature of British mercantile enterprise in India, with a network of diversified businesses orbiting around the original trading firm.[86] The system was emulated in Hong Kong, Malaya (Malaysia), Singapore, South Africa, Persia (Iran) and elsewhere. The trading firm (agency house) was appointed as agent to manage members of the group, often after floating them on the stock exchanges in London or locally. Managing agents were the face of British economic power and direct investment in many colonial societies.

A distinctive feature of this form of business group was that control was retained through the appointment of the trading firm as the manager of the businesses in the investment group.[87] Those controlling it benefited from the management fees for the businesses being managed, from the

[80] F. Dudeney, *The Exporter's Handbook and Glossary*, London, Pitman & Sons, 1916, 36–44.
[81] *An Export Handbook*, London, Institute of Export, 1939, 34.
[82] J. Drabble and P. Drake, 'The British Agency Houses in Malaysia: Survival in a Changing World' (1981) 12 *J. Southeast Asian Stud.* 297, 304–306, 314.
[83] T. Roy & A. Swamy, *Law and the Economy in Colonial India*, Chicago, University of Chicago Press, 2016, 152–156; S. Metcalfe, 'The Structure and Evolution of an Operational Network: The Borneo Company Ltd, 1850–1919' (2000) 7 *Asia Pacific Bus Rev* 17, 33.
[84] T. Roy, 'Indigo and Law in Colonial India' (2011) 64 *Econ Hist Rev* 60, 62: P. Kumar, *Indigo Plantations and Science in Colonial India*, New York, Cambridge University Press, 2012, 83–84.
[85] G. Jones, *Merchants to Multinationals*, Oxford, Oxford University Press, 2000, 29–30, 52–53.
[86] Ibid., 30. [87] Ibid., 51.

commissions earned on agency business in selling their goods and getting them to market, and from the dividends flowing from the shares held in them.[88] Agency and company law combined to facilitate managing the businesses in the interests of the controllers. For most of their history there was no special legislation for managing agents. However, since they represented foreign control, curbing their role became a platform of the independence movement in India, and to a lesser extent elsewhere. It did not assist the cause of managing agents that they had an advocacy role behind the scenes in matters of political economy.

3 Manufactured Goods, Distribution Methods and Infrastructure

> Up to thirty years ago the engineering and machinery businesses of this country were to a great extent dependant for their overseas trade on the large merchant shipping houses which had their own branches in various parts of the world and bought and sold on commission … As a result the shipping houses got choked up with agencies … banking, shipping, exchange, insurance, and their own export business in raw materials … Accordingly an entirely new policy was adopted … [We established] overseas branches wherever the existing or prospective trade justified the expense. (Sir John Wormald, manufacturer, 1919)[89]

Distributing manufactured goods in the industrial age occurred in myriad ways; only a few are explored in Chapter 4. As we have just seen, the agent was a key player early on in distribution, then the independent intermediary who bought manufactured goods for their onward marketing as principal. As reflected in this quoted passage from a leading British industrialist of the early part of the twentieth century, a further stage was the British manufacturer utilising more direct methods by itself distributing products abroad. To some judicial annoyance, distributors did not always accommodate to the categories of the law. For marketing reasons some wore the mantle of 'agent', although they were not agents in the legal sense.

Sale, as we will see, was not the exclusive avenue for marketing the products of the industrial age. From the second half of the nineteenth century hire and hire purchase took on a significant role in this (Chapter 4.4). A further strand to distribution were the methods manufacturers and producers used to bind those distributing and marketing their products, including the price at which they could sell to others down the distribution chain (Chapter 4.5)

Before developing these points, a short digression on infrastructure is appropriate, since it was crucial to the efficient distribution of commodities and manufactured goods. It is not pursued in any detail in this book, which is concerned with transactions. However, there is frequent mention of one

[88] Ibid., 160.

[89] J. Wormald, 'The Export Trade of our Engineering & Machinery Business' (1919) 1 *Ways & Means* 237, 237. Wormald was managing director of Mather & Platt, Ltd, mechanical, electrical, and hydraulic engineers, Manchester.

https://doi.org/10.1017/9781108182836.002 Published online by Cambridge University Press

important aspect of the infrastructure for trade, the ports. Goods moved across oceans by ship, first sail, but by the end of the nineteenth century that was largely supplanted by steam. Often the vessels were members of a shipping line, and the move to steam power meant that they could run to a timetable. The efficient loading and unloading of goods for export and of imported goods became an important issue in public policy. This led, in London, to an extensive building programme of docks in the early nineteenth century, and later their reorganisation and nationalisation, in effect, in the early twentieth century.[90] Docks were also constructed in other places like Liverpool.[91] Associated with the docks were large-scale wharves and warehouses, and railway and road connections. As well as warehousing goods, the docks performed extensive work necessary for the marketing and sale of goods, including through auctions.[92] By the end of our period containerisation, for one, had put paid to all of this.[93]

(i) Manufacturers and Distribution of their Products

Over time, larger British manufacturers reduced their reliance on trading firms abroad to distribute their products. From the end of the nineteenth century they were opening branches in foreign countries, sometimes with the dual role of both selling products and purchasing local raw materials for transmission to their factories at home.[94] The twentieth-century norm for larger businesses became forward integration and centralised control.[95] The corporate amalgamations of the interwar years led to a significant increase in the size of some British manufacturers, typified by Unilever and Imperial Chemical Industries.[96] Selling was undertaken by specialised sales departments within manufacturing firms, reducing their reliance on wholesalers and other intermediaries.[97] Given advances in communications, they might deal directly with customers abroad. They might even establish a direct presence abroad, cutting out the number of intermediaries needed to market their products.

[90] P. Stone, *The History of the Port of London*, Barnsley, Pen & Sword, 2017, 163–171; R. Cranston, 'Commercial Law and Commercial Lore', in J. Lowry & L. Mistelis (ed.), *Commercial Law: Perspectives and Practice*, London, Butterworths, 2006, 76–80.

[91] See T. Hunt, *Ten Cities that made an Empire*, London, Allen Lane, 2014, 389–391; S. Palmer, 'Ports', in M. Daunton (ed.), *The Cambridge Urban History of Britain*, Cambridge, Cambridge University Press, 2001, 140–146.

[92] On dock warrants covering warehoused goods: Chapter 6.2, 3.

[93] M. Levinson, *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger*, Princeton, Princeton University Press, 2016.

[94] P. Davies, *The Trade Makers. Elder Dempster in West Africa 1852–1972*, London, George Allen & Unwin, 1973, 30.

[95] C. Jones, International Business in The Nineteenth Century: The Rise and Fall of a Cosmopolitan Bourgeois, *op cit*, 184–185.

[96] 220 below.

[97] M. Thomas, 'The Service Sector', R. Floud & P. Johnson (ed.), *The Cambridge Economic History of Modern Britain Economic Maturity 1860–1939*, Cambridge, Cambridge University Press, 2004, 115.

British-based multinational companies also established manufacturing subsidiaries overseas, as well as sales and distribution networks. Courtauld was early in the field. In the first part of the twentieth century Samuel Courtauld & Co. appointed agents both at home and abroad to sell rayon, its new synthetic fibre. In 1908 it appointed an English merchant in New York as the exclusive agent, on a 1 per cent commission of net sterling receipts from US customers. Sixteen years later he became the president of the company's American subsidiary, American Viscose Corporation, which had factories in a number of states making rayon and other artificial fibres.[98] Other British companies followed suit. To find markets for their motor vehicles, processed foods and pharmaceuticals, as well as for intermediate goods such as chemicals, industrial gases and engineering products, they established factories abroad.[99]

None of this meant the complete demise of British manufacturers selling abroad through wholesalers or agents.[100] Many manufacturers were small and could not afford an employed salesforce for overseas markets. They continued to depend on agents, merchant importers and direct dealings.[101] In some cases, the continued use of agents reflected a failure to move with the times and to take marketing seriously. As well as complacency, the fate of the Sheffield cutlery industry after the Second World War has been attributed, in part, to its continued use of agents, who secured orders on commission but did not carry stocks or order on their own account. When competition arrived from foreign manufacturers like the Japanese, the industry therefore lacked the marketing tools to match it.[102]

[98] D. Coleman, *Courtaulds: An Economic and Social History, Rayon*, Oxford, Clarendon Press, 1969, vol. II, 67–68.

[99] see G. Jones, *Multinationals and Global Capitalism: From the Nineteenth to the Twenty First Century*, Oxford, Oxford University Press, 2004, 21–24, 173, 194–195, 232; B. Tomlinson, *The Economy of Modern India: From 1860 to the Twenty-First Century*, 2nd ed., Cambridge, Cambridge University Press, 2013, 122; E. Jones, *A History of GKN The Growth of a Business 1918–1945*, Basingstoke, Macmillan, 1990, 34–35; M. Wilkins, 'European and North American Multinationals, 1870–1914: Comparisons And Contrasts' (1988) 30 *Bus Hist* 8, 15–16; S. Nicholas, 'Agency Contracts, Institutional Modes, and the Transition to Foreign Direct Investment by British Manufacturing Multinationals before 1939' (1983) 43 *Journal of Economic History* 675; W. Reader, *Imperial Chemical Industries: A History*, London, Oxford University Press, 1975, 33–36; C. Wilson, *The History of Unilever*, London, Cassell & Co, 1954, vol. I, 102–103.

[100] e.g., *Heyman* v. *Darwins Ltd* [1942] AC 356 (Sheffield manufacturer used New York agent to sell its tool steels – for making into tools – under a 1938 agreement).

[101] P. Payne, *British Entrepreneurship in the Nineteenth Century*, 2nd ed., Basingstoke, Macmillan Education, 1988, 41, 51.

[102] G. Tweedale, *The Sheffield Knife Book*, Sheffield, Hallamshire Press, 1996, 135. cf. S-A. Taylor, *Tradition and Change: The Sheffield Cutlery Trades 1870–1914*, PhD thesis, University of Sheffield, 1988, 101–102. See also G. Tweedale. 'English versus American Hardware: British Marketing Techniques and Business Performance in the USA in the Nineteenth and Early-Twentieth Centuries', in R. Davenport-Hines (ed.), *Markets and Bagmen: Studies in the History of Marketing and British Industrial Performance 1830–1939*, Aldershot, Gower, 1986, 73–74.

(ii) Sale, Hire and Distribution Networks

With manufactured goods the distributor might be labelled as the manufacturer's 'agent', with the marketing advantages of a reputation and brand – and possibly also an access to spare parts and the authorised provision of after-sales services – which this conferred. In legal terms the 'agent' was in fact an independent intermediary who obtained the goods from the manufacturer and then dealt with its own customers as principal. In other words there were at least two contracts, a sale (say) between the manufacturer and the 'agent', and a sale or hiring between the 'agent' and its customers. The motor-vehicle dealer, labelled as the manufacturer's 'agent', was an example. It was also with products like motor vehicles that new techniques for financing their distribution emerged. For the dealer, the manufacturer might arrange inventory finance, provided by means of various types of stocking plan; for the ultimate customer, credit might be provided by means of hire or hire purchase. Chapter 4 covers hire and hire purchase as important legal devices in the narrative about the distribution of manufactured goods to commercial parties as well as consumers.

Another part of this narrative is how manufacturers and producers used their market power to control those in the distribution chain. At the international level they might allocate geographic areas, giving distributors the exclusive right to sell there. At a time of European empires, an allocated area might encompass the territory of both the metropolitan power and its colonies.[103] A range of factors would determine the prices at which distributors obtained the goods from the manufacturer or producer. Discounts could turn, for example, on whether a distributor arranged for payment against shipping documents, perhaps under a documentary credit. Under their contract distributors might be contractually obliged to 'push' the manufacturer's products (or use reasonable or best efforts in marketing them) and have their endeavours monitored. The ultimate sanction against bad performance was termination of the distributorship.

Control over those in the distribution chain was heightened at the domestic level. As well as distributors being confined to an allocated area, they might have to sell a manufacturer's products at set prices and their marketing efforts might have to proceed along strict lines. Controls over marketing might descend into the details of how the product was to be displayed, whether the products of other manufacturers could be marketed alongside, servicing obligations and the availability of spare parts, and a distributor's opening hours.[104] Resale price maintenance – a common tool in the British manufacturer's distribution toolbox – was virulent in the first part of the twentieth century and only gradually began to wither at the end of our period under the force of legislation.[105]

[103] 270 below. [104] 272, 274, 278 below.
[105] B. Yamey, *Resale Price Maintenance*, London, Weidenfeld & Nicolson, 1966. See 273–274 below.

4 Banks, Banking and the Finance of Trade and Industry

> With the emergence of the joint-stock banking in 1830s, historians observe that the physical image of banking and its symbolical capital changed … London and Westminster [Bank]'s headquarters, built in 1838, embodied symbols of power and authority in London's city space. Ambitious building of bank headquarters continued into the twentieth century. Midland [Bank] commissioned new head offices (built between 1924 and 1939) for what was, at the time, the world's largest clearing bank, ensuring that the design of the building reflected the bank's status. (Victoria Barnes and Lucy Newton, 2019)[106]

Reflecting the advanced state of its economy and the position of the City of London as the world's leading financial centre, by the end of the nineteenth century Britain's banking system was large and diversified.[107] Capital was accumulated and allocated for use around the globe. Merchant banks like the Rothschilds and the Barings were already engaged at the beginning of our period in organising the funding of governments and, by mid-century, in mobilising capital for American railways and similar infrastructure projects there and around the world.[108] Critical to our story was that the merchant banks throughout our period also financed international trade by accepting bills of exchange, thereby assuming primary liability for paying on them when they matured (the acceptance business). As a result, exporters could be paid as soon as goods were shipped, and importers obtained credit until closer in time to when they in turn were paid by those to whom they marketed the goods.

By the beginning of the twentieth century, joint stock banks like the London and Westminster Bank, the Midland Bank and the National Provincial Bank had grown enormously from their beginnings in the 1820s and 1830s. They had overtaken the private banks and made symbolic statements about their achievements (as Victoria Barnes and Lucy Newton describe in the passage quoted) in the size and elaborate architecture of their head offices in the City of London. At the same time they began to have a significant international reach. Partly it was through what they did as bankers, moving in on the merchant banks' acceptance business to finance international trade. Partly it was also through establishing an international presence, initially by the agency and correspondent relationships they forged around the world to service customers. By 1914, for example, the London City and Midland Bank (which became

[106] V. Barnes & L. Newton, 'Symbolism in Bank Marketing and Architecture: The Headquarters of National Provincial Bank of England' (2019) 14 *Management & Org Hist* 213–244, 214, 221 (notes omitted). See also I. Black, 'Rebuilding "The Heart of the Empire": Bank Headquarters in the City of London 1919–1939' (1999) 22 *Art History* 593; V. Barnes & L. Newton, 'Visualizing Organizational Identity: The History of a Capitalist Enterprise' (2018) 13 *Management & Org Hist* 24.

[107] R. Michie, *British Banking: Continuity and Change from 1694 to the Present*, Oxford, Oxford University Press, 2016, 92.

[108] 376, 438 below. See also R. Cranston, 'Globalization: Its Historical Context', in S. Worthington (ed.), *Commercial Law and Commercial Practice*, Hart Publishing, Oxford, 2003.

part of Hongkong and Shanghai Banking Corporation (HSBC)) had forty-five correspondent banks in the United States alone.[109] After 1914 the joint stock banks began to have a direct presence abroad through establishing branches, taking shareholdings in foreign banks and making other service arrangements with them.[110]

In keeping with the transactional focus of the book, the discussion in Chapter 6 is about how the banking system as a whole, rather than individual parts of it, went about financing international trade and British industry. An appreciation of the institutional background, however, throws some light on the transactional side. What follows, therefore, sketches a little more of the background to the important banking institutions of our period, the merchant banks and the joint stock banks. There is also brief mention of the finance houses, responsible for the hire purchase boom of the twentieth century, with their history in the nineteenth. In addition to the merchant banks, joint stock banks and the finance houses, there were a variety of other institutions which had a bearing on the financing of trade and industry. In Chapter 6 we examine just two, the money market and the clearing system for bank payments, to illustrate the wider financial architecture of which these banking and financial institutions were part.

(i) The Merchant Banks

As their name suggests, the merchant banks began life as merchants as well as bankers. Thus, the Barings and the Rothschilds traded commodities internationally, both on their own account and through agents.[111] The Barings dealt in a wide range of goods, making advances to induce overseas merchants to send consignments through the firm.[112] For example, in the 1830s the Second Bank of the United States authorised agents to purchase cotton and to ship it to Barings Brothers & Co. in Liverpool.[113] N. M. Rothschild & Sons was choosier than Barings, attempting to dominate in particular commodities such as cotton, tobacco and sugar from the Americas, and copper from Russia. Rothschild tended to deal through partners and salaried agents in key markets such as New Orleans, Havana and St Petersburg.[114] As well as finance, George Peabody & Co. (whose business became J.P. Morgan & Co. after Peabody's

[109] R. Cameron & V. Bovykin, *International Banking 1870–1914*, New York, Oxford University Press, 1991, 245.

[110] G. Jones, *British Multinational Banking 1830–1990*, Oxford, Oxford University Press, 1995, 78–79, 138–156.

[111] S. Chapman, *The Rise of Merchant Banking*, London, Allen & Unwin, 1984, 18–19, 32, 34, 38.

[112] P. Ziegler, *The Sixth Great Power Barings 1762–1929*, London, Collins, 1998, 131; J. Orbell, *Baring Brothers & Co, Limited. A History to 1939*, London, Baring Brothers & Co Ltd, 1985, 30–33; J. Hidy, *The House of Baring in American Trade and Finance*, Cambridge, Mass, Harvard University Press, 1949, 102–106, 189–190, 360–361.

[113] W. Buckingham Smith, *Economic Aspects of the Second Bank of the United States*, Cambridge, Mass, Harvard University Press, 1953, 196.

[114] N. Ferguson, *The World's Banker: The History of the House of Rothschild*, London, Weidenfeld & Nicolson, 1998, 293, 297.

retirement) had been dealing in American grain and the China trade. In 1849 it began to engage directly in the export trade from Britain of iron rails for American railways. Peabody's rationale was that the profits on exporting the rails exceeded what he could make in financing the transactions.[115] Early on J. Henry Schroder & Co. specialised in the Baltic trade, for example receiving tallow on consignment from St Petersburg.[116] A number of other merchant banks such as Kleinwort Sons & Co. and Antony Gibbs & Sons continued to have trading arms throughout the nineteenth century.[117]

From the perspective of the merchant banks, banking and trading were intertwined. To others the merchant banks offered trade credit by lending their names to bills of exchange drawn by exporters which would pay for their goods. Given their reputation, if a merchant bank accepted a bill of exchange (by writing this on its face), that meant the bill could be readily sold (discounted) in the money market either in London or abroad. The bills might be issued under letters of credit. This financing of trade through bills of exchange was the so-called acceptance business, which from the mid-1820s began with British trade with Europe and the United States.[118] What became known as the Bill on London – a bill of exchange accepted by one of the first-class London banks, payable in London in pounds sterling – became the benchmark for financing international trade. When Britain was under the gold standard the pound sterling became the reserve currency of the world, literally convertible into gold.[119] Closely related to the acceptance business was the exchange business – in other words, dealing in bills of exchange to take account of the differences in currencies between London and elsewhere. For example, a bill of exchange might be drawn in pounds sterling, but the exporter might want payment in the local currency, say the Indian rupee. Until the 1870s, the leading merchant bankers gathered twice weekly at the Royal Exchange to settle the rates of exchange for bills and currencies. When the Rothschilds and the Barings decided that there were more profitable outlets for their activities, other merchant banks such as Samuel Montagu & Co. became foreign exchange and arbitrage specialists.[120]

As well as the acceptance business, the merchant banks assisted in securities issues. Hence, they were sometimes called 'issue houses'.[121] Early in the

[115] K. Burk, *Morgan Grenfell 1838–1988: The Biography of a Merchant Bank*, Oxford, Oxford University Press, 1989, 14.

[116] R. Roberts, *Schroders*, Basingstoke, Macmillan, 1992, 36, 38.

[117] S. Diaper, *The History of Kleinwort Sons & Co in Merchant Banking 1855–1961*, PhD thesis, University of Nottingham, 1983, 254–256; G. Jones, *Merchants to Multinationals*, Oxford, Oxford University Press, 2000, 53,

[118] Y. Cassis & P. Cottrell, *Private Banking in Europe: Rise, Retreat, and Resurgence*, Oxford, Oxford University Press, 2015, 122.

[119] C. Schenk, 'Sterling and Monetary Policy 1870–2010' in R. Floud, J. Humphries & P. Johnson (eds.), *The Cambridge History of Modern Britain Growth and Decline 1870 to the Present*, 2nd ed., Cambridge, Cambridge University Press, 2014, 450–451.

[120] S. Chapman, The Rise of Merchant Banking, *op cit*, 47. See T. Moxon, *English Practical Banking*, 15th ed., Manchester, John Heywood, 1910, 39, 43–44.

[121] R. Roberts, 'What's in a Name? Merchants, Merchant Bankers, Accepting Houses, Issuing Houses, Industrial Bankers and Investment Bankers' (1993) 35 *Business Hist* 22.

nineteenth century, those like the Rothschilds and the Barings had been appointed by foreign states for the issue of government bonds.[122] Other merchant banks followed, along with a few mavericks like Parr's Bank Ltd, an expanding joint stock bank, which assisted with Japanese government issues in the early twentieth century.[123] As well as government bonds, the merchant banks became involved in the issue, underwriting and marketing of corporate shares and bonds. In the nineteenth century this was mainly for companies operating abroad, such as American railways, although in the early twentieth century the Barings organised some domestic issues and took investments (both for itself and customers) in developments like the London tramways and underground railway, and the Liverpool docks.[124] After the First World War the merchant banks turned to domestic issues as international business dried up. The company amalgamations and rationalisations of the 1920s and 1930s were a source of opportunities.[125] It was at this point that their role in proffering corporate advice became an important avenue of activity. Morgan Grenfell was a leader in this with its role in the acquisition of Vauxhall Motors by General Motors in 1925.[126] Following the Second World War exchange controls remained in place and there was a decline in the acceptance business. The advent of the hostile takeover in the late 1950s filled the gap.[127] From the 1960s there was further expansion for the merchant banks with unit and investment trusts, insurances broking, asset finance, venture capital and, of major significance, a resurgence of international issues and international lending with the arrival of the Euromarkets.

(ii) The Joint Stock Banks and the Finance Houses

Merchant banking was well established when the joint stock banks arrived on the scene. Unlike the merchant banks their focus, at least initially, was domestic banking as rivals to the private banks, which predated them. The joint stock banks were a creation, it seems almost accidental, of nineteenth-

[122] M. Flandreau & J. Flores, 'Bonds and Brands: Foundations of Sovereign Debt Markets, 1820–1830' (2009) 69 *J Econ Hist* 646, 656–675; F. Dawson, *The First Latin American Debt Crisis; The City of London and the 1822–25 Loan Bubble*, Princeton, Princeton University Press, 1990.

[123] RBS, Parr's Bank Ltd, PAB/135, 4% loan agreement to Japanese government, 1899.

[124] e.g., V. Carosso & R. Carosso, *The Morgans: Private International Bankers 1854–1913*, Cambridge, Mass, Harvard University Press, 1987, 222–223, 488; P. Ziegler, *The Sixth Great Power Barings 1762–1929*, London, Collins, 1988, 287–288.

[125] J. Grady & M. Weale, *British Banking 1960–85*, Basingstoke, Macmillan, 1986, 97. See also S. Diaper, 'Merchant Banking in the Inter-War Period: The Case of Kleinwort, Sons & Co' (1986) 28 *Business Hist* 55, 56–60.

[126] K. Burk, *Morgan Grenfell 1838–1988: The Biography of a Merchant Bank*, Oxford, Oxford University Press, 1989, 92–93. See D. Ross, 'Industrial and Commercial Finance in the Interwar Years', in R. Floud & P. Johnson (eds.), *The Cambridge Economic History of Modern Britain Economic Maturity, 1860–1939*, Cambridge, Cambridge University Press, 2004, 424.

[127] e.g., N. Ferguson, *High Financier: The Lives and Time of Siegmund Warburg*, London, Allen Lane, 2010; R. Cranston, 'The Rise and Rise of the Hostile Takeover', in K. Hopt & E. Wymeersch (eds.), *European Takeovers: Law and Practice*, London, Butterwort, 1992.

century statute.[128] At least for a time, there was intense rivalry with the private banks. An Act of 1826 enabled unlimited liability joint stock banks outside a sixty-five miles radius of London.[129] The Bank Charter Act 1833 allowed such joint stock banks also to be established in London.[130] Large numbers of joint stock banks were formed, and thus the possibility of a system of national banking. An attempt to restrict them, through curtailing their right to issue bank notes, was contained in the Bank Charter Act 1844.[131] Further legislation in 1858 and 1862 allowed them to assume the mantle of limited liability.[132]

It was outside London that the Industrial Revolution had its base, and it was there that an extensive network of private and joint stock banks existed, so-called country banking. These were sometimes established by local industrialists intent on making money, providing payment services and financing their businesses.[133] They linked to London banks and others through agency arrangements. There was no love lost between the private and joint stock banks. For a while the private banks excluded the joint stock banks from the London Bankers' Clearing House. But the deposits of the joint stock banks grew, and in the final decades of the nineteenth century the private banks transformed into joint stock banks or loitered for a while as smaller rivals to them.[134] In part as a reaction to the 1844 restrictions, the joint stock banks had continued to establish branches. By the end of the century these had become relatively large national networks, constituting the core of their banking business.[135] Bank amalgamations which began in the 1880s culminated in 1918 in a domestic banking market dominated by five of the joint stock banks – Lloyds, Barclays, Midland, National Provincial and Westminster – all with extensive branch networks.[136] This combination of growth and amalgamation had transformed them into powerful financial institutions, which they remained for the rest of our period.

[128] V. Barnes & L. Newton, *The Introduction of the Joint-Stock Company in English Banking and Monetary Policy*, Discussion Paper, Henley Business School, September 2016.

[129] Banking Co-partnership Act 1826, 7 Geo. IV c. 46. The term 'joint stock' was because a number of individuals ('joint') held shares (stock) in the bank's capital. At this point there was no limited liability.

[130] 3 & 4 Wm IV, c. 98. [131] 7 & 8 Vic, c. 113, ss.10–12.

[132] M. Collins, *Money and Banking in the UK: A History*, London, Croom Helm, 1988, 51–56; B. Anderson & P. Cottrell, *Money and Banking in England: The Development of the Banking System 1694–1914*, Newton Abbot, David and Charles, 1974, 241–250.

[133] L. Pressnell, *Country Banking in the Industrial Revolution*, Oxford, Clarendon Press, 1956, 13–36; S. Jones, 'The Cotton Industry and Joint-Stock Banking in Manchester 1825–1850' (1978) 20 *Business Hist* 165.

[134] R. Michie, British Banking: Continuity and Change from 1694 to the Present, Oxford, *op cit*, 38–39; Y. Cassis & P. Cottrell, *Private Banking in Europe: Rise, Retreat and Resurgence*, Oxford, Oxford University Press, 2015, 167–170. By 1909 there were only two private banks remaining in the City of London: Y. Cassis, *City Bankers 1890–1914*, Cambridge, Cambridge University Press, 1994, 15n.

[135] V. Barnes & L. Newton, 'How Far Does the Apple Fall From The Tree? The Size of English Bank Branch Networks in the Nineteenth Century' (2018) 60 *Business Hist* 447, 459, 466.

[136] M. Billings, S. Mollan & P. Garnett, 'Debating Banking in Britain: The Colwyn committee 1918', Business History, DOI: 10.1080/00076791.2019.1593374.

In the nineteenth century, the main functions of the joint stock banks were to facilitate their customers' payments, to make short-term advances and, later, to take and keep safe their deposits. An efficient payments system was especially important. Inland bills of exchange and the banks' own bank notes facilitated payments in the first part of the nineteenth century. But the system still fell short. In the mid-nineteenth century, for example, obligations between members on the Liverpool Cotton Exchange were being directly settled in cash and gold.[137] The use of inland bills declined, and, as we have seen, the 1844 Act limited the banks in issuing their own notes. Cheques and Bank of England notes, which had become legal tender in 1833 for sums above five pounds, began to dominate.[138] In the second half of the nineteenth century and until the end of our period the cheque became the commonly used instrument for commercial payment domestically.[139]

As for bank advances, these were primarily for short-term, not long-term, capital purposes. Most British industries in the nineteenth century were modest in size; the services of the merchant banks for securities issues were simply not appropriate, although by the end of our period the picture was different. For working capital, however, industry could turn to a bank, or at least its branch at the local level, which might provide an overdraft facility, or perhaps a loan. Before the amalgamation movement in banking took hold at the end of the nineteenth century, the acceptance business was not regarded as the work of the joint stock banks, although Liverpool banks like the Liverpool Union Bank began accepting bills in the 1880s.[140] Then in the early twentieth century the larger joint stock banks, at least in London, became rivals to the merchant banks in offering their customers trade finance and foreign exchange services.[141] The issuing business remained with the merchant banks. For example, in the interwar period Barclays occasionally underwrote issues for first-class borrowers, but it was usually content to refer customers wanting to raise capital through shares or debenture issues to a merchant bank.[142]

Standing apart from the banks were the finance houses. These took various forms, but one type in the twentieth century provided what today is called 'asset finance', in other words credit secured on the asset being financed. Asset

[137] A. Ellis, *Heir of Adventure The Story of Brown, Shipley & Co Merchant Bankers 1810–1960*, London, Brown, Shipley & Co, 1960, 60. A former partner of that firm recalled: 'I have seen a long row of boys from brokers' offices, with bags of gold on their shoulders and Bank of England notes in their pocket-books, waiting to make their settlements with our cashier.' Cash payment through the post was by cutting notes in half and sending the halves by different post: ibid., 112.

[138] Bank Notes Act 1833, s.6. [139] 389 below.

[140] A. Wilson, *Banking Reform*, London, Longmans, Green & Co, 1879, 168; S. Chapman, Merchant Enterprise in Britain: From the Industrial Revolution to World War I, *op cit*, 212; T. Gregory, *The Westminster Bank through a Century*, London, Oxford University Press, 1936, vol. I, 263.

[141] P. Cottrell, 'Domestic Finance, 1860–1914', in R. Floud & P. Johnson (eds.), *The Cambridge Economic History of Modern Britain* Economic Maturity, 1860–1939, op cit, 275; D. Kynaston, *The City of London The Golden Years 1890–1914*, London, Pimlico, 1995, 293; C. Goodhart, *The Business of Banking 1891–1914*, London, Weidenfeld and Nicolson, 1972, 136.

[142] M. Ackrill & L. Hannah, *Barclays: The Business of Banking 1690–1996*, Cambridge, Cambridge University Press, 2000, 97–98.

finance began in the nineteenth century as hire and deferred (hire) purchase. Some of these finance houses had their origin in the railway wagon companies, which from the late 1850s built and repaired wagons for use on the railways and provided them to customers on hire and hire purchase. The British Wagon Company provided hire purchase for motor vehicles and lorries in the interwar years, as did the Birmingham Wagon Company.[143] Perhaps the best example is the North Central Wagon Company, which began business in 1861, incorporated in 1894 and, in the twentieth century as the North Central Wagon and Finance Company Ltd, became an important provider of hire purchase and leasing (hire) facilities for motor vehicles and lorries.[144] In time, it became Lombard North Central (after amalgamating with Lombard Bank) and part of National Westminster Bank.[145] It was not the only finance house to be acquired by a bank.[146] At the end of our period Lombard North Central was a provider of asset finance, leasing items such as aircraft, ships and petrochemical works.

In addition to the wagon companies, new finance houses appeared on the scene.[147] One of the most important, United Dominions Trust (UDT), began in 1919 as a branch of Continental Guaranty Corporation of New York. It was acquired by British interests in 1923.[148] It concluded agreements in the 1920s with Austin Motor Company and Morris Motors to finance their vehicles on hire purchase, and agreements with other motor vehicle manufacturers followed. The UDT credit facility with Morris was partly financed by the company itself, which had a veto over who was to be given hire purchase contracts.[149] Most hire purchase for motor vehicles was accounted for by UDT and the other finance houses, but in London some of the large car dealers operated their own hire purchase schemes.[150] In the post–Second World War

[143] see *Staffs Motor Guarantee Ltd* v. *British Wagon Company Ltd* [1934] 2 KB 305; J. Hypher, C. Wheeler & S. Wheeler, *Birmingham Railway Carriage & Wagon Company*, Cheltenham, Runpast Publishing, 1995, 5–8.

[144] e.g., *North [Central] Wagon & Finance Co Ltd* v. *Graham* [1950] 2 KB 7 (the company is incorrectly named in the official report); *North Central Wagon Finance Co Ltd* v. *Brailsford* [1962] 1 WLR 1288.

[145] R. Reed, *National Westminster Bank: A Short History*, London, National Westminster Bank, 1983. In the post–Second World War period Lombard Bank had offered credit facilities for household, leisure and other consumer goods.

[146] *Report of the Committee on the Working of the Monetary System*, Cmnd 827,1959, 74 (the Radcliffe Report).

[147] R. Harris, *Hire Purchase in a Free Society*, 3rd ed., London, Hutchinson, 1961, 24.

[148] *United Dominions Trust Ltd* v. *Kirkwood* [1966] 1 QB 783, 790–791 (on appeal [1966] 2 QB 431, upholding the finding that it was carrying on a banking business within section 6(d) of the Moneylenders Act 1900 and so need not be registered under that Act as a moneylender: see 55 below).

[149] P. Scott, *The Market Makers: Creating Mass Markets for Consumer Durables in Inter-war Britain*, Oxford, Oxford University Press, 2017, 279.

[150] Ibid., 280–281. See also *Transport and General Credit Corporation Ltd* v. *Morgan* [1939] Ch 531 (subsidiary of company selling radios formed to offer hire purchase to customers).

period controls over lending by the finance houses were used by the government as an instrument of monetary control. Industrial output of consumer durables was adversely affected when the tap was turned down.[151]

(iii) Financial Architecture

The merchant banks, joint stock banks and finance houses were important parts of Britain's financial architecture during our period. Other parts of that architecture, ensuring before the First World War London's role as the world's leading financial and commercial centre, included Lloyds of London (the insurance market), the Baltic Exchange (as a shipping market) and the London Stock Exchange. At the centre, and an essential part of Britain's wider history, was the Bank of England.

The Bank of England was a private institution until 1946, and as such it had private customers and occasionally rubbed up against other financial interests in competition with it. The Bank was especially troubled in the first part of the nineteenth century by the competitive threat from the newly founded joint stock banks. In 1837, for example, it resorted to law and obtained an injunction against the London and Westminster Bank accepting demand bills and bills with maturities of less than six months, which it regarded as its privilege to handle in London. The injunction lasted until the 1844 Act.[152] Despite public criticism, the Bank also refused to open an account for the new bank or to discount bills payable there. However, in the second half of the nineteenth century there was a general expectation that the Bank of England would act in the national, not in its private, interest. In 1890 it averted any wider financial crisis when leading the rescue of Barings, which as a result of the failure of its Argentinian interests had thought itself unable to carry on business.[153] The Bank's special status derived from its position as the government's bank, the monopoly provider of banknotes[154] and the backstop in providing accommodation in times of financial stress.[155] By the time of the First World War the Bank's function as the lender of last resort was confirmed.[156]

[151] P. Scott & J. Walker, 'The Impact of 'Stop-Go' Demand Management Policy on Britain's Consumer Durables Industries 1952–65' (2017) 70 *Econ Hist Rev* 1321.

[152] *Governor and Company of the Bank of England* v. *Anderson* (1837) 2 Keen 328, 48 ER 655. See D. Kynaston, *Till Time's Last Sand: A History of the Bank of England 1694–2013*, London, Bloomsbury, 2017, 130; T. Gregory, *The Westminster Bank*, London, Oxford University Press, 1936, vol. I, 150; J. Slinn, *A History of Freshfields*, London, Freshfields, 1984, 83. (Freshfields acted as the Bank's solicitors.)

[153] Among accounts of the crisis: D. Kynaston, Till Time's Last Sand: A History of the Bank of England 1694–2013, op cit, 226–232; R. Vasudevan, 'Quantitative Easing through the Prism of the Barings Crisis in 1890' (2014) *J Post Keynesian Econ* 91. On its causes e.g., P. Vedoveli, 'Information Brokers and the Making of the Baring Crisis, 1857–1890' (2018) 25 *Financial Hist Rev* 357.

[154] Eventually, the banks still issuing bank notes under the Bank Charter Act 1844 forfeited their right altogether.

[155] see S. Battilossi, 'Money Markets', in Y. Cassis, R. Grossman & C. Schenk (eds.), *The Oxford Handbook of Banking and Financial History*, Oxford, Oxford University Press, 2016, 224–229.

[156] 443, 449 below.

In the money market the Bank of England acted primarily through the discount houses, which bought and sold acceptances (bills of exchange accepted by a first-class London bank) and took surplus funds from the banks on a short-term (often overnight) basis.[157] From 1864 the Bank became a member of the Bankers' Clearing House. The clearing house functioned to short-circuit the payment process for the banks. They no longer needed to pay individually each cheque or other payment order but could set off with other banks all the payment orders received in a day. Members of the clearing house held accounts with the Bank of England so that, at end of the day, they were able to settle across the Bank's books the net amounts they owed the others. These accounts with the Bank provided the banking sector with a source of liquidity.

1.3 Legal Context: Principles, Practices and Realities

> . . . the late Vice-Chancellor, Sir William Page Wood, afterwards Lord Chancellor Hatherley, made the order to take the Agra and Masterman's Bank out of liquidation nearly six months after its stoppage. I remember on that occasion a charming old solicitor, a neighbour of ours in Old Jewry, before the case came on, using every argument he could . . . to induce me to abandon what he considered the absolutely hopeless attempt, he being instructed on behalf of some of the Indian banks . . . but the evidence we brought forward was so overwhelming as to the view and wishes of both creditors and shareholders that the Vice-Chancellor was persuaded into make the order. I afterwards called upon my solicitor friend and neighbour and consoled with him . . . [H]e said to me: 'Oh Morris, I see now how you did it – the law was dead against you but you went to the poor man's heart!' (John Morris, solicitor, Ashurst Morris Crisp & Co., 1903)[158]

There were a number of principles animating English commercial law during our period. The basal principle was freedom of contract. One dimension to this was that commercial parties (and others) should be held to their bargains. As the *Law Times* expressed the principle in 1870, absent fraud or misrepresentation 'an adamantine degree of hardness in a contract is no ground for relief'.[159] Just because the turn of events bore heavily on a party, or circumstances significantly changed to a party's detriment, was no

[157] R. Michie, British Banking: Continuity and Change from 1694 to the Present, *op cit*, 111–112.

[158] LMA/4537/F/10/005, Ashurst Morris Crisp and Company, Report of proceedings at John Morris's 80th birthday celebration, 11–12. Morris was a leading City of London solicitor in the second half of the nineteenth century: J. Slinn, *Ashurst Morris Crisp: A Radical Firm*, Cambridge, Granta, 1997, 55; I. Doolittle, *Ashurst Morris Crisp*, London, Ashurst Morris Crisp, n.d., 8–9; C. Jones, *International Business in the Nineteenth Century: The Rise and Fall of a Cosmopolitan Bourgeoisie*, Brighton, Wheatsheaf, 1987, 173, 239–240.

[159] e.g., 'Unconscionable Bargains' (1870) 49 *LT* 223, 223. This is one of many such statements: see e.g., 'Unreasonable Contracts' (1884) 48 *JP* 401. See also C. Macmillan, 'Contract Terms between Unequal Parties in Victorian England', in L. Gullifer & S. Vogenauer (eds.), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale*, Oxford, Hart Publishing, 2014.

justification to intervene.[160] As important for commercial law was another dimension to freedom of contract, party autonomy. As a result of party autonomy, commercial parties could design, in a largely unfettered manner, the arrangements they desired for their individual transactions, the standards and standard form contracts for their regular dealings, and the rules for the organised markets, institutions and dispute resolution procedures behind them. It was private law-making writ large, within a benign framework of state law.[161] But it was not law without the state. English law took the view – as expressed by one of the leading commercial judges – that there could be 'no Alsatia in England where the King's writ does not run'.[162]

The second principle was certainty.[163] To put it another way, commercial law should comprise bright-line rules which traders, merchants, brokers and bankers could readily understand and apply in commercial practice. This ensured that parties could not only plan for their future relationship but also, as Lord Sumner put it on one occasion, 'gather their fate then and there' if things went wrong.[164] If a rule did not meet commercial needs, the principle also meant that there could be a clear expression of what otherwise was required. This ready ability to correct matters was also a corollary of party autonomy. Both principles meant that if legal doctrine proved an obstacle to commercial or financial dealings, commercial parties were able to draft around it with clear-cut modifications in the terms of their contracts, the rules of their markets or the design of their institutions.

A third principle was that the law should be flexible enough to accommodate commercial expectations, needs and developments. As Scrutton LJ put it on one occasion, commercial parties 'must be entitled to act on reasonable commercial probabilities'.[165] If legal doctrine rubbed up against commercial practice – for example, its implications for certain transactions were unanticipated or the results unacceptable – the two should be capable of being reconciled. In some cases this principle meant that the courts went as far as giving normative force to commercial practice by adopting commercial custom and trade usage as the foundation for decision-making. In others commercial practices, even if they did not have normative force, could feed into the application of legal doctrine to help achieve a compatible result.

[160] e.g., *Manchester Sheffield and Lincolnshire Railway Co* v. *Brown* (1883) 8 App Cas 703, at 712–713, 716, 718–719, 722. See also 114 below.

[161] On private law-making, see, e.g., D. Snydner, 'Private Lawmaking' (2003) 64 *Ohio State LJ* 371; L. Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 *J Leg Stud* 115; R. Ellickson, *Order Without Law: How Neighbors Settle Disputes*, Cambridge, Mass, Harvard University Press, 1991.

[162] *Czarnikow* v. *Roth Schmidt & Company* [1922] 2 KB 478, 488, per Scrutton LJ. See 371 below.

[163] Modern statements include R. Goode, 'The Codification of Commercial Law' (1988) 14 *Monash ULR* 135, 150; Lord Irvine, 'The Law: An Engine for Trade' (2001) 64 *MLR* 333, 339, 348–349; *Scandinavian Trading Tanker Co AB* v. *Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] QB 529, 540–541, per Robert Goff LJ.

[164] *Bank Line Ltd* v. *Arthur Capel & Co* [1919] AC 435, 454.

[165] *Embiricos* v. *Sydney Reid & Co* [1914] 3 KB 45, 54. (At this point as Scrutton J.)

Although courts made occasional reference to these principles, they were not at the forefront expressly of judicial (or parliamentary) decision-making.[166] English conventions of judgment writing meant that there were few references to general principles or legal policy. There were exceptions, one factor being the personality of the judge. In his judgments Scrutton LJ made frequent references to the expectations of the business community and his knowledge of commercial practice as a basis for his specific conclusions.[167] His pupil Lord Atkin, another strong personality, was also forthright in the legal principles he thought should govern judgments.[168] For most judges, however, the watchword of the craft was careful reasoning, dressed up in blandness.

The absence of these principles from judgments should give pause to assertions that they were always, or even mainly, in play. On the occasions when legal principle or policy was articulated, it was typically to resolve first-order issues, such as the common problem in commercial disputes of where the loss should fall between two innocent parties because of the fraud or insolvency of a third party. In that context, one approach was to identify which side, in the circumstances, was at greater fault; as Ashurst J. put it in the leading case of *Lickbarrow* v. *Mason*,[169] 'who has enabled such third person to occasion the loss must sustain it'.[170] Another approach was to place the loss on the party better able to bear it, as Bray J did in a contest between a bank and a company whose secretary had forged its cheques. 'The truth is', he said, 'that the number of cases where bankers sustain losses of this kind are infinitesimal in comparison with the large business they do, and the profits of banking are sufficient to compensate them for this very small risk'.[171]

Moreover, a heavy dose of realism is necessary about litigation, illustrated in the story John Morris (quoted at the outset) told during his eightieth birthday celebrations. While the outcome of commercial litigation might ostensibly turn on the application of doctrine and possibly also high principle, it was regularly unpredictable and might depend on the money thrown at it. As every lawyer knew, the immediate outcome of a case could be the product, in practice, of a range of additional factors: the persuasiveness of the advocate and personality of the judge

[166] In as much as English law favoured creditors over debtors, this was never expressed as a principle or policy and is better conceptualised as an outcome: see P. Wood, *Maps of World Financial Law*, 6th ed., London, Sweet & Maxwell, 2008.

[167] D. Foxton, *The Life of Thomas E. Scrutton*, Cambridge, Cambridge University Press, 2013, 268–269.

[168] G. Lewis, *Lord Atkin*, London, Butterworths, 1983, 68–93.

[169] (1787) 2 Term Rep 63, 100 ER 35. On the case, 351, 382 below.

[170] at 70, 39 respectively. See also *Henderson & Co.* v. *Williams* [1895] 1 Q.B. 521 (sale of sugar in Liverpool warehouse; Lord Halsbury at 529 cited the American case, *Root* v. *French*, 13 Wend 570, where Savage CJ adopted Ashurst J's formulation). cf. *Farquharson Brothers & Co* v. *King & Co* [1902] AC 325, 332, 342 (sale of timber stored at Surrey Commercial Docks).

[171] *Kepitigalla Rubber Estates Ltd* v. *National Bank of India Ltd* [1909] 2 KB 1010, 1025–1026. The company had estates in Ceylon (Sri Lanka). Bray J's analysis was approved in *London Joint Stock Bank Ltd* v. *Macmillan* [1918] AC 777, although this passage was not mentioned.

(as in the example John Morris gave); in the early nineteenth century, the impact of the stylised rules of common-law pleading; how the evidence emerged at trial; the answers juries gave to questions the judges posed (at least until the decline in jury trials in commercial causes); and a judge's sense of the merits of the specific dispute before the court and how they should be met.[172]

Further, the application of common law doctrine (or of the occasional statutory provision) was not necessarily straightforward. One aspect was the existence of a compendium of doctrine into which a specific case could be fitted. That was important in dictating how a dispute was best conceptualised and in which web of rules it fell. In the first part of the nineteenth century bills of exchange law had a reasonably well-developed set of rules, although during the nineteenth century these became disordered and codifying legislation in the form of the Bills of Exchange Act 1882 won wide support.[173] With areas such as contract and sales law, a coherent body of doctrine came later. In contract law this was brought to fruition, it seems, in the treatises published in the second part of the nineteenth century.[174] In sales law, there was the occasional distillation of doctrine by the courts,[175] and Judah Benjamin's treatise of 1868 assembled it in a more orderly fashion.[176] Later, the Sale of Goods Act 1893 gathered it into a simplified, authoritative whole.

Apart from overall bodies of doctrine, a further difficulty was to know which rule governed in the circumstances of a specific case. A 'leading case' might be unreported or unexpectedly conjured out of the air later in the day to govern the situation now before the court.[177] Conversely, what a court thought significant at the time of a decision might fade from the picture relatively quickly.[178] As every

[172] J. Getzler, 'Interpretation, Evidence, and the Discovery of Contractual Interpretation', in S. Degeling, J. Edelman & J. Goudkamp (eds.), *Contract in Commercial Law*, Sydney, Thompson Reuters, 2016, 122–123. See *Oxford History of the Laws of England*, Oxford, Oxford University Press, 2010, vol. XI, 590 (P. Polden) on the reforms in the Common Law Procedure Act 1852. On civil juries, see 55 below.

[173] 35, 384 below.

[174] For contract, see e.g., *Oxford History of the Laws of England*, Oxford, Oxford University Press, 2010, vol. XII, 308, 312–313 (M. Lobban); W. Swain. *The Law of Contract 1670–1870*, Cambridge, Cambridge University Press, 2015, 228; C. Macmillan, *Mistakes in Contract Law*, Oxford, Hart 2010, 112; J. Gordley, *The Philosophical Origins of Modern Contract Doctrine*, Oxford, Clarendon Press, 1991, 216.

[175] e.g., Mellor J on the implied terms about quality in *Jones* v. *Just* (1868) LR 3 QB 197.

[176] J. Benjamin, *Sale of Personal Property*, London, Henry Sweet, 1868. See 210 below. For agency, see 72 below on Story's influential contribution. See also 'Liability of Agent to Repay Money Received on behalf of Principal' (1877) 62 *LT* 383, 384 for five principles 'deductible from the cases'.

[177] e.g., 57 (*May* v. *Butcher* [1934] 2 KB 17) and 224 (*Medway Oil and Storage Co* v. *Silica Gel Corporation* (1928) 33 Comm Cas 195) below. The resuscitation of *Raffles* v. *Wichelhaus* (1864) 2 Hurl & C 906, 159 ER 375 is also instructive: B. Simpson, 'Contracts for Cotton to Arrive: The Case of the Two Ships *Peerless*' (1989) 11 *Cardozo LR* 287; C. Macmillan, Mistakes in Contract Law, *op cit*, 117. See also E. Lim, 'Of 'Landmark'; or 'Leading' Cases: *Salomon's* Challenge' (2014) 41 *JLS* 523.

[178] 'This is a case of very great importance to the mercantile world', said the Lord Chancellor in *Navulshaw* v. *Brownrigg* (1852) 2 De G M & G 441, 42 ER 943, although the case was soon eclipsed by others. See 152 below.

lawyer knew, even if doctrine was available it was, as the *Law Times* put it on one occasion, 'difficult to say, with the certainty the man in the street generally expects a lawyer to speak, whether the facts of a particular case bring it within the principles'.[179] On countless occasions judges disagreed about doctrine or its bearing as a case ascended the judicial hierarchy, and about whether it applied on subsequent occasions, was to be distinguished, or required variation or radical surgery. Unsurprisingly in these circumstances, commercial parties could be mightily unimpressed with the law, their lawyers and the courts.

1 Party Autonomy, Legislation and Private Law-making Party

> I do not see why businessmen should require the Court and Barristers to interpret what they mean. (Letter, W. H. Lever [Lord Leverhulme] to F. W. Brock, 25 May 1915)[180]

Freedom of contract as an underlying principle of English law is a familiar theme. It was well understood by trade and industry, although as Lever's letter illustrates some businesspeople were so frustrated with the law and lawyers that they thought party autonomy should go further to exclude the courts from the picture altogether. During our period there was a transformation in contract law doctrine. Notions of fairness and equality of exchange, coupled with liability based on reliance and the receipt of benefit, were substituted by a contract law based more on the expressed will of the parties and liability grounded on promises. Whether this transformation was as stark as sometimes portrayed, nineteenth-century contract law was related, in a way, to the ideas of the day.[181] In broad terms the emphasis on abstraction and formalism in nineteenth-century contract law fitted with the market economy of the industrial age.[182] It should not be surprising that the judges brought to their daily tasks the dominant ideas of the society in which they lived and worked. Just how these were reflected in their judgments is a complex matter. Judgment writing eschewed a discussion of policy issues or high principle, different judges inevitably placed a different weight on such matters, and in any event those ideas jostled with legal doctrine and other factors as specific fact patterns were litigated. It does not seem in the least controversial to assert that, during our period, the law gave support to the market economy, stood behind market

[179] 'Wrongs independent of a Contract' (1896) 101 *LT* 295.

[180] Unilever Archives, Brunner Mond & Co, LBC/93, File 632. Lever was replying to his solicitor's suggestion that the court be asked about the meaning of a Lever Bros-Brunner Mond & Co agreement: see 237–242 below. I am grateful to Jacob Corbin, Archivist at Unilever.

[181] See, e.g., P. Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford, Oxford University Press, 1979, 389. cf. *Oxford History of the Laws of England*, Oxford, Oxford University Press, 2010, vol. XII, 297–298 (M. Lobban); B. Simpson, 'Innovations in Nineteenth Century Contract Law' (1975) 91 *LQR* 247, 277–278.

[182] L. Friedman, *Contract Law in America*, Madison, University of Wisconsin Press 1965, 84–85.

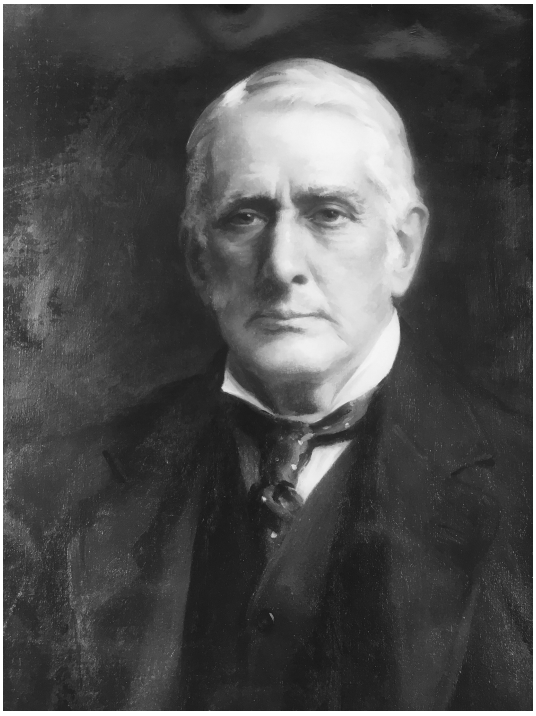

Figure 1.2 Mackenzie Chalmers (President and Fellows of Trinity College, Oxford)

transactions and enforced them in accordance with rules which generalised economic behaviour.

(i) The Legislative Framework

Legislation intruded little, if at all, on commercial transactions. The design of one body of legislation was explicitly to facilitate commerce, not curb it. The codifications pertinent to our story of transactions, the Sale of Goods Act 1893 and the Bills of Exchange Act 1882, fell into that category.[183] Their facilitative aim was made explicit on various occasions by Mackenzie Chalmers, who drafted them. As he put it in the first edition of his book on the 1893 Act, it 'does not seek to prevent the parties from making any bargain they please. Its object is to lay down clear rules for the cases where they had either formed no intention, or failed to express it.'[184] Legislative intention had some impact on implementation, not least this indication that his codified sales law comprised default rules, at work if parties did not choose otherwise, but freely modified or avoided if they so wished.

[183] See also 407 below (legislation making dock warrants documents of title).
[184] *The Sale of Goods 1893*, London, William Clowers & Sons, 1894. v-vi.

https://doi.org/10.1017/9781108182836.002 Published online by Cambridge University Press

Similarly, the Factors Acts were facilitative of commerce. They were aimed at protecting against claims by owners those third parties who were caught out by the wrongful actions of the owner's agent – for example, the merchant purchasing goods in an ordinary commercial dealing not knowing that they were not the agent's, or the bank making an advance to an agent, wrongly believing that the documents of title to goods proffered as collateral were his, not the principal's. We see in Chapter 3 there was an affection for owners leading courts to undermine the legislative intent in the Factors Acts to protect third parties entering market transactions. Over time, that led to Parliament throughout the nineteenth century periodically rewriting the legislation to maintain the goal of protecting third parties in their market dealings.[185]

In addition to facilitative legislation like this, there was a body of statutes which were regulatory in character, although in practice commercial and financial dealings were largely untouched. At one extreme was the Larceny Act 1861, which on rare occasion was wheeled out to address fraud and egregious market abuse.[186] Short of the full weight of the criminal law there was, as regards sales, statutory control to ensure reliable weighing and measuring equipment, relevant to some spot sales. Prohibiting short weight and measure did not really arrive until the Sale of Food (Weights and Measures) Act 1926, which, as its title suggests, had a limited ambit.[187]

Next, there was some control on the claims circulated when selling goods. The Merchandise Marks Act 1862 criminalised applying false marks in the sale of goods with intent to defraud. The legislation was, though, a dead letter.[188] Its successor, the Merchandise Marks Act 1887, prohibited the false application to goods of the marks and names of others, false trade descriptions of goods and false indications that goods were made in Britain.[189] But again it fell short of the mark: the offences were unclear, had limited scope, were rarely enforced and applied only where the offending occurred within the jurisdiction. In commercial circles it was regarded as a dead duck.[190]

Further, there was the regulation of anticompetitive practices in sales. The common-law doctrine of restraint of trade had taken a benign view of such practices. The judicial justification for this echoed the conventional wisdom and public policy of the time: first, the courts said, commercial parties had freedom to enter the contracts they wished, even those restricting competition in marketing;[191] and, second, there were benefits from such practices in

[185] 151–152 below. [186] 116, 447 below.

[187] See R. Cranston, *Consumers and the Law*, London, Weidenfeld & Nicolson, 1978, 262–263. For control on food quality: ibid., 256–257.

[188] H. Payn, *Merchandise Marks Act 1887*, London, Stevens & Sons, 1888, 1–2.

[189] ss. 2, 16. Trade descriptions applied by sellers were deemed to be warranted as true: s. 17.

[190] D. Higgins & A. Velkar, '"Spinning a Yarn": Institutions, Law, and Standards c.1880–1914' (2017) 18 *Enterprise and Society* 591, 605, 607–611; R. Cranston, Consumers and the Law, *op cit*, 235.

[191] *Attorney General of Australia* v. *Adelaide Steamship* [1913] AC 781, 795. See also *Rawlings* v. *General Trading Company* [1921] 1 KB 635, 650, per Atkin LJ. See 279–280, 292 below.

steadying prices and preventing ruinous competition.[192] Towards the end of our period attitudes and public policy advanced, and the anticompetitive practices of manufactures and producers in marketing and distributing their goods started to face regulatory challenge.[193]

As for banking services, apart from the restraints of company law (such as they were) banks as institutions were largely unregulated until after our period.[194] Banks were limited in issuing banknotes, but as long as they complied with bills of exchange law they were free in the payment services they offered customers. Once the usury laws were repealed in 1854, there were no statutory restrictions relevant to the overdrafts and loans they furnished. The Bills of Sale Acts required the registration of chattel mortgages, but this was not the type of collateral banks took when they wanted security to back an advance to a commercial customer.[195] Nor, after judicial clarification, were the Bills of Sale Acts relevant to those providing asset finance through hire and hire purchase facilities.[196]

(ii) Private Law-Making – Markets and Institutions

In this almost regulation-free environment, party autonomy gave free rein to the private law-making of commercial parties. One aspect was the founding of organised markets and of the institutions to underpin them. Firstly, there were the rules and regulations governing the membership of venues where dealings were conducted; and, secondly, there were the standards, rules and regulations for trading on these markets and for the settlement of the disputes which arose. In the London and Liverpool commodity markets the standards, rules and regulations were contained, in part, in the standard form contracts drawn up by the trade associations to govern individual sales, in separate rules establishing standards, and in the terms and conditions for the auctioning of imported commodities where this occurred.[197] Private law-making on financial markets tended to be less extensive and dealings less formulaic. For example, the London money market embraced a relatively small, close-knit group of banks and discount houses, with the Bank of England casting its shadow from the background. Verbal agreements were common for individual dealings, without being reduced to writing in the same detail they were on the commodity markets.[198] Trust and the pressure of informal norms smoothed the edges if problems arose.

[192] *North Western Salt Company Ltd* v. *Electrolytic Alkali Company Ltd* [1914] AC 461, 471–472, per Lord Haldane LC.

[193] Monopolies and Restrictive Practices (Inquiry and Control) Act 1948; Restrictive Trade Practices Act 1956; Resale Prices Act of 1964. See 273–274 below.

[194] see 378 below. The Banking Act 1979 provided the first systematic regulation.

[195] W. Cornish, S. Banks, C. Mitchell, P. Mitchell & R. Probert, Law and Society in England 1750–1950, *op cit*, 221, 234.

[196] see 259 below.

[197] see Chapter 6 below. On standards: A. Velkar, *Markets and Measurements in Nineteenth Century Britain*, Cambridge, Cambridge University Press, 2012, 191.

[198] 452 below.

Accompanying the private law-making for the organised markets was the establishment of market-supporting structures. Notable with the commodity markets were the rules and regulations for the clearing and settlement of individual transactions. These were prepared by private bodies such as the London Produce Clearing House (LPCH). Again, contract was central – standard form contracts for individual trades combined with the rules of the clearing house as regards how the mechanism worked. The contractual network framing the work of the LPCH dressed it in the drapery of a law-making body.[199] As to financial markets, the London Bankers' Clearing House was an important market-supportive institution, formed by the banks and enabling them to handle payments between their customers in bulk, so only net differences needed to be paid.[200] The rules of the clearing house were spartan and mechanical, but backed by formal and informal understandings between the banks, with the backing of the Bank of England.

The systems of private law constituted by these rules, regulations and standard form contracts had a number of characteristics. One was standardisation, which reduced transaction costs in contracting since there was no need on each deal to negotiate all the terms anew.[201] Multilateral standardization boosted confidence in a market, in part because commercial parties knew that they were getting terms no worse than others.[202] A second characteristic was that the system of private law created was detailed and sophisticated. It was drawn up by commercial parties, after input from relevant interests. Unlike some state law-making, there was a wealth of experience to draw on regarding the problems likely to be encountered, the different contexts in which they occurred and their incidence at different times. Third, although these systems of private law governing markets and institutions were erected on a foundation of profit-making and competitive interests, their architects worked to certain principles and were attuned to the balance of interests to be accommodated.[203]

Fourth, lawyers had little hand in this private law-making. The drafting of standards, rules and contracts was by commercial parties, knowing what they wanted, with lawyers having an ancillary role of vetting for legal error and occasional advice on drafting. When disputes arose, the involvement of lawyers was discouraged on the basis that commercial parties would be better able to understand the issues and be more motivated to reach a quick and efficient solution.[204] That only changed if legal proceedings ensued. Fifth, almost from the

[199] cf. J. Lurie, 'Commodities Exchanges as Self-Regulating Organizations in the late 19th Century: Some Perimeters in the History of American Administrative Law' (1975) 28 *Rutgers LR* 1107, 1116.

[200] 454 below.

[201] H. Collins, *Regulating Contracts*, Oxford, Oxford University Press, 1999, 230.

[202] See J. Hurst, *Law and Markets in United States History*, Madison, University of Wisconsin Press,1982, 37.

[203] see 335–337 below on drafting standard form contracts.

[204] cf. Y. Dezalay & B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, Chicago, University of Chicago Press, 1996, 133. See 369–373 below.

outset these systems of private law had an international reach. That was attributable to Britain's leading role during our period in trade, banking, shipping and insurance, and the outward looking nature of those involved, many of whom were foreign or whose families originated abroad.[205] Britain's dominant role in private law-making was not uncontested.[206] However, once international merchants and bankers reached a certain size, the reality was that they had to deal through London (and, to a lesser extent, Liverpool) with its banks and reserve currency, its marine insurance and its shipping and commodity markets.

Sixth, and as a corollary, to engage in these activities – finance, ship chartering, marine insurance, international commodity sales and so on – commercial parties, wherever they were, had to comply with the rules of these London and Liverpool institutions and markets. This meant that English law – and these systems of private law it spawned – was at the same time both local and global.[207] Thus the standard form contracts predominantly employed for international commodity sales were drawn in Britain.[208] (First-mover advantage means that their descendants still apply to dealings in a considerable volume of international trading in commodities like grain and cotton.[209]) Crucially, commercial dealings were deemed to be made and performed in England – whatever the reality – and the mandatory dispute resolution mechanism of trade arbitration occurred there.[210] The upshot of arbitration was, on scattered occasions, the subject of supervision by the English High Court.[211]

Seventh, if these systems produced untoward results, the principle of party autonomy was generally there to remedy matters through redrafting the relevant rule or standard form contract, or institutional redesign.[212] Finally, enforcement was largely self-contained and free of state law. Markets and institutions exercised the power to exclude members in cases of serious non-

[205] e.g., R. Michie, 'Insiders, Outsiders and the Dynamics of Change in the City of London since 1900' (1998) 33 *J Contemp Hist* 547, 555–557, 558–559; S. Chapman, 'The International Houses: The Continental Contribution to British Commerce, 1800–1860' (1977) 6 *J Eur Econ Hist* 5.

[206] e.g., for commodity sales, see A. Quark, Global Rivalries: Standards Wars & the Transnational Cotton Trade, op cit, 47, 54, 65, 104.

[207] G. Mallard &. J. Sgard, 'Contractual Knowledge: One Hundred Years of Legal Experimentation in Global Markets', in G. Mallard &.J. Sgard (eds.), *Contractual Knowledge*, Cambridge, Cambridge University, 2016, 12. cf. T. Röder, *From Industrial to Legal Standardization 1871–1914*, Leiden, Brill, 2011, a case of limited standardization in insurance law.

[208] 313–315 below. [209] See 295 below.

[210] On commodities arbitration: D. Kirby-Johnson, *International Commodity Arbitration*, London, Lloyd's of London Press, 1991; A. Slabotzky, *Grain Contracts and Arbitration*, London, Lloyd's of London Press, 1984; 361–373 below. On maritime arbitration: B. Harris, 'London Maritime Arbitration' (2011) 77 *Arbitration* 116; P. Tassios, 'Choosing the Appropriate Venue: Maritime Arbitration in London or New York?' (2004) 21 *J Int'l Arb* 355, 355–359; C. Ambrose, K. Maxwell & M. Collett, *London Maritime Arbitration*, 4th ed., London, London, Informa Law, 2017, 2–3.

[211] cf. J. Braithwaite, 'Standard Form Contracts as Transnational Law' (2012) *MLR* 779, where parties choose English law and jurisdiction. See also H. Collins, Regulating Contracts, *op cit*, 329; M. Bridge, *The International Sale of Goods*, 4th ed., Oxford, Oxford University Press, 2017 17–19.

[212] See for example 358–361 below.

compliance with the system of formal norms, although with the maverick or recalcitrant this might fall short in bringing them to heel. The courts adopted a hands-off approach to member discipline.[213] In some contexts informal norms operated within close-knit groups where trust was at a maximum and future interactions, both commercial and perhaps social, were anticipated. This was a characteristic of London and local financial markets.[214] It was less the case with the commodity markets, where size alone meant more rough and tumble. Informal norms, and the big stick of the courts in reserve, buttressed compliance with arbitration awards, albeit that observance abroad was an occasional concern.[215]

(iii) Private Law-Making – Distribution Networks

Party autonomy allowed individual manufacturers and producers to control the marketing of their products down the distribution chain.[216] Distributors in handling goods for onward sale were bound by contract to do this in specified ways, confining their efforts to particular parts of the country or the world, obliging them to 'push' the product or use their 'best endeavours' in marketing it and requiring them to supply goods to their own customers at the prices the manufacturer or producer laid down. These contracts could also contain sanctions for errant distributors. Manufacturers and producers might act individually in such cases, with the possibility of *in terrorem* enforcement through an injunction from the court obliging compliance.

During our period manufactures and producers also acted collectively through trade associations, which had powers conferred under their rules to impose fines and, as an ultimate sanction, stop orders, effectively preventing a distributor handling a product for non-compliance with these strictures.[217] The courts saw nothing wrong in this.[218] When these systems of fines and stop lists were challenged, they upheld them as legitimate practices in furtherance of business interests. Parties, as the court said in a parallel case, were the best judges of what was reasonable among themselves in relation to such practices, and all the courts should do was 'within due bounds to facilitate, not to fetter, trade and industry'.[219] The upshot was, as the Board to Trade put it in 1951, that 'the collective punitive action by which most fixed resale prices are

[213] 69–71 below.

[214] P. Thompson, 'The Pyrrhic Victory of Gentlemanly Capitalism: The Financial Elite of the City of London, 1945–90. Part 2' (1997) 32 *J Contemp Hist* 427, 434; R. Michie, 'Outsiders and the Dynamics of Change in the City of London since 1900' (1998) 33 *J Contemp Hist* 547, 563.

[215] 369 below.

[216] N. Isaacs, 'Business Postulates and the Law' (1928) 41 *Harv LR* 1014, 1018–1019.

[217] W. Cornish, S. Banks, C. Mitchell, P. Mitchell & R. Probert, Law and Society in England 1750–1950, *op cit*, 262. In practice trade association powers may have been a damp squib: see J. Turner, 'Servants of Two Masters: British Trade Associations in the First Half of the Twentieth Century', in H. Yamazaki & M. Miyamoto (eds.), *Trade Associations in Business History*, Tokyo, University of Tokyo Press, 1988.

[218] *Thorne* v. *Motor Trade Association* [1937] AC 797; see 272 below.

[219] *English Hop Growers* v. *Dering* [1928] 2 KB 174, 187, per Sankey LJ.

enforced amount to a private system of law which in effect is outside the jurisdiction of the Courts'.[220] It was not until the competition legislation of the post–Second World War period that this type of behaviour vis-à-vis distributors came under a cloud. Effective regulation of restrictive trade practice was slow in coming, and when it arrived, towards the end of our period, the relevant law initially lacked bite. When cases reached the courts, enforcement efforts did not always receive a sympathetic audience.[221]

2 Certainty, Predictability and Equitable Rules

> In mercantile matters I imagine that the certainty and definiteness of a rule are of more importance than a very nice and exact adjustment of conflicting interests in each particular case. (Mackenzie Chalmers, 1881)[222]

The need for certainty, or bright-line rules, was another principle of English commercial law, expressed here by the drafter of the Bills of Exchange Act 1882 and the Sale of Goods Act 1893, Mackenzie Chalmers. There was, firstly, its forward-looking aspect. Certainty, it was assumed, assured predictability for commercial parties and allowed them to plan their affairs in the way they thought best. They could anticipate risks by contractual provisions or in some cases through insurance. As well as this advantage in rule design, certainty also meant that, should a dispute arise, commercial parties would in most cases know where they stood. That would facilitate settlement and discourage delay and litigation.[223] As a result of pursuing certainty, the merits of a case could be secondary considerations in decision-making. In as much as equitable doctrines were thought to introduce uncertainty into commercial dealings, commercial (and other) judges took a dim view of their intrusion in this context.

(i) Certainty vs Merits

Certainty as a component of modern English commercial law can be traced to Lord Mansfield, who in a marine insurance case in 1774 said: 'In all mercantile transactions the great object should be certainty: and therefore it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.'[224] That was litigation where Mansfield wanted a clear definition of barratry as it related to a contract of marine insurance, so that in the future underwriters and insurers would feel more confident in entering commercial

[220] Board of Trade, *A Statement on Resale Price Maintenance*, Cmd. 8274, 1951, 11.
[221] 275 below.
[222] M. Chalmers, 'On the Codification of Mercantile Law with Especial Reference to the Law of Negotiable Instruments', J Institute of Bankers, vol. II, March 1881, 113, 121–123.
[223] cf. *Hammond & Co* v. *Bussey* (1887) 20 QBD 79, 94, per Bowen LJ; *Biggin & Co Ltd* v. *Pemanite Ltd* [1951] 2 KB 314, 321, per Somervell LJ.
[224] *Vallejo* v. *Wheeler* (1774) 1 Cowp 143, 153, 98 ER 1012, 1017.

contracts. This was not an isolated sentiment.[225] As the touchstone for commercial law, certainty echoed throughout our period.[226]

A corollary of certainty was a strict application of the rules. In 1920 the House of Lords considered the lender's use of a clause imposing default interest, in other words, a higher rate of interest absent punctual payment. Lord Birkenhead LC observed that 'it would be a very singular circumstance if he who had been careful to stipulate that certain payments of interest under an instrument of this kind should be made to him punctually upon a certain specified day, were deprived by a decision of the Law Courts of the right of insisting upon the strict implement of that for which he had so stipulated'.[227] In circumstances like this, the assumption ran, borrowers could bargain with their lenders for the inclusion of provisions such as days of grace or negotiate for relief post-default.[228]

In light of the certainty principle, the merits of individual cases took a back seat to the strict application of legal rules. Adherence to bright-line rules, it was accepted, could result in some commercial parties with unmeritorious claims profiting at the expense of others. Despite this, the assumption ran, bright-line rules meant a greater consistency in the courts' decision-making, and that promoted its own fairness. Further, what was sauce for the goose was sauce for the gander. Markets oscillated, and commercial parties seeking to take advantage of unmeritorious points one day faced the possibility of being victims the next. Lord Atkin in *Arcos* v. *Ronaasen*[229] thought that there was no difference between the views of businesspeople and lawyers on the point: commercial parties should be able to insist on their strict legal rights, regardless of the harsh consequences for the other side.[230] A familiar example was the owner's withdrawal of a vessel for failure of the charterer to pay hire on the due date. The courts sanctioned this, notwithstanding that late payment was neither deliberate nor negligent; that the payment, when made, was only a few days late; or that the owner's motivation was to snatch back the vessel to charter it else-

[225] See his earlier comments: *Hamilton* v. *Mendes* (1761) 2 Burr 1198, 1214; 897 ER 787, 795. See also *Carlos* v. *Fancourt* (1794) 5 Term Rep. 482, 486, 101 ER 272, 274.

[226] Indeed, to the present day: e.g. *Mardorf Peach & Co Ltd* v. *Attica Sea Carriers Corporation of Liberia* (The Laconia) [1977] AC 850, 878 per Lord Salmon; *A/S Awilco of Oslo* v. *Fulvia S.P.A. Di Navigazione of Cagliari* (The Chikuma) [1981] 1 W.L.R. 314, 321, 322 per Lord Bridge; *Homburg Houtimport BV* v. *Agrosin Private Ltd (The Starsin)* [2003] UKHL 12; [2004] 1 AC 715, [13], per Lord Bingham; *Jindal Iron and Steel Co Ltd* v. *Islamic Solidarity Shipping Co Jordan Inc* [2004] UKHL 49, [2005] 1 WLR 1363, [16], per Lord Steyn; *Golden Strait Corpn* v. *Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353, [1]. cf. *PST Energy 7 Shipping* v. *OW Bunker Malta (The Res Cogitans)* [2016] UKSC 23, [2016] AC 1034. See J. Lian Yap, 'Predictability, Certainty, and Party Autonomy in the Sale and Supply of Goods' (2017) 46 *Common Law W'ld Rev* 269.

[227] *Maclaine* v. *Gatty* [1921] 1 AC 376, 385–386.

[228] Denning LJ's views to the contrary in *British Movietonews Ltd* v. *London and District Cinemas Ltd* [1951] 1 KB 190, 202 do not seem to have survived the appeal: [1952] AC 166, 181–184, 187–188.

[229] [1933] AC 470. See 208–209 below about the case. [230] at 480.

where on a rising market in chartering rates.[231] A parallel example was the buyer's use of an immaterial breach in a sales contract to refuse delivery, when with a movement in market prices the goods could be obtained more cheaply elsewhere. Again, the courts were unmoved.[232]

(ii) 'Business against Chancery'

> We had an interesting case some time ago winding up a dissolved Russian Bank: business against Chancery. It shocked the purists. (Letter, Lord Atkin to Professor Gutteridge, Spring 1936)[233]

During our period, and particularly after the Judicature Act 1873, some judges expressed trenchant views that equitable doctrines should be kept at arm's length from English commercial law so as not to threaten its bright-line rules.[234] It would be 'dangerous and unreasonable' to apply to mercantile agreements the equitable rules that a contract might be enforced although the time fixed for its completion had passed, said Cotton LJ about a typical commodity sale in *Reuter, Hufeland & Co* v. *Sala & Co*.[235] In the twentieth century Lord Atkin was the forthright opponent of equitable niceties blurring the bright-line rules of English commercial law. 'Business against Chancery' as he put it in the private correspondence quoted, a regular theme of his work as a law lord.[236] Eschewing equity's influence in sales law was the basis of his well-known judgment in *Re Wait*.[237]

[231] *Tankexpress A/s* v. *Compagnie Financiere Belge des Petroles SA* [1949] AC 76, disapproving *Nova Scotia Steel Co* v. *Sutherland Steam Shipping Co* (1899) 5 Com Cas106. In *Tankexpress*, Le Quesne QC and Roskill for the owners argued that the charterers' contentions for leniency on payment would introduce uncertainty: 82; and see Lord Wright at 94–95.

[232] 215 below. See also Atkin LJ, along with Bankes and Scrutton LJJ, in *Re An Arbitration between Moore and Company Ltd and Landauer and Co* [1921] 2 KB 519 (buyer could reject when about half the Tasmanian canned fruit stated as being in cases containing 30 tins each arrived in London with 24 tins to a case, although this made no difference in value. The ship's arrival was much delayed by strikes and the buyer likely rejected for this reason).

[233] Quoted in G. Lewis, Lord Atkin, *op cit*, 74. The reference was to *Russian & English Bank* v. *Baring Bros & Co Ltd (No.4)* [1936] AC 405. Gutteridge had been Cassel professor of commercial law at the London School of Economics and was later professor of comparative law at Cambridge: see R. Cranston, 'Praising the Professors: Commercial Law and the LSE', in R. Rawlings, *Law, Society and Economy*, Oxford, Oxford University Press, 1997, 119–121.

[234] G. Kennedy, 'Equity in Commercial Law', in P. Finn (ed.), *Equity and Commercial Relationships*, Sydney, Law Book Company, 1987, 2. See also *Salt* v. *Marquess of Northampton* [1892] AC 1, 18–19, per Lord Bramwell. Although Bramwell's views were somewhat nuanced, he was a well-known exponent of laissez-faire: see A. Ramasastry 'The Parameters, Progressions, and Paradoxes of Baron Bramwell' (1994) 38 *Amer J Legal Hist* 322; R. Epstein, 'For A Bramwell Revival' (1994) 38 *Amer J Legal Hist* 246.

[235] (1879) LR 4 CPD 239, 249 (sale in 1876 on a broker's standard form contract of some twenty-five tons of Penang black pepper, October and/or November shipment; only twenty tons declared as compliant, the remainder being shipped under a December bill of lading. Held, entire contract, so buyers not bound to accept anything less than full twenty-five tons – an approach codified in Sale of Goods Act 1893, ss. 30(1) and 31(1)).

[236] G. Lewis, Lord Atkin, *op cit,* 74–75.

[237] [1927] 1 Ch 606.

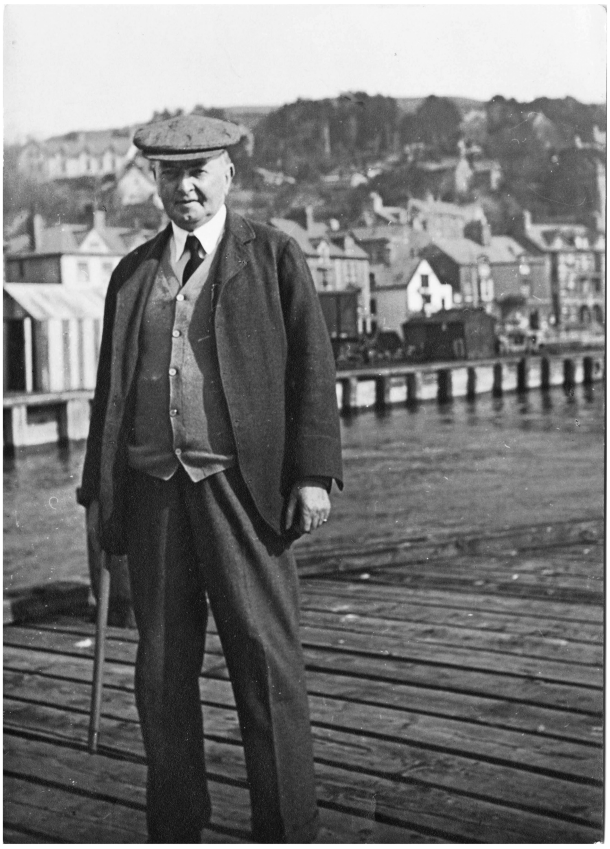

Figure 1.3 Lord Atkin on the jetty at Aberdovey, Wales (Treasurer and Masters of the Bench, Gray's Inn)

There in another commodity sale Wait bought 1,000 tons of Western White wheat from Balfour Williamson & Co., London, ex *Challenger*, expected to load in December 1925 at Oregon or Washington. It was a CIF contract, dated 20 November 1925, on LCTA's form 22.[238] The following day Wait sold 500 tons to sub-buyers. The wheat was shipped in bulk on 21 December, a bill of lading for the 1,000 tons reaching Wait on 4 January 1926. Payment was due thirty-three days after sight, that is on 6 February. The previous day the sub-buyers gave Wait a cheque, although they had no bill of lading, delivery order or document of title. Wait paid this cheque into his account and pledged the bill of lading to his bank. He became bankrupt before the ship arrived and so never appropriated the 500 tons to the sub-buyers. His trustee in bankruptcy redeemed the bill of lading and the entire 1,000 tons, leaving the sub-buyers to their remedy in damages. It was argued that they had a pro rata equitable

[238] 208, 305 below.

https://doi.org/10.1017/9781108182836.002 Published online by Cambridge University Press

interest in the cargo. A Divisional Court in the Chancery Division agreed and gave them specific performance of their contract, an equitable remedy.

The Court of Appeal (Lord Hanworth MR and Atkin LJ) held that the sub-buyers could not obtain specific performance. That remedy required as a precondition that goods be specific or ascertained. That was not the case since Wait had never allocated the 500 tons in relation to the sub-buyers. The court rejected the argument that there had been an equitable assignment, giving the sub-buyers a beneficial interest or lien in the 500 tons. The sub-buyers had taken the well-known risk of insolvency in paying Wait without receiving a bill of lading or other document of title. Atkin LJ was scathing about the role of equitable principles in sales. They had beneficial results in their own sphere, he said, but in this context he felt 'bound to repel the disastrous innovations' which would be introduced into well-settled commercial relations. Trade finance would be adversely affected, he continued, because a financing bank would be affected by notice of the sub-buyer's equitable interest, even though it acquired legal title through the documents of title.[239] It would have to satisfy itself on being paid that those equitable interests were not being defeated, presumably by contacting the sub-buyers. The effect would be, he concluded, 'to throw the business world into confusion, for credit would be seriously restricted'.[240]

Atkin was not the only commercial judge to inveigh against equitable notions (and what might now be the law of unjust enrichment). 'There is now no ground left for suggesting as a recognizable "equity" the right to recover money in personam', said Lord Sumner in *Sinclair* v. *Brougham*, 'merely because it would be the right and fair thing that it should be refunded to the payer'. But Atkin was the most insistent. In *Re Wait* there was a strong dissent by Sargant LJ ('complete and fundamental' disagreement[241]). In a pointed comment on the majority judgments in the *Law Quarterly Review*, Sir Frederick Pollock observed that the modern equity lawyer felt that he was 'walking in a shadow of archaic superstition'.[242] Nonetheless, as Pollock conceded, the majority judgments represented the law, indeed, continue to do so.

Constructive notice was another equitable doctrine whose recognition in commercial dealings was deprecated. *Manchester Trust* v. *Furness*[243] was the leading case. There the Court of Appeal held that the bank as the indorsee of bills of lading – it had made an advance – did not have constructive notice that the charterparty contained a special clause that the captain, although appointed and paid for by the owners, was the agent of the charterers. If the bank had had notice it would have had to sue the charterers, not the owners, as the party liable for the captain's failure to deliver the cargo of Merthyr steam coal to Rio de Janeiro. It was 'perfect good sense', said Lindley LJ, that the

[239] 381–382 below. [240] at 639–640. [241] at 641.
[242] 'Notes. Re Wait' (1927) 43 *LQR* 293, 295. [243] [1895] 2 QB 539.

courts had resolutely set their face against an extension of the equitable doctrines of constructive notice to commercial transactions. '[I]n commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralyzing the trade of the country.'[244]

A few years earlier, in *London Joint Stock Bank* v. *Simmons*, Lord Herschell had said that he would be 'very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments'.[245] That was a case where brokers, now insolvent, had pledged foreign bonds, which a client left with them, to their bank to support an overdraft. In reversing the Court of Appeal, the House of Lords held that there were no suspicious circumstances to put the bank on inquiry.[246] It therefore took in good faith (and of course because of the overdraft, for value), and so its security was good. In Sir John Paget's view, the case put paid to what he described as the 'pernicious theory' of constructive notice as regards negotiable instruments.[247] The upshot of the case was that a bank was not put on inquiry in such circumstances: simply because it dealt with brokers did not infect it with knowledge that they might be pledging, without authority, the bonds and instruments of their clients as collateral for an advance. As Lord Halsbury LC put it, the deposit of securities as cover in a broker's business was a well-known commercial practice, and it would be a startling proposition that in every case the bank had to inquire whether a broker had the authority of his customer to do so.[248] To put it another way, this was standard commercial practice, and the court should be loath to upset it.

The protection against constructive notice in commercial transactions was further extended. In general, banks were held not to be on constructive notice in conducting standard banking operations.[249] In 1926 Scrutton LJ generalised the position: in commercial transactions, he said, a person could not be taken to know what he had the means of knowing.[250] Summing up the approach of the courts during our period, Diplock J said in 1958: '"Reason and justice" do not seem to me to prescribe the introduction into commercial matters … of the doctrine of constructive notice.'[251]

[244] at 545. Lopes and Rigby LJJ agreed. Before appointment to the bench Lindley had practised at the Chancery bar, which reinforced the point: G. Jones & V. Jones, 'Lindley, Nathaniel, Baron Lindley (1828–1921)', *Oxford Dictionary of National Biography*.

[245] *London Joint Stock Bank* v. *Simmons* [1892] AC 201, 221.

[246] The Court of Appeal applied the earlier House of Lords decision, *Earl of Sheffield* v. *London and Joint Stock Ba*nk (1888) 13 App Cas 333, which (as in the nature of these things) the House in *London Joint Stock Bank* v. *Simmons* had much grief distinguishing.

[247] J. Paget, *The Law of Banking*, London, Butterworth, 1904, 244. See also W. Willis, *The Law of Negotiable Securities*, London, Stevens, 1896, 4 (House of Lords in the case had rendered great service to the commercial community and restored confidence in banking transactions).

[248] [1892] AC 201, 211–212.

[249] e.g., *In Re Valletort Sanitary Steam Laundry Company Ltd* [1903] 2 Ch 654.

[250] *Greer* v. *Downs Supply Company* [1927] 2 KB 28, 36 per Scrutton LJ.

[251] *Port Line Ltd* v. *Ben Line Steamers Ltd* [1958] 2 QB 146,167.

But while there was a good deal of huffing and puffing about equitable principles not being allowed to pollute commercial transactions, they had, in certain situations, an acceptable, indeed essential, purchase. Agency was the best example, where equitable principles governing the duties of the agent to the principal were brought to bear against the dishonest agent, the agent failing to disclose crucial information to their principal or those agents acting in their own and not their principal's interests. In such cases, even Lord Atkin was disposed to act, albeit not always willing to ascribe the remedy's source to equity.[252] In Chapter 3 we encounter a number of examples of dishonest agents being brought to book as a result of a breach of their fiduciary duties.[253] After our period, the role of equity in commercial law obtained a much firmer, albeit ring-fenced, footing.[254]

3 The Normative Force of Commercial Practice

> The influence of commercial details . . . has more than once been shown to be a very important factor in the development of English law in modern times. Its effect has naturally been to simplify it, and to bring it more into harmony with common sense by the extinction of useless technicalities. (*The Law Times*, 1885)[255]

As a matter of legal policy, English courts took steps to accommodate the law to commercial practice. This happened in several ways. The first was straightforward and consistent with legal doctrine. That was through the notion that commercial custom and usage could be employed to interpret contracts and supplement them by implying additional terms. As a result, normative force was given to some commercial practices of markets, trades and ports.[256] However, by the 1950s, if not earlier, custom and usage had become a spent force in transposing commercial practices into law. Partly, this was attributable to greater formalism in legal reasoning; partly, to customs and usages being subsumed in standard form contracts; and, partly, to imperial decline and the loss of the markets, ports and trades which engendered them.[257]

[252] e.g., *Solloway* v. *McLaughlin* [1938] AC 247; *Ellerman Lines Ltd* v. *Read* [1928] 2 KB 144,155.

[253] 132, 136–139 below.

[254] e.g., W. Goodhart & G. Jones, 'The Infiltration of Equitable Doctrine into English Commercial Law' (1980) 43 *MLR* 489; P. Millett (1998) Equity's Place in the Law of Commerce' (1998) 114 *LQR* 214; M. Briggs, 'Equity in Business' (2019) 135 *LQR* 567.

[255] 'The Conflict between Law and Business as to Agreements between Debtors and Creditors' (1885) 78 *LT* 351, 351.

[256] cf. current debates at the international level (e.g., J. Coetzee, 'The Role and Function of Trade Usage in Modern International Sales Law' (2015) 20 *Uniform LR* 243; J. Dalhuisen, 'Custom and its Revival in Transnational Private Law' (2008) 18 *Duke J Comp & Int'l L* 339) and national level (L. Bernstein, 'Custom in the Courts' (2016) 110 *Northwestern ULR* 63).

[257] See J. Basedow, 'The State's Private Law and the Economy: Commercial Law as an Amalgam of Public and Private Rule-Making' (2008) *Amer J Comp L* 703, 709; L. Bernstein, 'The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study' (1999) 66 *U Chi LR* 710, 737, 770, 776, 779; R. Epstein, 'Confusion about Custom:

The second way commercial practices could have normative force was more subtle, indeed mysterious. In many cases it was below the surface, turning on a commercial ethos which many judges deciding commercial cases shared by dint of their background, time at the commercial bar or temperament. Occasionally, however, this disposition to accommodate commercial practices was articulated. In some instances the court expressly adopted a commercial practice as the template for its reasoning, albeit that it fell short of trade usage. In others, commercial practice or opinion was more a prop for the court's reading of a contract or statute, or an added justification for the conclusion it reached through more conventional avenues. There were other more tenuous examples, difficult to pin down with the passage of time. What can be said is that this disposition in English law to accommodate commercial practice had enduring mileage – unlike custom and usage – when London had revived fortunes, after our period, as an international financial, insurance and dispute resolution centre.[258]

(i) Custom and Usage

> [T]he admissibility of evidence of a usage of trade for the purpose of importing terms into commercial contracts . . . is a question of paramount importance in an industrial age and a commercial country. (J. Balfour Browne, *The Law of Usages and Customs*, 1875)[259]

The common law accepted that commercial practice could have normative force if it constituted trade usage.[260] Whether it did depended on whether the practice was so widely observed and so well known in a market or locality that it was taken as the basis of contracting. In practice the courts took a flexible approach, although to have normative force a commercial practice had to be proved as a matter of fact. Until the First World War, when civil juries faded, the existence of trade usage might be decided by them.[261] Once the existence of usage was established, the courts used it in two main ways. First, as Lord Cairns LC held in a case of an international commodity sale, while it was for the court

Disentangling Informal Customs from Standard Contractual Provisions' (1999) 66 *U Chi LR* 821, 822–823.

[258] e.g., Lord Goff, 'Commercial Contracts and the Commercial Court' [1984] LMCLQ 382, 391 ('we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil'); Lord Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433 (courts give effect to reasonable expectations of honest businesspeople).

[259] J. Balfour Browne, *The Law of Usages and Customs*, London, Stevens & Haynes, 1875, 43.

[260] Although the terms 'custom' and 'usage' were sometimes used interchangeably, strictly speaking custom applied to practices which had an immemorial existence and if recognised became the law of a place. Usage was more flexible, a settled and established practice of a trade or port, so universally observed to be regarded as binding: *Postlethwaite* v. *Freeland* (1880) 5 App Cas 599, 616, per Lord Blackburn; *Strathlorne Steamship Co Ltd* v. *Hugh Baird & Sons Ltd* 1916 SC (HL) 134, 141.

[261] e. g., *Alexiadi* v. *Robinson* (1861) 2 F & F 679, 175 ER 1237.

https://doi.org/10.1017/9781108182836.002 Published online by Cambridge University Press

to interpret the words of the contract, that was subject to 'any peculiarity of meaning which may be attached by reason of the custom of the trade'.[262] Second, as Parke B put it in another case, usage 'may be used to annex incidents to all written contacts, commercial or agricultural, and others, which do not by their terms, exclude it, upon the presumption that the parties have contracted with reference to such usage'.[263]

Through contractual interpretation and 'annexing incidents' to contractual terms, trade usage introduced flexibility into different areas of commercial law. With organised markets the courts gave welcome effect to commercial practices operating there.[264] *Graves* v. *Legg*[265] is just one case in point. London merchants employed a Liverpool broker to purchase wool, who bought bales for them deliverable at Odessa, the contract stating that 'the names of the vessels to be declared as soon as the wools were shipped'. Custom and usage in Liverpool was that all a vendor needed to do was to inform the broker of the name of the vessel, not the buyer. Consistently with that practice, the Exchequer Chamber held that the vendor was not in breach of contract in failing to pass on to the buyer the ship's name. '[Having] employed an agent at Liverpool to make a contract there, it must be taken to have been made with all the incidents of a contract entered into at Liverpool', said Cockburn CJ.[266]

The normal rule was that, as agents, brokers on the commodity markets would drop out of the picture and liabilities on the transaction would be between the principal and the third party. That did not accord with the commercial need to make the person on the spot liable. In various decisions the courts invoked trade usage to impose liability directly on brokers when things went wrong.[267] There was even authority that a third party employing a broker to conduct a transaction on a market, in the usual manner, impliedly assented to the market's reasonable usages, whether aware of them or not.[268]

The ports generated various cases. Early on it was held that the usage of a port might bind a party, ignorant of it, if it was well known in the trade.[269] As late as 1959 it was held that it was a usage of the London freight market that forwarding agents should incur personal liability to

[262] *Bowes* v. *Shand* (1877) 2 App Cas 455, 462. See also *Russian Steam-Navigation Trading Company* v. *Silva* (1863) 13 CBNS 610, 143 ER 242 (meaning of bill of lading). The practice developed earlier: C. Mitchell, 'Mercantile Usage, Construction of Contracts and the Implication of Terms, 1750–1850' in C. Mitchell & S. Watterson (eds.), *The World of Maritime and Commercial Law*, London, Hart, 2020.

[263] *Gibson* v. *Small* (1853) 4 HLC 353, 397, 10 ER 499, 516–517, citing *Hutton* v. *Warren* (1836) 1 M&W 446,150 ER 517.

[264] e.g., *Johnson* v. *Raylton Dixon & Co* (1881) 7 QBD 438 (iron trade); *Imperial Marine Insurance Co* v. *Fire Insurance Corp Ltd* (1879) 4 CPD 166 (underwriters).

[265] (1859) 4 Hurl & N 210, 157 ER 88. cf. 'A man who employs a banker is bound by the usage of Bankers': *Hare* v. *Henty* (1861) 10 CBNS 65, 77, 142 ER 374, 379, per Willes J in argument.

[266] at 213, 89. [267] 73n below.

[268] *Robinson* v. *Mollett* (1875) LR 7 HL 802 was a leading case on the requirement that with custom and usage there be knowledge of its existence: see 78–79 below.

[269] *Hudson* v. *Ede* (1868) LR 3 QB 412.

shipowners.[270] *Petrocochino* v. *Bott*[271] had entered the books much earlier: where goods were consigned to a particular port, delivery was to be according to the customs and usages prevailing there. In that case the court held that it was the usage in the Victoria Docks in London that, as soon as the goods left the ship's deck, the liability of the vessel owner ended and that this was not affected by any terms of the bill of lading.[272] Accordingly, the shipowner was not liable when one of sixty-nine bales of hides from Calcutta (Kolkata), ex the steamer *Zeno*, went missing between the vessel's discharge in the Victoria Docks and arrival of the bales by lighters at Sun Wharf, further up the Thames, for storage for the consignees. No doubt all this was gratifying to some using the ports, if not to those on the wrong end of it.

Trade usage featured as well with sales transactions, although there was less scope when deals were conducted according to standard form contracts, since it had long been accepted that usage could not be invoked to contradict the terms of a written contract.[273] Hire and deferred (hire) purchase as marketing tools were given a boost in the late nineteenth century by decisions that the hiring of furniture was usage in the hotel trade and that 'the three years' system' for hiring pianos 'was a custom well known to the mercantile world and the public generally'.[274] As regards high finance, Cockburn CJ led the charge in *Goodwin* v. *Robarts,*[275] invoking usage to extend negotiability to the new types of international bonds flooding the market. It was a question of fact, the courts held, but negotiability could attach by usage to instruments, even of recent origin. This liberal approach did not pass unchallenged, but to no avail.[276] It meant that there was no need for statute to confer the protection (if it was such) of negotiability on the bonds and corporate instruments which could find their way into the investment portfolios of the upper middle classes; the common law undertook the task.

In some quarters there was a concern that the courts might be accepting usage too readily. There was a looseness, the *Law Times* opined in 1878, as

[270] *Anglo Overseas Transport Ltd* v. *Titan Industrial Corp Ltd* [1959] 2 Lloyd's Rep 152.

[271] (1874) LR 9 CP 355.

[272] The docks, as Brett J put it, were 'an intermediate place of delivery'. On the common-law position: T. Scrutton, *Charterparties and Bills of Lading*, 13th ed., edited by S. Porter & W. McNair, London, Sweet & Maxwell, 1931, 345. See also *Grange* v. *Taylor* (1904) 9 Com Cas 223, another Victoria Docks case. On the usages of the Port of London: R. Cranston, 'Commercial Law and Commercial Lore', *op cit*, 80–81.

[273] *Trueman* v. *Loder* (1840) 11 Ad & E 589, 113 ER 539 (a transaction in tallow).

[274] *In re Parker* (1885) 14 QBD *636*; *In re Blanshard ex parte Hattersley* (1878) 8 Ch D 601, 603. See 256–258 below.

[275] (1875) LR 10 Ex 337; affirmed (1876) 1 App Cas 476. Cockburn was differing from Blackburn J's conservative approach in *Crouch* v. *Credit Foncier of England Ltd* (1873) LR 8 QB 374. cf. *Picker* v. *London & County Banking Co* Ltd (1887) 18 QBD 515. See W. Blair, 'Negotiability and Estoppel' (1988) 3 *JIBL* 8.

[276] F. Bosanquet, 'Law Merchant and Transferable Debentures' (1899) 15 *LQR* 130, 143. cf. F. Palmer, 'Negotiability of Debentures to Bearer and the Growth of the Law Merchant' (1899) 15 *LQR* 245, 253–258.

regards the legal tests applied, which had led to an 'enormous amount of litigation', and an 'impression among commercial men that the cloak of usage and custom will cover a multitude of mercantile shortcomings'.[277] There may well have been something in this. Despite the condemnation, however, a steady stream of cases continued in the years prior to the First World War in which, in commercial dealings, custom and usage were recognised as binding. In one extraordinary case it was held that the standard term in LCTA contracts – that generally speaking buyers could not reject poor-quality grain but must cope with an allowance on the price – was the custom and usage of the London market and applied despite the parties contracting on their own terms without using a LCTA contract![278]

In the interwar years there were attempts to rekindle Cockburn CJ's enthusiasm in *Goodwin* v. *Robarts* for the efficacy of custom and usage, invoking his rhetorical question as to why the door should be shut to their further adoption.[279] Commercial parties, said a writer in 1922, would then be assured that their transactions 'will not necessarily be illuminated only by the farthing rushlight of mercantile customs prevalent in the days before the New World was discovered or the steam engine invented'.[280] As late as 1935, Mackinnon J upheld the conclusion of the arbitrators in the case that there was a trade usage in the London oil and tallow trade that brokers acting for an undisclosed principal were liable, along with their principal, on the contract with the third party.[281] By then, however, the ground for trade usage was rather barren. One problem, said Professor Chorley, was that commercial practice had moved on from the usages recognised by the courts in a previous era, yet these could not be overruled under the English system of precedent. That, he added, struck a blow at the whole conception of keeping commercial law developing through incorporating contemporary customs and usages.[282]

By the end of our period the prerequisites to establishing custom and usage had hardened and were almost impossible to satisfy. *Kum* v. *Wah Tat Bank Ltd*[283] serves as an example. There the Privy Council considered in the context of trade between Sarawak (East Malaysia) and Singapore whether mate's receipts could be a document of title as a result of the custom of that trade. It did not rule out the possibility, although in the end it did not have to decide the point. However, the Privy Council emphasised that, if proved, the custom would take effect as part of the common law of Singapore, be applied by any court applying Singaporean law and thus bind anyone anywhere in the world.[284] So stated, this was a high hurdle and assimilated trade usage to custom as a source of law. Lord

[277] 'Mercantile Customs' (1878) 64 *LT* 418.
[278] *Re an Arbitration between Walkers, Winser & Hamm and Shaw, Son & Co* [1904] 2 KB 152 (Channell J was much influenced by the findings of the arbitrator, who was LCTA's chair).
[279] (1875) LR 10 Ex 337, 346, 352.
[280] R. Negus, 'Negotiability of Bills of Lading' (1921) 37 *LQR* 442, 444.
[281] *Thornton* v. *Fehr* (1935) 51 Ll L Rep 330.
[282] R. Chorley, 'The Conflict of Law and Commerce' (1932) 48 *LQR* 51, 52, 61.
[283] [1971] 1 Lloyd's Rep 439. [284] at 444, per Lord Devlin.

Devlin, the author of the Privy Council's opinion, had expressed the view in a lecture at the London School of Economics in 1951 that a successful claim of custom was by then extremely rare and that it 'can no longer be regarded as a revivifying source of commercial law'.[285] That, at the end of our period, was the prevailing view.

(ii) Accommodating Commercial Practice

Here the cases fell along a spectrum as the courts accommodated commercial practice in their decision-making. At one end, a commercial practice could bear heavily on the outcome of the legal issue, even if it did not constitute custom and usage; at the other end, commercial opinion in, for example, the City of London was advanced to bolster a conclusion on other grounds. Either way this diverged from the approach in other branches of law, where the courts would have looked askance at the notion of according any leverage to the practices or views of landlords, motorists or burglars in decision-making in those areas.[286] The explicit harmonising of law with commercial practice not only injected English law with a desirable responsiveness but also enhanced its legitimacy. It was one element in its reputation that in commercial causes it took commercial practice and need seriously.

At one end of the accommodating spectrum was the line of argument in a 1909 book on custom and trade usages by Dr Robert Aske (later Sir Robert Aske QC, MP). Commercial practices, he contented, while not hardened into definite and uniform shape were not devoid of worth as regards the performance of a contract.[287] If adopted by those engaged in trade, a commercial practice would almost invariably possess the merits of fairness and convenience, or at least would not be unsuitable for the purpose of determining performance issues such as the usual manner or time taken.[288] In 1936 Aske had some luck to appear as counsel in *The Njegos*,[289] which went a little way to boosting his textbook speculations. One issue in determining the proper law of the bills of lading in that litigation was whether the arbitration clause in the charterparty was incorporated into them. Aske (and counsel for the shipowners) had to accept that in the absence of a specific contractual provision, the commercial practice in London was that this was never the case. At that

[285] P. Devlin, 'The Relation between Commercial Law and Commercial Practice' (1951) 14 *MLR* 249, 264–265 (reproduced in *Samples of Lawmaking*, London, Oxford University Press, 1962). Examples were *Wilson IIolgate* v. *Belgian Grain and Produce Co* [1920] 2 KB 1; *Diamond Alkali Export Corporation* v. *Fl Bourgeois* [1921] 3 KB 443. See also R. Goode, 'Usage and its Reception in Transnational Commercial Law' (1997) 46 *LQR* 1, 8–9.

[286] C. Schmitthoff, 'Commercial Law in Action' (1957) 101 *Sol J* 10, 11, reprinted in C. Schmitthoff, *Select Essays on International Trade Law*, London, Graham & Trotman, 1988.

[287] R. Aske, *The Law relating to Custom and the Usages of Trade*, London, Stevens, 1909, 199.

[288] Ibid., 199–200. Aske cited cases like *Lewis* v. *Great Western Railway Company* (1877) 3 QBD 195, 208, per Brett LJ ; *Shamrock Steamship Company* v. *Storey & Co* (1899) 81 *LT* 1 (interpretation of charterparty with time for loading coal specified as 36 running hours on terms of 'usual colliery guarantee').

[289] [1936] P 90.

point Sir Boyd Merriman P stopped argument; the commercial practice that the arbitration clause was not incorporated in the bill of lading was determinative.[290]

The charterparty in *The Njegos* was on the UK Chamber of Shipping River Plate (Centrocon) form, which had been introduced in 1914. The Centrocon form reappeared in *The Annefield,*[291] another case of the charter of a vessel to carry Argentinian grain to Europe. Rather boldly, counsel for the shipowners contended that *The Njegos* should be overruled on the point of the non-incorporation in the bills of lading of the arbitration clause in the charterparty. The Court of Appeal was having none of it. There was a course of practice from 1914 to 1970, some fifty-six years, and after that lapse of time it would require a very strong case to upset it.[292] There was the additional point weighing in *The Annefield,* that a court had put a construction on a standard form contract and commercial parties would have acted on it. House of Lords authority was that, in commercial cases, it was of the highest importance that legal authority should be certain and that consequently, in circumstances like these, an interpretation of a standard form would only be altered if it was clearly wrong.[293] If the commercial community was not satisfied with the court's judgment, said Lord Denning MR, it should alter the standard form.[294]

Arab Bank v. *Ross*[295] was another case at the end of the spectrum where Lord Denning, for one, treated commercial practice as determinative. A purchaser of a Lancashire cotton mill gave two promissory notes as payment, which the bank discounted (bought), enabling the vendors to obtain their money earlier than if they had waited for the notes to mature. The vendors were a firm registered in Palestine and as payees of the notes were described as a company. However, when they indorsed the notes to the bank they failed to add the word 'company' to their names. The purchaser when sued on the bills contended that the bank was not a holder in due course of the notes under section 29 of the Bills of Exchange Act 1882 since, at the time it took them, they were not 'complete and regular on the face of it'. The Court of Appeal agreed: there was doubt that the indorsers were the same legal person as the payees. Somervell and Romer LJJ reached their conclusion on an examination of the notes; there was some authority supporting their conclusion.[296] However, Denning LJ thought the question was best determined by banking opinion, which would not accept the indorsements in the case as regular. It was impossible for bankers to inquire whether all indorsements on a bill were genuine, but it was some safeguard against dishonesty that they were regular on their face.

[290] at 100. [291] [1971] P 168.
[292] at 183, 185, 186 per Lord Denning MR, Phillimore and Cairns LJJ respectively.
[293] *Atlantic Shipping and Trading Co* v. *Louis Dreyfus & Co* [1922] 2 AC 250, 257, per Lord Dunedin (a case about the arbitration clause in the Centrocon form).
[294] [1971] P 168, 184. [295] [1952] 2 Q.B. 216.
[296] *Slingsby* v. *District Bank Ltd* [1932] 1 KB 544.

'[W]e shall not go far wrong if we follow the custom of bankers of the City of London on this point', he said.[297]

At the other end of the accommodating spectrum were those cases where commercial practice or opinion was offered as support of the court's legal analysis. Lord Mansfield was early in the field in *Miller* v. *Race*.[298] Trade and commerce 'would be much incommoded by a contrary determination', he said, if bank notes were not negotiable.[299] Referring to the status which a bill of lading had as a document of title, Lord Campbell CJ asserted in an 1854 case that 'it to be of essential importance to commerce that this law should be upheld'.[300] In 1914 Atkin J said that if commercial practice indicated that a contract on CIF terms meant anything different to what it had in the past – he did not believe it did – 'the Courts should be prompt to recognize the altered use if they are satisfied that there is in fact a change'.[301] And in 1924 McCardie J said in a case involving a commodity sale into Europe that the common law's object was 'to solve difficulties and adjust relations in social and commercial life … An expanding society demands an expanding common law.'[302] These are but a few examples.

In the twentieth century, City of London practice became a source on which courts drew to buttress legal conclusions. In upholding the validity of the trust receipt in *In re David Allester Ltd*,[303] Astbury J said that it was a device enabling the bank to realise the goods over which it already had security 'in the way in which goods in similar cases have for years and years been realised in the City [of London] and elsewhere'.[304] Branson J adduced City practice to aid the construction of the Assurance Companies Act 1909 and held that insurance business encompassed the carrying on of reinsurance. In practice, he said, insurance and reinsurance ran alongside each other, and that, with life assurance, this was 'continually done every day in the City of London'.[305] In 1966 the Court of Appeal held that a party liable on a bill of exchange as acceptor could not resist

[297] at 227–228. Denning LJ referred to *Leonard* v. *Wilson* (1834) 2 Cr & M 589, 149 ER 895 (hence the reference to 120 years) and *Bank of England* v. *Vagliano Bros* [1891] AC 107, 157, per Lord Macnaghten. Somervell and Romer LJJ did not find banking practice helpful: at 222, 234.

[298] e.g. *Miller* v. *Race* (1758) 1 Burr 452, 97 ER 398. [299] at 457, 401 respectively.

[300] *Gurney* v. *Behrend* (1854) 3 El & Bl 622, 637, 118 ER 1275, 1281.

[301] *C. Groom Ltd* v. *Barber* [1915] 1 KB 316, 325 (sale by Mincing Lane broker of 100 bales of Hessian cloth; shipment on CIF terms from Calcutta (Kolkata) according to rules and regulations of Jute Goods Association; case coming to court from association's arbitration appeal committee).

[302] *Prager* v. *Blatspiel Stamp and Heacock Ltd* [1924] 1 KB 566, 570. McCardie J found that in selling the goods the London merchant was dishonest, not an agent of necessity as claimed.

[303] [1922] 2 Ch 211.

[304] at 218. On trust receipts, R. Cranston, 'Doctrine and Practice in Commercial Law', in K. Hawkins (ed.), *The Human Face of Law*, Oxford, Clarendon, 1997, 200–206.

[305] *Attorney-General* v. *Forsikringsaktieselskabet National* (1923) 16 Ll L Rep 362, 363. Insurance practice was also referred to in *Niger Co Ltd* v. *Yorkshire Insurance Co Ltd (No 2)* (1919) 1 Ll L Rep 13, 17.

judgment against the holder in due course on the ground that it had a counterclaim on a related trading transaction. Any other result, said Winn LJ, would lead to 'surprise and some disquiet in the City of London'.[306] Earlier that year the majority of the same court had held that the finance company UDT escaped categorisation as an unlicensed moneylender because of its reputation among City bankers as bona fide carrying on banking business.[307] When Parliament had given no guidance on the meaning of that term, said Lord Denning MR, the judges could not do better than look at the reputation of the business among them.[308]

Along the accommodating spectrum were the cases where, for example, the courts stated that their task was to bring business knowledge and sense to the task of interpreting commercial documents. In a case involving construction of a marine insurance policy in 1885 Lord Esher MR stated that 'the proper way is to consider them with the aid of our knowledge of business, and to take it for granted that merchants and insurers have acted in a business like way'.[309] '[B]usiness sense will be given to business documents', said Lord Halsbury in *Glynn* v. *Margetson & Co*, a case turning on the construction of a bill of lading.[310] In *Hillas & Co Ltd* v. *Arcos Ltd*,[311] Lord Wright said that since commercial parties often recorded the most important agreements in crude and summary fashion, it was 'accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects'.[312]

Cases where the courts adopted a commercially sensitive approach in applying the ordinary rules of interpreting contracts are not difficult to find. In *Burrell & Sons* v. *F. Green & Co*,[313] the *ejusdem generis* rule – that words following general words are generally construed as limited to things previously enumerated – was ditched in favour of giving an unrestricted meaning to a charterparty term, 'because charterparties

[306] *Brown Shipley & Co Ltd* v. *Alicia Hosiery Ltd* [1966] 1 Lloyd's Rep 668, 669.

[307] *United Dominions Trust* v. *Kirkwood* [1966] 2 QB 431. On UDT and other finance houses, see 28 above.

[308] at 454. See also 473–474, per Diplock LJ.

[309] *Stewart & Co* v. *Merchants Marine Insurance Co Ltd* (1885) 16 QBD 619, 627. Earlier in this passage Lord Esher said that at one time he would have asked a jury for their interpretation. See R. Aske, The Law relating to Custom and the Usages of Trade, *op cit*, 21. In *Alexander* v. *Vanderzee* (1872) LR 7 CP 530, where the jury had been asked whether cargoes of maize were 'June shipments' in the ordinary business sense of the term, Kelly CB and Blackburn J had disapproved the practice. See C. Hanly, 'The Decline of Civil Jury Trial in Nineteenth-century England' (2005) 26 *J Legal Hist* 253; M. Lobban, 'The Strange Life of the English Civil Jury, 1837–1914', in J. Cairns and G. McLeod (eds.), *The Dearest Birthright of the People of England: The Jury in the History of the Common Law*, Oxford, Hart, 2002; R. Jackson, 'The Incidence of Jury Trial during the Past Century' (1937) 1 *MLR* 132, 142.

[310] [1893] AC 351, 358. See also 355–356, per Lord Herschell LC.

[311] (1932) 43 Ll L Rep 359.

[312] at 367. See also 366, per Lord Thankerton. Lord Warrington and Lord Macmillan concurred. See also *The Okehampton* [1913] P 173, 180, per Hamilton LJ (later Lord Sumner).

[313] [1914] 1 KB 293, 303.

often contain many redundant words', an approach adopted by other eminent judges.[314]

Another aspect of a more generous outlook was when the parties had added words to a standard form contract without working through the implications for its other terms. Sometimes this might be nothing more than an application of the general rule that greater effect should be given to what the parties had added over the printed words already there. For example, in *Dudgeon* v. *E. Pembroke*[315] the court held that although the parties had used a printed form of insurance for a voyage policy, the added terms referring to a voyage from 22 January 1872 to 23 January 1873 meant that it was to be treated as a time policy. Yet Lord Penzance might be thought to have been stating a wider principle of giving effect to any terms the parties added to a standard form when he said: '[T]he practice of mercantile men of writing into their printed forms the particular terms by which they desire . . . is too well known, and has been too constantly recognised in Courts of Law.'[316] Other courts reflected a generous approach along these lines as they sought to repair the mangling by commercial parties of standard form documents.[317]

(iii) Hurdles to Commercial Sensitivity

In various ways, then, the courts adopted a commercially sensitive approach, and in some cases went as far as conferring on commercial practices a normative force. But on occasion there were reasons holding them back from doing this. First, to continue with a case of interpreting an amended standard form, the parties may have botched the job so badly that, however magnanimous their outlook, the courts found it impossible to give the result commercial, indeed any, sense. In a decision in the years prior to the First World War, Lord Halsbury recalled Lord Blackburn surmising that the commercial community always wished to write it short and the lawyers to write it long, but that a mixture of the two rendered the whole thing unintelligible.[318] In that case Lord Loreburn LC expressed exasperation: '[I]it is useless to draw the attention of commercial men to the risks they run by using confused and perplexing language in their business documents.'[319] In this regard Lord Atkin was splenetic in a case concerning marine insurance. Commercial parties, he

[314] See also *Schloss Brothers* v. *Stevens* [1906] 2 KB 665, 673, per Walton J; *Chandris* v. *Isbrandtsen-Moller Co Inc* [1951] 1 KB 240, 245, per Devlin J. There were cautions, however, against taking this too far: e.g., *Hillas & Co Ltd* v. *Arcos Ltd* (1932) 43 Ll L Rep 359, 363–364, per Lord Tomlin.

[315] (1877) 2 App Cas 284. Lords O'Hagan, Blackburn and Gordon agreed.

[316] at 293. See also *Glynn* v. *Margetson & Co* [1893] AC 351, 355, 357; *In re an Arbitration between L Sutro & Co and Heilbut, Symons & Co* [1917] 2 KB 348, 361–362, per Scrutton LJ.

[317] e.g., *Weis & Co* v. *Produce Brokers' Co* (1921) 7 Ll L Rep 211 (CIF sale of China white peas on LCTA form for Chinese and Manchurian Cereals); *W. P. Greenhalgh & Sons* v. *Union Bank of Manchester* [1924] 2 KB 153 (wrong forms used in depositing bills of exchange with bank in payment for shipment of Egyptian cotton).

[318] *Nelson Line (Liverpool), Ltd* v. *James Nelson & Sons Ltd* [1908] AC 16, 20.

[319] at 20. Lords Halsbury, Macnaghten and Atkinson agreed. It was a case about the liability of a shipowner under the contract of carriage.

said, habitually ventured large sums of money on contracts which were 'a mere jumble of words', trusting to luck of the opposite party, and 'with the comfortable assurance that any adverse result of litigation may be attributed to the hairsplitting of lawyers and the uncertainty on the law'.[320] Commercial practice, from this perspective, was not something to be encouraged.

Second, there are examples of how a conclusion contrary to what commercial interests thought desirable was driven by legal doctrine or judicial disfavour of the substance of a commercial practice.[321] In some cases, the result was to check the commercial practice; in others, the court's disapproval was surmounted by amending a market rule or the relevant standard form contract.[322] Third, as Scrutton LJ put it in the early 1930s, 'in many commercial matters the English law and the practice of commercial men are getting wider apart'. What Scrutton LJ was suggesting – however inaccurately – was that unlike earlier judges his contemporaries were not as concerned with reconciling commercial practice and commercial law where these were opposed, perhaps did not even think it was their task to do this. The result was, he thought, a flight from the courts, and for commercial disputes to be decided by commercial arbitrators.[323] The immediate background to Scrutton's remarks was his tussles with the House of Lords.[324] However, there was support for Scrutton's view that things were not as right as rain.[325] Commercial practice and commercial law were sometimes out of kilter. Perhaps this is not surprising: on the one hand, there was commerce, ever-changing with new techniques to pursue profit; on the other, a judicature, dependent on commercial parties litigating the right cases so it could bring law up to date, and a Parliament, where law reform was near the bottom of the agenda.[326]

1.4 Conclusion

Vagliano v the Bank of England[327] was, out of the usual course, argued before the six judges of the Court of Appeal and five of those judges were in favour of the

[320] *De Monchy* v. *Phoenix Insurance Company of Hartford* (1929) 34 Ll L Rep 201, 209.

[321] See 75, 138, 351, 407 below. See also *James Finlay and Company Ltd* v. *N. V. Kwik Hoo Tong Handel Maatschappij* [1929] 1 K.B. 400, 408 ('lax practice' after the First World War of entering the wrong date on bills of lading) and McCardie J's remarks in *Diamond Alkali Export Corp* v. *Bourgeois* [1921] 3 KB 443, 457. See A. Lentin, *Mr Justice McCardie (1869–1933)*, Cambridge, Scholars Publishing, 2016 on this iconoclastic judge.

[322] See *Robinson* v. *Mollett* (1875) LR 7 HL 802, *Cooke & Sons* v. *Eshelby* (1887) LR 12 App Cas 271 discussed below at 78–79, 75–76 respectively.

[323] *Hillas & Co Ltd* v. *Arcos Ltd* (1931) 40 Ll L Rep 307, 311.

[324] In *May* v. *Butcher*, eventually reported at [1934] 2 KB 17, his view had been rejected. After these remarks in *Hillas & Co Ltd* v. *Arcos Ltd*, when he fell into line with the law lords, his views were again rejected in the House of Lords: (1932) 43 Ll L Rep 359, but see continuation of the tussle in *Foley* v. *Classique Coaches* [1934] 2 KB 1, 9–10. See D. Foxton, The Life of Thomas E. Scrutton, op cit, 282. See also H. Gutteridge, 'Contract and Commercial Law' (1935) 51 *LQR* 91, 113.

[325] R. Chorley, 'The Conflict of Law and Commerce', *op cit*; P. Devlin, 'The Relation between Commercial Law and Commercial Practice', *op cit*.

[326] 397 below. [327] [1891] AC 107.

https://doi.org/10.1017/9781108182836.002 Published online by Cambridge University Press

> plaintiff and agreed with Mr Justice Charles, who tried the case. But in the House of Lords six of the noble Lords were in favour of the defendants and two in favour of the plaintiffs. Thus, in the result, the views of seven judges prevailed over those of eight judges. (John Hollams, *Jottings of an Old Solicitor,* 1906)[328]

Pivotal to the context of commercial law during our period was Britain's dominant role in international trade and finance for a significant part of it, reinforced by its leading position in shipping and insurance. Trade and finance coalesced in the merchant banks. Initially engaged in trade themselves, they also facilitated the trade of others by furnishing credit and payment services through accepting bills of exchange and issuing documentary credits. The joint stock banks later joined in the acceptance business and trade financing, while continuing their traditional services of short-term funding of commerce and industry through overdrafts and on-demand loans.

Trade in commodities occurred through the organised markets in London and Liverpool. Crucially, the trade associations in both cities, which revolved around these markets, engaged in private law-making, drawing up (or indorsing) standards for the many commodities being handled; the rules and regulations channelling the work, including the conduct of the merchants and brokers dealing there; and the standard form contracts recording and governing the transactions entered. Cooperating sometimes with others, the trade associations founded supportive institutions such as clearing houses, which handled more efficiently the accounting side of dealings, in particular the futures transactions which, with time, came to maturity on these markets.

During our period trading firms arranged both the shipping of commodities to Europe and the export of manufactured goods abroad. Trading firms could be agents one minute and principals the next, with a presence in Britain as well as abroad. In some parts of the world trading firms might hold multiple agencies, not only for manufacturers and producers elsewhere, but also for shipping lines, insurance companies and banks. They might also act as managing agents running estates, mines and factories which they had promoted or in which they had invested. Many British manufacturers were small and continued to rely on the trading firms, but a feature in the twentieth century was that the larger sometimes dealt directly abroad or established a presence there, as did some of the banks.

The sale and purchase of heavy manufactured goods could lead to a close association between manufacturers and purchasers as both worked to resolve problems with innovative plant and machinery. Making it could also be accompanied by the close involvement of a buyer in the manufacturing process, and in some cases the engagement of consultant engineers to monitor compliance with

[328] J. Hollams, *Jottings of an Old Solicitor*, London, John Murray, 1906, 157. On Hollams, 297 below. Successful counsel for the Bank of England later expressed doubt about the decision: Viscount Alverstone, *Recollections of Bench and Bar*, London, Edward Arnold, 1914, 156–157.

the specifications and drawings for its design. The marketing of other manufactured goods led to innovations in credit financing, the use of hire and hire purchase rather than sale, and the growth of specialist financial institutions to dispense them. Until the state stepped in at the end of our period, the marketing of manufactured goods could be associated with restrictive trade practices as manufacturers and producers – sometimes working collaboratively through trade associations – attempted to control how their goods were distributed and priced.

The law furnished a broad framework in which this commercial and financial activity took place. During our period regulatory law was at a minimum, with no real bearing on the regular operation of commercial markets, marketing transactions or the financing of trade and industry. At most bodies like the Bank of England would indicate desirable courses of action, which were generally followed despite a lack of legal backing. As for the common law, it was animated by broad principles, in theory all facilitative of commercial activity. Party autonomy empowered commercial parties to design the market rules, standard form contracts and institutions they fancied. It also enabled them to keep lawyers and the courts at bay, with the bulk of disputes being dealt with through private dispute settlement in the form of arbitration.[329] Bright-line rules assisted in commercial planning and knowing where parties stood in straightforward cases if a transaction turned sour. That was because, as one judge bluntly put it in a bills of exchange claim just after our period, the strict application of rules was not to be whittled away 'by introducing unnecessary exceptions . . . under the influence of sympathy-evoking stories . . . [H]ard cases can make bad law.'[330]

Then, if disputes did end in court, the judges could generally be relied on to adopt a commercially sensitive approach, aware of wider public interests, for example, as expressed in the same case, of how the erosion of clear rules in English bills of exchange law would likely 'work to the detriment of this country, which depends on international trade to a degree that needs no emphasis'.[331] This commercially sensitive approach was symbolised in 1895 with the establishment of the Commercial Court, a special list in the Queen's Bench Division of the High Court in London, with judges having a knowledge and experience of commercial practices, and with procedural rules conducive to the expeditious and flexible handling of commercial litigation.[332] At points in its history the court was in the

[329] J. Veeder 'Two Arbitral Butterflies: Bramwell and David,' in M. Hunter, A. Marriott and V. Veeder (eds.), *The Internationalisation of International Arbitration*, Leiden, Martinus Nijhoff, 1995. See 361–373 below.

[330] *Cebora SNC* v. *SIP (Industrial Products)* [1976] 1 Lloyd's Rep 271, 279, per Sir Eric Sachs (stay on claim on bill of exchange refused, despite possible counterclaim under a distribution contract). See also *Bell* v. *Lever Brothers Ltd* [1932] AC 161, 226, per Lord Atkin. See other examples at 42–43 above.

[331] at 278. See 54–55 above; 69, 88, 119, 121, 123, 125, 209, 214, 218, 350, 355, 382, 394, 395–396 below.

[332] e.g., J. Veeder, 'Mr Justice Lawrance: the 'true begetter' of the English Commercial Court' (1994) 110 *LQR* 292; *Oxford History of the Laws of England*, *op cit*, vol. XI, 828–829 (P. Polden); Lord Thomas, 'Keeping Commercial Law up to date', in R. Merkin & J. Devenney (eds.), *Essays in Memory of Professor Jill Poole Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws*, Abingdon, Informa/Routledge, 2018.

doldrums.[333] However, it emerged strengthened by reforms in the 1960s so that, just after our period, there was a heavy workload, international in character, with the great majority of cases having foreign parties, in many cases on all sides.[334]

The quotation from Sir John Hollams at the head of this conclusion – a leading solicitor of our period – demonstrates that it would be wrong to take too benign a view of the relationship between commercial law and commercial practice. If commercial disputes reached court – and vast numbers did not – the outcome could be a lottery. Further, for good or ill judges did not always take account of commercial practice, and whatever its history or motivation, there could be a disconnect between doctrine and the commercial realties.[335] What can be said is that the formal law for commercial transactions was generally capacious and pliable. It empowered extensive private law-making as markets, merchants and banks moulded transactions through the formulation of rules, the issue of standard form contracts and the establishment of private dispute resolution mechanisms. When difficulties were encountered, these were fairly readily surmounted by contractual or private arrangements. In most cases, lawyers could be kept in the background. Although insolvency and fraud could demand its presence, brushes with the formal trappings of the law could be minimised by mandating arbitration for dispute settlement. Overall, the law cast few shadows over profit making.

[333] R. Ferguson, 'The Adjudication of Commercial Disputes and the Legal System in Modern England' (1980) 7 *Brit JL&S* 141, 146.
[334] M. Kerr, 'Modern Trends in Commercial Law and Practice' (1978) 41 *MLR* 1, 4–5.
[335] S. Hedley, 'The "Needs of Commercial Litigants" in Nineteenth and Twentieth Century Contract law' (1997) 18 *J Leg Hist* 85.

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