

## English Commercial Law: Chasing Shadows

**Introduction: On the possibility of Big Legal History.** If commercial law is “the totality of the law’s responses to mercantile disputes”,<sup>1</sup> what is the “totality” in historical perspective? The historicity of commercial law is of clear importance if we accept the following three statements by the doyen of commercial law, Professor Sir Roy Goode: “In the history of the world few influences have been as powerful as the driving force of trade”;<sup>2</sup> “The history of commercial law is one of constant reinvention of the wheel”;<sup>3</sup> and “Part of the fascination of commercial law lies in its seemingly infinite capacity for change.”<sup>4</sup> In providing a brief historical outline of English commercial law, he ties in initial continental developments of *lex mercatoria*, before nineteenth century crystallisation led to the contemporary position of a mature commercial jurisdiction.<sup>5</sup> This outline is expanded within Goode’s Hamlyn lectures: English commercial law increased in “scope and sophistication”, with various concepts and tools from law and equity helping create a full-service commercial law.<sup>6</sup> English commercial law developed in response to commercial practice, and by means – at least until modern times – of judicial rather than statutory intervention in a way that “[a] civil lawyer would surely find ... truly astonishing”.<sup>7</sup>

However:

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<sup>1</sup> Roy GOODE: *Commercial Law in the Next Millennium*, Sweet & Maxwell, London, 1998, 8. Cf. Ewan MCKENDRICK: *Goode on Commercial Law*, Penguin, London, 2010, xxi (a reprint of the Preface to the Third Edition): “[T]he primary objective of commercial (as opposed to consumer) law is to respond to the legitimate needs of the mercantile community and of the markets which are central to its activities.”

<sup>2</sup> GOODE: *Next Millennium ...*, *op. cit.*, 1.

<sup>3</sup> *Ibid.*, 3.

<sup>4</sup> MCKENDRICK: *Goode (2010) ...*, *op. cit.*, xxi.

<sup>5</sup> Ewan MCKENDRICK: *Goode on Commercial Law*, Penguin, London, 2016, 3-8.

<sup>6</sup> GOODE: *Next Millennium ...*, *op. cit.*, 9.

<sup>7</sup> *Ibid.*, 11. Cf. Boris KOZOLCHYK: *The Commercialization of Civil Law and the Civilization of Commercial Law*, Louisiana Law Review, 40(1979)/1, 3–47; Geoffrey SAMUEL: *Civil and Commercial Law: a Distinction Worth Making?*, Law Quarterly Review, 102(1986)/3, 569–584. It is possible that legislation had an identifiable impact, such as the Warehousing Act 1803, which increased trade by shifting the liability for import duties from the point of importation to that of disposition, or the repeal of the Navigation Acts in 1849: Graeme J. MILNE, *Trade and traders in mid-Victorian Liverpool: Mercantile business and the making of a world port*, Liverpool University Press, Liverpool, 2000, 80–81; 147–148.

History is barren if directed only to showing the course and change of institutions; equal attention must be paid to the more puzzling question of *why* one institution rather than another persisted, *why* one new variant rather than another has emerged. And legal history loses most of its value if it is obscured by an attempt to compress into one flat plane of analytical synthesis half a century of decisions that grow out of the one plane into another and another.<sup>8</sup>

Llewellyn's notion of planes of synthesis justifies a particular examination of the history of commercial law: utilising Braudel's structural conceptualisation of material civilization over the *longue durée* to evaluate the structural nature of English commercial law.<sup>9</sup> In *The Structures of Everyday Life*, Braudel argued that there are three levels of material civilisation: the shadow under-layer, concerning unrecorded transactions; the open middle layer, concerning market exchange; and the third "shadowy" over-layer, of global financial capitalism.<sup>10</sup> The connection between these layers is provided by exchanges of goods, and it is these connecting points that will be the focus of this chapter. It is at those points that the system of English law demonstrates a capacity to generate doctrinal forms which regulate flows of value as between the layers.

English commercial law demonstrates continuity of practices, of business and legal institutions,<sup>11</sup> contextualised by long-term historical change. Yet for sale, its late arrival as a discrete area of law,<sup>12</sup> can be explained by a signal turning point in the *longue durée*: the changes evident in the eighteenth and nineteenth. Whilst it is perhaps too much to talk of a

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<sup>8</sup> Karl Nickerson LLEWELLYN: *Cases and Materials on the Law of Sales*, Callaghan and Co., Chicago, 1930, xii.

<sup>9</sup> There are probably infinite possible approaches to this task. Here, Braudel's approach was chosen for use; others were not. So be it.

<sup>10</sup> Fernand BRAUDEL (trans. Siân REYNOLDS): *Civilization & Capitalism 15th-18th Century: The Structures of Everyday Life: The Limits of the Possible*, Harper Row, New York, 1981. This theme of a shadow over-layer is common to historians from left- and right-wing persuasions: see e.g. Karl POLANYI: *The Great Transformation: The Political and Economic Origins of Our Time*, (1944), Beacon Press, Boston, 2001; Niall FERGUSON: *The World's Banker: The History of the House of Rothschild*, Weidenfeld & Nicolson, London, 1998. Cf. David GRAEBER: *Debt: The First 5,000 Years*, (2011), Melville House Publishing, London, 2014, 127: "we end up with a sanitized view of the way actual business is conducted. The tidy world of shops and malls is the quintessential middle-class environment but at either the top or the bottom of the system, the world of financiers or of gangsters, deals are often made in ways not so completely different from ways that [can be seen in supposedly primitive non-commercial societies]."

<sup>11</sup> E.g. GOODE: *Next Millennium...*, *op. cit.*, 5. Cf. John H. BAKER: *The Law Merchant and the Common Law before 1700*, 8(1979)/2, Cambridge Law Journal, 295–322; James Stephen ROGERS: *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law*, Cambridge University Press, Cambridge, 1995. For a recent analysis of the failure of attempts to develop merchant courts, see Christian M. BURSET: *Merchant Courts, Arbitration, and the Politics of Commercial Litigation in the Eighteenth-Century British Empire*, 34(2016)/3, Law and History Review, 615–647. See also Justin SIMARD: *The Birth of a Legal Economy: Lawyers and the Development of American Commerce*, Buffalo Law Review, 64(2016)/5, 1059–1134 (the ordinary practice of lawyers created the structures and institutions for economic development). This chapter focuses on other aspects of the development of commerce and commercial law.

<sup>12</sup> Lawrence M. FRIEDMAN: *Formative Elements in the Law of Sales: The Eighteenth Century*, Minnesota Law Review, 44(1960)/3, 411–460, 413–419

“birth” of consumption,<sup>13</sup> there was a shift in consumption patterns: multiple things were bought and sold (exchanged) at markets serving radically different purposes to the fairs and markets that had been part of commercial life until this point.<sup>14</sup> Things also became more durable,<sup>15</sup> and consisted of more complex and different elements requiring equally complex supply chains. Things made other things, and things drew value not just from their use-value but from other intangible elements (such as brands).<sup>16</sup> This all led, eventually, to a quantitative explosion of things, and of exchange-value attached to (and generated by) things. These exchanges of things needed institutions—legal concepts, in order to properly situate them within material civilisation. This meant that “the law ... [had to meet] face to face the problems of business usage and policy posed by the times.”<sup>17</sup>

The creation of sale as a discrete body of doctrine prioritised a doctrinal structure, codified as the Sale of Goods Act 1893,<sup>18</sup> which was an ossification of legal responses to different consumption patterns resting on much older paradigms.<sup>19</sup> However, English commercial law was already structured to enable the value-shifting from the middle layer to the upper law.<sup>20</sup> The sales law was a reaction; the law on *financing* sales was already designed, based on many customs of practice, to *pull* the value up (sale itself did not and could not *push* the value up) to the higher layer. Sales law’s crystallisation as a discrete topic would complement the more readily formed law on financing, by providing a strong property core to the sale concept, as the property concept was central to financing. Property provided the edifice which would create the shadows within which capitalism operated.<sup>21</sup>

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<sup>13</sup> Cf. Neil MCKENDRICK, John BREWER, J. H. PLUMB: *The Birth of a Consumer Society: Commercialization of Eighteenth Century England*, Indiana University Press, Bloomington, 1982.

<sup>14</sup> Frank TRENTMANN: *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-first*, Allen Lane, London, 2016, 1.

<sup>15</sup> *Ibid.*, 29: “Possessions were becoming more numerous and refined [by the fifteenth century].”

<sup>16</sup> *Ibid.*, chapter 2.

<sup>17</sup> FRIEDMAN: *Formative Elements in the Law of Sales...*, *op. cit.*, 460.

<sup>18</sup> For an instance of how the Sale of Goods Act 1893 merely replicated prior (error-ridden) doctrine, see e.g. Sean THOMAS: *The Development of the Implied Terms on Quantity in the Law of Sale of Goods*, *The Journal of Legal History*, 35(2014)/3, 281–318.

<sup>19</sup> See e.g. Grant GILMORE: *On The Difficulties of Codifying Commercial Law*, *The Yale Law Journal*, 57(1948)/8, 1341–1358.

<sup>20</sup> For analysis of a slightly earlier era: Donald O. WAGNER: *Coke and the Rise of Economic Liberalism*, *The Economic History Review*, 6(1935)/1, 30–44.

<sup>21</sup> Cf. Edward A. PURCELL JR.: *Capitalism and Risk: Concepts, Consequences, and Ideologies*, *Buffalo Law Review*, 64(2016)/1, 23–59, 26: “One could usefully see the distinctive core of capitalism as three interrelated ideas about private property and the dynamic tendencies those ideas generated: first, the idea that property can be abstract and liquid, appear in a multitude of forms, and be exchanged systemically through numbers written on paper; second, the idea that individuals should use property to create commodities for sale and profit rather than for their own consumption; and third, the idea that individuals should pursue their own self interest and strive to amass the largest amount of property as possible because doing so is both a social and moral good.” The chapter focuses on ideas one and two.

Is it really possible to put forward such a grand theory of commerce, methodologically speaking? Certainly, as Armitage and Guldi argue, a (re)turn to the *longue durée* has “great [...] critical potential ... [Its] return ... is imperative.”<sup>22</sup> Shorter-term analyses are limited, and cannot “formulat[e] a turning point of consequence.”<sup>23</sup> The problem of universality in legal history though is subject to a penetrating analysis by Sugarman and Rubin.<sup>24</sup> They examine the complexity and evidential uncertainty as to whether and to what extent law facilitated economic development in the period concerned.<sup>25</sup> In particular, they question the claim (often presented as axiomatic) that legal certainty and predictability was both essential to and wanted by commercial actors. Thus regardless of the changes wrought throughout the nineteenth century to the complicated and contradictory doctrine and practice concerning commercial and corporate law, “[t]he bulk of British trade and industry continued as previously.”<sup>26</sup> Yet claims as to the irrelevance of law to commercial behaviour may well be “erroneous ... [as] the law, both instrumentally and ideologically, might directly or indirectly impinge upon every stratum in society.”<sup>27</sup> Furthermore, the law’s effect on “every stratum” may also be negative, i.e. “the state legal system might co-operate in its partial or complete suppression.”<sup>28</sup> Moreover:

Facilitative laws are but one instance of a wider phenomenon, namely, the role of the law in the facilitation and legitimation of a plurality of semi-autonomous realms – a role which has yet to be fully chronicled. The law simultaneously exemplified such a realm and defined and reproduced a mode of thought and practice which promoted a variety of semi-autonomous realms ... [F]acilitative laws ... built upon as well as were imbricated within the long-standing tradition of semi-autonomous realms.<sup>29</sup>

This notion of a “semi-autonomous realm”, and the role of laws, is particularly useful in conceptualising the issues at hand here. It is also valuable to remind ourselves that any legal

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<sup>22</sup> Cf. David ARMITAGE and Jo GULDI: *The Return of the Longue Durée. An Anglo-American Perspective* (a translation of David Armitage, Jo Guldi, « Le retour de la longue durée: une perspective anglo-américaine », *Annales. Histoire, Sciences Sociales* 2015/2 (70th Year) 289-318), 221. Source: [http://www.cairn-int.info/article-E\\_ANNA\\_702\\_0289--the-return-of-the-longueduree.htm](http://www.cairn-int.info/article-E_ANNA_702_0289--the-return-of-the-longueduree.htm)). Armitage and Guldi want to marry the conceptual basis of *longue durée* with the technological tools available to modern historians. Though an entirely laudable aim, it is not that of this chapter.

<sup>23</sup> *Ibid.*, 221.

<sup>24</sup> David SUGARMAN and G.R. RUBIN: *Towards a New History of Law and Material Society in England, 1750-1914 = Law, Economy and Society, 1750-1914: Essays in the History of English Law*, eds. G.R. RUBIN and David SUGARMAN, Professional Books Ltd, Abingdon, 1984, 1. To a considerable extent that essay replicates and builds on David SUGARMAN: *Law, Economy and the State in England, 1750-1914: Some Major Issues = Legality, Ideology and The State*, ed David SUGARMAN, Academic Press, London, 1983, 213.

<sup>25</sup> SUGARMAN and RUBIN: *Towards a New History...*, *op. cit.*, 3 et seq.

<sup>26</sup> *Ibid.*, 6.

<sup>27</sup> *Ibid.*, 7.

<sup>28</sup> *Ibid.*, 9.

<sup>29</sup> *Ibid.*, 10.

authority (or, indeed, its absence) will invariably have involved “the marginalisation, suppression, qualification or consolidation of pre-existing social relations.”<sup>30</sup> Here the consolidation of pre-existing social relations to be examined is that of commercial law. This chapter, in an attempt to “transcend the confines of lawyers’ legal history”,<sup>31</sup> and provide an alternative to the twin manacles of legal history – empiricism and functionalism,<sup>32</sup> endeavours to provide a “more inter-disciplinary and theoretically informed history of law and material society.”<sup>33</sup> This is not a claim to a perfect theoretical framework or empirical basis. Rather it is just an attempt to “tell us more about the extent to which law is imbricated in and constitutive of social and economic relations.”<sup>34</sup> The broad approach taken in this chapter appears viable, as it looks not just at the instrumentality of specific areas of doctrine, but instead takes specific doctrinal examples contextualised within broader socio-economic structures, of being illustrative of a far broader trend impacting on society as a whole.

The argument herein is not that English law on sales financing shows one style of capitalist law. Rather, increased exchange-value attaining to goods was enabled by doctrinal structures and mechanisms drawing on pre-existing and long-standing practices. In this sense then, this chapter progresses not on the basis that, as per Horwitz, the eighteenth century English contract law was “essentially antagonistic to the interest of commercial classes”<sup>35</sup> and that this changed in the following century, but on the grounds that any nineteenth century doctrine which seems peculiarly apt for that period’s style of capitalism is really just because such styles of capitalism are continuations of much older social practices in material civilization. The contemporary perspective of eighteenth century England might well have been that people felt they were in an era of change,<sup>36</sup> and to some extent they were, but in Simpson’s words: “the picture of a loss of primeval innocence appears most implausible.”<sup>37</sup>

**Commerce: Vertical and Horizontal Shadows.** For Braudel, an appropriate metaphor for his analytical structure was that of a multi-storied house: the lowest levels were of material

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<sup>30</sup> *Ibid.*, 112.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, 119: “The militantly positivist-empiricist methodology of orthodox legal history...” Cf. n. 22 above.

<sup>33</sup> *Ibid.*, 120.

<sup>34</sup> *Ibid.*, 123.

<sup>35</sup> Morton J. HORWITZ: *The Historical Foundations of Modern Contract Law*, Harvard Law Review, 87(1974)/5, 917–956, 927.

<sup>36</sup> See e.g. Paul LANGFORD: *A Polite and Commercial People: England 1727-1783*, (1989), Oxford University Press, Oxford, 1992.

<sup>37</sup> A.W.B. SIMPSON: *The Horwitz Thesis and the History of Contracts*, University of Chicago Law Review, 46(1979)/3, 533-601, 541.

life, which sat underneath layers of “‘economic life’, before moving on to the highest level of all, the action of capitalism.”<sup>38</sup> Yet these layers also intersect at multiple points:

the contact surface ... takes the form of thousands of humble points of intersection: markets, stalls, shops. Each point marks a break: on one side is economic life with its commerce, its currencies, its nodal points and its superior equipment – great trading cities, Stock Exchanges and fairs; on the other ‘material life’, the non-economy, imprisoned within self-sufficiency. The economy begins at the fateful threshold of ‘exchange value’.<sup>39</sup>

For Braudel, the task was to study “the borderlines of the social, the political and the economic.”<sup>40</sup> What he said about mid-eighteenth century Amsterdam pertains to the whole task:

[We need] to see how this entire network, which I see as a superstructure, connected at lower levels with lesser economies. It is with these connections, meeting points and multiple links that we shall be particularly concerned, since they reveal the way in which a dominant economy can exploit subordinate economies, while not soiling its own hands with the less profitable activities or types of production, or even, most of the time, directly supervising the lesser links in the chain of trade.<sup>41</sup>

The questions are: can the nodal points be identified, and what can they tell us about the layers of material civilisation? In such analysis, one needs to be aware of “the variable value of the weapons of domination: shipping, trade, industry, credit, and political power or violence.”<sup>42</sup>

The connecting factor of price (money) in the role of exchange helps create a permeable interface between different layers of material civilisation. Price enables under-layers of shadow-material transactions to become valued and thus move to the middle layer of open, market exchange.<sup>43</sup> The value aspect of that exchange then entails to the shadow over-layer of finance. Yet there is in essence a hierarchy of power in these relationships, whereby an upper layer governs any lower layers by virtue of the money-exchange connection:

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<sup>38</sup> Fernand BRAUDEL (trans. Siân REYNOLDS): *Civilization & Capitalism 15th-18th Century: The Wheels of Commerce*, vol 2, (1979), Phoenix Press, London, 2002, 21.

<sup>39</sup> BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 21.

<sup>40</sup> *Ibid.*, 21.

<sup>41</sup> *Ibid.*, 248.

<sup>42</sup> *Ibid.*, 35.

<sup>43</sup> Cf. Fernand BRAUDEL (trans. Siân REYNOLDS): *Civilization & Capitalism 15th-18th Century: The Perspective of the World*, vol 3, (1979), William Collins Sons & Co Ltd, London, 1984, 96: “Towns spelled money, the essential ingredient of the [12th century] commercial revolution.” For a critical examination of money see e.g. GRAEBER: *Debt...*, *op. cit.* (money existed in a formal, accounting, sense, but was not relevant in real commercial activity).

capitalism implies above all hierarchy, and it takes up a position at the top of the hierarchy, whether or not this was created by itself. Where it appears only belatedly, it merely requires a way in ... the connection is made, the current transmitted ... [or] by means of 'forays' or 'liaisons' ... capitalism inserts itself into the chain leading from production to wholesale trade, not seeking to take over entire responsibility for them, but to occupy the strategic points controlling the key sectors of accumulation.<sup>44</sup>

This is not really a modern phenomenon, nor is it a revolutionary change in human activity. The Champagne fairs, which sat (geographically and economically) between the twelfth and thirteenth century poles of the Low Countries and the Italian Mediterranean, they were less about the goods on sale as they were about the opportunity for credit markets.<sup>45</sup> Such fairs were arguably just an "interlude",<sup>46</sup> but what followed had same basic structures, just on a different scale in later centuries. They were nodal points, shifting value from middle to upper lawyers of exchange, and the shadows cast by such exchanges were small but growing.

The changes were slow, because the commercial and productive activity of the Mediterranean and northern Europe remained basically unchanged until, roughly, the eighteenth century.<sup>47</sup> Over the *longue durée* there was a growth in the volume of trade, but no significant change in the types of commodities imported into northern European ports. What changes that occurred were "nearly all ... to do with the superstructure – which is at once important and almost nothing, even though this 'almost nothing' – money, capital, credit, increased or diminished demand for a given product – may govern ordinary, 'natural', day-to-day living."<sup>48</sup> Then around the mid-seventeenth to mid-eighteenth centuries there was an evident shift to imports from Asia and America, primarily resulting from colonialism.<sup>49</sup> The re-exporting trade, so long centred in Italy, shifted to northern Europe, where it would start to

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<sup>44</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 65. See also BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 378: "This pyramid of trade, always identifiable, a society within a society, can be found anywhere in the West, and in any period. It had its own laws of motion. Specialization and division of labour usually operated from the bottom up. If modernization or rationalization consists of the process whereby different tasks are distinguished and functions subdivided, such modernization began *in the bottom layer of the economy*." And at 432–433: capital's essential feature, the capacity to efficiently move towards a sector of high profit, to obtain that money-flow for the higher layer.

<sup>45</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 112.

<sup>46</sup> *Ibid.*, 115.

<sup>47</sup> *Ibid.*, 36: "The basic distances, routes, delays, production, merchandise and stopping places – everything or almost everything had remained the same." Niels STEENSGAARD: *The growth and composition of long-distance trade of England and the Dutch Republic before 1750 = The Rise of Merchant Empires: Long-Distance Trade in the Early Modern World 1350–1750*, ed. James TRACY, Cambridge University Press, Cambridge, 1990, 102–152, 106: "remarkable continuity"; TRENTMANN: *Empire of Things...*, *op. cit.*, 33: "There was more of everything ... but a household in 1600 still mostly had the same kind of things as two hundred years earlier."

<sup>48</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 36.

<sup>49</sup> See also TRENTMANN: *Empire of Things...*, *op. cit.*, chapter 3 on the role of Empire on consumption.

have substantial impact on consumption patterns,<sup>50</sup> in a similar manner to narrower but still profound changes wrought to consumption patterns of textiles in the mid-sixteenth to mid-seventeenth century following expansion of the English East Indian Company.<sup>51</sup> The effect of these long-term trends married to shorter-term changes was profound: “in 1800 [compared to 1500], twenty-three times as many goods were floating on the world’s oceans.”<sup>52</sup>

These broad changes can be observed (over the *longue durée*), in first Dutch, then British trade. Amsterdam was a world-city, perhaps *the* world-city, of the early eighteenth century.<sup>53</sup> World-cities are centres, focused on commerce, trade and exchange, sucking in assets and debt/credit. World cities operate on the primary nodal points of networks and circuits, and thus provide the best places to operate the translation function inherent in the processing between the different layers of material civilization. Amsterdam during the late seventeenth and early eighteenth century rested its commerce on non-specie commerce.<sup>54</sup> The mechanisms of commerce, the acceptance trade, were, however, transferable across the North Sea, not least because they were built on foundations developed long before the eighteenth century; the eighteenth century being merely a period of acceleration.<sup>55</sup> For Braudel, Amsterdam went “chasing shadows” by providing financial services at the expense of developing trade, and in doing so it “dropped the bird in the hand”, i.e. the economics of *entrepôt*, leaving space for London.<sup>56</sup> From the mid-eighteenth century on, London became and remained preeminent and unchallenged until the start of the twentieth century, not least because London had the advantage of an enormous and growing domestic and colonial market (of production and consumption).

This history enables interpretation of the “mechanisms through which capitalism and the market economy can coexist and interpenetrate one another without always merging entirely.”<sup>57</sup> Domination of local economies by dominant cities or zones “rests upon a dialectic between a market economy developing almost unaided and spontaneously, and an overarching economy which seizes these humble activities from above, redirects them and holds

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<sup>50</sup> STEENSGAARD: *Growth and composition of long-distance trade...*, *op. cit.*, 151.

<sup>51</sup> *Ibid.*, 123–128.

<sup>52</sup> TRENTMANN: *Empire of Things...*, *op. cit.*, 23.

<sup>53</sup> The focus here is necessarily restricted to the “Western” world.

<sup>54</sup> Cf. Carla Rahn PHILLIPS: *The Growth and Composition of Trade in the Iberian Empires, 1450–1750 = Merchant Empires...*, TRACY *op. cit.*, 34–101, 87 (noting the correspondence between the Dutch golden age and war and political disruption amongst their rivals).

<sup>55</sup> Fernand BRAUDEL: *Afterthoughts on Material Civilization*, Johns Hopkins Press, Baltimore, 1977, 27–28.

<sup>56</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 246. London would itself later undertake the same shift from *entrepôt* to finance: Sean THOMAS: *The Origins of the Factors Acts 1823 and 1825*, 32(2011)/2, *The Journal of Legal History*, 151–187.

<sup>57</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 36.



them at its mercy. .... *Any means that worked were used, in particular the granting of judicious credit.*"<sup>58</sup> That credit, as a specific commercial tool, was vital, is clear at a general level. But what were the specific conditions for Britain? For Braudel, a vital point was the shifting nature of the pound sterling in the seventeenth and early eighteenth century; specifically, the overvaluation of gold relative to silver and the consequent export of silver to areas where it had an important function in commerce,<sup>59</sup> the emerging de facto gold standard (long before a de jure gold standard) corresponding to the access to volumes of Portuguese-Brazilian gold following Lord Methuen's 1703 treaty with Portugal, put the British economy in a position to easily shift to a paper based-economy and thus reduce friction between the middle and upper layers of material civilization. Thus, "[p]aper money's real guarantee was undoubtedly neither gold nor silver but the huge output of the British Isles. It was the goods created by British industry and the profits from British trade ... The stability of the pound was a weapon."<sup>60</sup> But it was not the only weapon.

The nodal points of connection and intersection between the layers are (at least partially) institutional.<sup>61</sup> One particular institution that needs examination is that of law: how law, as an institution, can and does respond to commerce, itself an institution.<sup>62</sup> It is a case of institutional interaction, in vertical and horizontal ways. The vertical interaction, the intersections between the different layers, meshes with horizontal interactions, between the different participants and actors within a particular layer. Sometimes one or the other is more visible: with the material and economic layers the circulation of goods is "visible on first observation without difficulty" and is the market economy.<sup>63</sup> The visibility of these interactions varies with one's perspective: it is arguably easy now to observe the circulation (or lack thereof) of non-material wealth—finance—between one and another layer.<sup>64</sup> Yet, legal doctrine can sometimes be blind to history.<sup>65</sup>

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<sup>58</sup> *Ibid.*, 38 (emphasis added).

<sup>59</sup> See e.g. Ward BARRETT: *World bullion flows, 1450–1800...*, *op. cit.*, 224–254, 250–251 (noting the movement of silver to the Baltic).

<sup>60</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 364–65.

<sup>61</sup> *Ibid.*, 27–31.

<sup>62</sup> Cf. Ajay K. MEHROTRA: *A Bridge Between: Law and the New Intellectual Histories of Capitalism*, Buffalo Law Review, 64(2016)/1, 1–22, 15: "Not only do legal rules and categories, like property and contract, come to define economic and social relations, legal institutions and processes provide the rational and routinized system of governance that is so critical to an effective market economy."

<sup>63</sup> BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 22. See also, at 582: "The preconditions of any form of capitalism have to do with circulation."

<sup>64</sup> *Ibid.*, 25–26. See further e.g. W.E. SCHEUERMAN: *Global Law in Our High Speed Economy = Rules and Networks: The Legal Culture of Global Business Transactions*, eds. R.P. APPLEBAUM, W.L.F. FELSTINE and V. GESSNER, Hart Publishing, Oxford, 2001, chapter 3, 104–105.

<sup>65</sup> Ron HARRIS: *The Encounters of Economic History and Legal History*, Law and History Review, 21(2003)/2, 297–346, 340: "Each piece, or legal rule, interrelates with other, at times seemingly unrelated, pieces, in a thick

On the other hand, law can be revelatory: this is what an examination of the borderlines reveals following acknowledgment they are both created by and consist of law.<sup>66</sup> The presence and nature of borders and intersection matters, but so does understanding how connections were made between different state institutions and characters;<sup>67</sup> how “networks and circuits combine to make up a system ... Everything was conceived with a view to movement.”<sup>68</sup> There is a vast literature on networks, with evidence of many different types of network succeeding and failing. Sometimes strong institutions provide an appropriate framework of social closure,<sup>69</sup> sometimes weak, transitory ties operating to provide information flows will not require such institutional strength.<sup>70</sup> Here though the type of network is of less interest than the connections within and between networks; the intersections between different layers of material civilisation. This is where law comes in. Consider what Goode wrote of the history of commercial law:

This constant rediscovery of rules and techniques developed by our ancestors reflects a point of some importance, namely that commercial law evolves from the usages of business, so that the level of its influence and the degree of its subtlety at any one time are a function of the volume of economic activity and the complexity of the practices that drive commercial law. ... The sophistication of modern commercial law is thus a function of the size and independence of modern markets rather than of intellectual progression.<sup>71</sup>

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legal-historical context.” See also Frederick POLLOCK: *Essays in Jurisprudence and Ethics*, MacMillan and Co., London, 1882, 198: “Lawyers, again, are for the practical purposes of their business concerned with the laws as they are, not as they have been.”

<sup>66</sup> Cf. MILNE: *Trade and traders...*, *op. cit.*, 114–115: “Historians have bemoaned” the volume of consignments to order; 153: a key area of inter-trader reliance was credit-worthiness, but this is an area “strangely invisible in much historical writing.” See also Frank TRENTMANN: *Introduction = The Oxford Handbook of the History of Consumption*, ed. Frank TRENTMANN, Oxford University Press, Oxford, 2012, 1–19, 15: ‘Historical engagement with ... law has been ... patchy’.

<sup>67</sup> Cf. BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 419: “it was within the context of the modern economy that a certain capitalism and a certain version of the modern state first appeared”, 515: the state had “to exert control over economic life, both near and far, to arrange for the circulation of goods, with as much coherence as possible”; GRAEBER: *Debt...*, *op. cit.*, especially 50–52: markets are bound up by violence, in an triangular relationship with institutions of states and taxation.

<sup>68</sup> BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 168. See also *ibid.*, at 142–149, noting the role of bills of exchange as connecting trade circuits, as well as closing them off when completed.

<sup>69</sup> E.g. Avner GREIF: *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade*, Cambridge University Press, Cambridge, 2006.

<sup>70</sup> E.g. Emily ERIKSON and Sampsa SAMILA: *Networks, Institutions, and Encounters: Information Flow in Early-Modern Markets*, Working paper, December 2015. Source: [https://www.law.yale.edu/system/files/area/center/privatelaw/document/erikson\\_networks\\_market\\_expansion.dccx](https://www.law.yale.edu/system/files/area/center/privatelaw/document/erikson_networks_market_expansion.dccx).

<sup>71</sup> GOODE: *Next Millennium...*, *op. cit.*, 4. See also BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 575: alongside the usual touchstone of double-entry bookkeeping, other commercial instruments were an accumulation of practice, yet “[m]ore significant than the innovating spirit of entrepreneurship were the increased volume of trade, the frequent inadequacy of the money supply, etc.” As to the question of the changing complexity of doctrine, compare Patrick DEVLIN: *The Relation Between Commercial Law and Commercial Practice*, Modern

The role of change and development in the history of commercial law is clear; the more intricate issue is the extent and nature of this role. Certainly, the systemic revolution in litigation, from procedural to substantive disputes, needs accounting for.<sup>72</sup> Furthermore, as Bridge argues, the variety in types of sales transactions, from small-scale deals between individuals through to massive, complex international commodity trades, makes “[t]he unity of these diverse transactions ... sometimes precarious as allowance has be made” for this variation.<sup>73</sup> Yet complex commercial transactions per se, or the variation between types of commercial transaction, are not really modern phenomena. What therefore can we draw out about sales in the broader context of commerce, over the *longue durée*?

It is tentatively suggested here that a key turning point was a shift in the nature and role of fixed capital (by which is meant tangible property, from goods to housing) in societies.<sup>74</sup> Braudel suggests that the transformation of fixed capital, in terms of becoming more durable (and thus also more costly) positively affected production within societies.<sup>75</sup> Such changes provide not just the opportunity for commercial growth, but they also identify with greater clarity potential targets for commerce, i.e. fixed capital. However, the capacity of things to hold value relative to their movement within the system, combined with existing and sophisticated ways of managing the transfer of things along networks and circuits, required close control of such processes of transfer. This much is clear from Milne’s description of the port of Liverpool in the mid-nineteenth century:

Making money from trade could require complex arrangements for overseeing multi-lateral commodity flows, which might or might not actually involve the goods themselves appearing in the trader’s home port. This was the vital point. The continued prosperity of a port like Liverpool required the maintenance of control over the trading process on a number of levels. Traders had to define their markets, allowing their customers –

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Law Review, 14(1951)/3, 249–266, 251 with Peter BIRKS: *English and Roman Learning in Moses v Macferlan*, Current Legal Problems, 37(1984)/1, 1–28, 1–2.

<sup>72</sup> Cf. Robert B. FERGUSON: *The Adjudication of Commercial Disputes and the Legal System in Modern England*, British Journal of Law and Society, 7(1980)/2, 141–157.

<sup>73</sup> Michael G. BRIDGE: *The evolution of modern sales law*, Lloyd’s Maritime and Commercial Law Quarterly, (1991), 52–69, 52.

<sup>74</sup> See e.g. Sean THOMAS: *Mortgages, fixtures, fittings and security over personal property*, Northern Ireland Legal Quarterly, 66(2015)/4, 343–365.

<sup>75</sup> BRAUDEL: *Wheels of Commerce...*, op. cit., 247, 338. See also e.g. Judith FLANDERS: *The Making of Home*, Atlantic Books, London, 2014. The increased quality of goods is a possible reason for changes in quality obligations: Paul MITCHELL: *The development of quality obligations in sale of goods*, Law Quarterly Review, 117(2011)/3, 645–663, 655. The story of goods at the lowest layer of material civilisation is admittedly more varied: Sara PENNELL: *Material Culture in Seventeenth-Century ‘Britain’: The Matter of Domestic Consumption* = *Oxford Handbook ...*, TRENTMANN, op. cit., 64–84.

industrialists, primary producers and consumers, at home and abroad, to influence but never control the trading chain.<sup>76</sup>

With greater commercial complexity came the division of control and ownership of the things moving: at different stages of the circuit exchanges between differing controllers and owners occur (whether through fair means or foul). Multiple methods were used to minimise the inevitable risk, such as financing using trusted personal/family connections,<sup>77</sup> or by using often location-specific (if not necessarily novel) work-arounds.<sup>78</sup> However, the capacity of exchanges in complex commercial transactions to provide a translating function, an institutional nodal point between different layers of material civilisation, matters. The process of exchange can shift value from one layer of material civilisation to another. Yet as Braudel notes, merchants used to continually change roles, following the highest profits, which hindered the growth the highest capitalist layer. This did not prevent financing from arising though; it was just that the lower layers of material civilisation were insufficiently secure or broad to support a coherent and consistent upper layer. It was only really during the first half of the nineteenth century period that the upper layer of financial capitalism became a fixture.<sup>79</sup> This was a consequence of the changes in fixed capital, which enabled effective reinvestment of funds into fixed capital which generated income.<sup>80</sup> Another form of reinvestment was in financing the sales transactions themselves.<sup>81</sup> In this context, the mechanisms of financial capitalism, such as bills of exchange, bearer and non-bearer documents, rules concerning endorsement and obligations, and so on, were *already in place*.<sup>82</sup> The changes in trade meant that the light generated by commerce became bright enough to create the shadows in which the exchanges, from the middle to the upper layer of material civilisation, could operate most effectively.

**English Commercial Law: Chasing Shadows.** The development of English commercial law is a story of incredible complexity affected not just by the massive changes wrought by the industrial revolution, but by other regional and global historical trends (such as the shifts

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<sup>76</sup> MILNE: *Trade and traders...*, *op. cit.*, 21.

<sup>77</sup> *Ibid.*, 124–125.

<sup>78</sup> *Ibid.*, 134–145 on the peculiar nature of joint ownership of ships, justified in Charles ABBOTT: *A Treatise of the Law Relative to Merchant Ships and Seamen*, London, 1802, 82–83. This sub-divided joint ownership mirrors Venetian practice 500 years before: BRAUDEL: *Perspective of the World...*, *op. cit.*, 129.

<sup>79</sup> BRAUDEL: *Afterthoughts...*, *op. cit.*, 58–62.

<sup>80</sup> See generally e.g. Thomas PIKETTY (trans. Arthur GOLDHAMMER): *Capital in the Twenty-First Century*, Harvard University Press, Cambridge, Mass., 2014.

<sup>81</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 246.

<sup>82</sup> Dave DE RUYSSCHER: *From Usages of Merchants to Default Rules: Practices of Trade, Ius Commune and Urban Law in Early Modern Antwerp*, 33(2012)/1, 3–29, 15–16, 25.

away from the Mediterranean towards northern Europe in the early modern period),<sup>83</sup> as well as by peculiarities specific to the UK (such as the law/equity division;<sup>84</sup> the relationship between Scotland and England).<sup>85</sup> For Goode, three factors had (at least some) causal impact on the “pre-eminence” of English commercial law: the growth in commercial activity; political and social stability; and relative non-interference by the legislature combined with a pro-commercial judicial attitude.<sup>86</sup> A further factor that needs to be accounted for is the formularisation of commercial practice and thought into doctrine,<sup>87</sup> and doctrine into dogma.<sup>88</sup>

The initial English commercial texts (i.e. those going beyond mere records of mercantile practices<sup>89</sup>) include important works such as Chitty’s 1799 text on bills of exchange,<sup>90</sup> Charles Abbott’s 1802 text on shipping,<sup>91</sup> avoided sales as a discrete topic, and other less valuable compendia merely offered sales as a single chapter.<sup>92</sup> The early formalism of English law meant the “substantive mercantile law ... had no existence as a coherent system of principles before the common law itself developed the means of giving it expression.”<sup>93</sup> However, Blackburn’s 1845 text on sale arguably changed this.<sup>94</sup> However,

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<sup>83</sup> See generally BRAUDEL: *Structures of Everyday Life...*, *op. cit.*; BRAUDEL: *Wheels of Commerce...*, *op. cit.*; BRAUDEL: *Perspective of the World...*, *op. cit.* See also TRACY: *Merchant Empires...*, *op. cit.*

<sup>84</sup> GOODE: *Next Millennium...*, *op. cit.*, 4.

<sup>85</sup> As to the Scottish influence of Lord Mansfield, oft seen as the progenitor of modern English commercial law, see generally James OLDHAM: *The Mansfield manuscripts and the growth of English law in the eighteenth century*, University of North Carolina Press, Chapel Hill, 1992.

<sup>86</sup> GOODE: *Next Millennium...*, *op. cit.*, 5–7; Robert B. FERGUSON: *Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes*, *British Journal of Law and Society*, 4(1977)/1, 18–38.

<sup>87</sup> BRIDGE: *Evolution...*, *op. cit.*, 52: “the sale of goods ... has been formed by ideas drawn from mercantile dealings, with the market-place bulking large in its development.” Contrast DE RUYSSCHER: *Usages of Merchants...*, *op. cit.*, 3 (what were often presented as customs were actually default (legal) rules); David LIEBERMAN: *Property, commerce and the common law: Attitudes to legal change in the eighteenth century = Early Modern Conceptions of Property*, eds. John BREWER and Susan STAVES, Routledge, London, 1996, 144–158 (eighteenth century English commentators understood the impact and nature of commerce, and the division really stood as between real property and commercial law). This debate is part of the argument over whether there really was a *lex mercatoria*: Emily KADENS: *The Myth of the Customary Law Merchant*, *Texas Law Review*, 90(2012)/5, 1153–1206; Emily KADENS: *The Medieval Law Merchant: The Tyranny of a Construct*, *Journal of Legal Analysis*, 7(2015)/2, 251–289.

<sup>88</sup> BRIDGE: *Evolution...*, *op. cit.*, 52–53: case-law provides a foundation for later commentary. See also Alan RODGER: *The codification of commercial law in Victorian Britain*, *Law Quarterly Review*, 108(1992)/3, 570–590.

<sup>89</sup> Cf. e.g. BAKER: *Law Merchant...*, *op. cit.*, 296 fn 7: ‘G. Maylnes, *Lex Mercatoria* (1622), which is not a law book but a compendium, of current practice compiled by a merchant.’ Baker later notes, at 297 that there was a ‘flood of textbooks on commercial law which followed [Lord Mansfield’s] retirement [1793]’.

<sup>90</sup> Joseph CHITTY: *A Treatise on the law of Bills of Exchange, Checks on Bankers, Promissory Notes, Bankers’ Cash Notes, and Bank-Notes*, London, 1799.

<sup>91</sup> ABBOTT: *Law Relative to Merchant Ships...*, *op. cit.*

<sup>92</sup> See e.g. H.W. WOOLRYCH: *A Practical Treatise on the Commercial and Mercantile Laws of England*, London, 1829; J.W. SMITH: *A Compendium of Mercantile Law*, London, 1834.

<sup>93</sup> BAKER: *Law Merchant...*, *op. cit.*, 321. Compare Roman law, which treated sale distinctly: see e.g. Reinhard ZIMMERMANN: *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford University Press, Oxford, 1996.

Bridge queried this text: it was “not easy to reconcile with a commercial sales ethic” as it rejected “the historical values of personal property law”, and involved an “enthronement of property represent[ing] an attempt to create a sophisticated intellectual structure” for sale.<sup>95</sup> However, Blackburn’s property focus was not a “rejection” of historical practice,<sup>96</sup> but arguably an illustration of the increasing importance of goods as stores of wealth,<sup>97</sup> and a useful touchstone to ascertain liability and interests.<sup>98</sup> By focusing on the concept of property, there was the possibility of distinguishing different types of commercial relationships vis-à-vis goods. This impacted on interconnections between layers of material exchange and financial capital.

Although other texts began appearing,<sup>99</sup> it was monumental, career-rescuing,<sup>100</sup> 1868 tome that captured the market: Benjamin’s *Treatise on the Law of Sale of Personal Property*.<sup>101</sup> It provided a conceptualisation of sale; one of such significance that the current English law on sale is merely a minor modification of Benjamin’s scheme.<sup>102</sup> This is important due to the clear connection between Blackburn and Benjamin’s texts. However,

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<sup>94</sup> Colin BLACKBURN: *A Treatise on the Effect of the Contract of Sale, on the Legal Rights of Property and Possession in Goods, Wares, and Merchandize*, London, 1845.

<sup>95</sup> BRIDGE: *Evolution...*, *op. cit.*, 63.

<sup>96</sup> Cf. BAKER: *Law Merchant...*, *op. cit.*, 299: “Lord Mansfield’s law was binding on his successors; and so, to the extent that it embodied mere current usage, it froze the practice of Georgian merchants as the permanent law of England.” Or, did it merely replicate customs and practices that come up again and again in different contexts?

<sup>97</sup> That goods *could be* stores of wealth was not a new concept, Sir Frederick POLLOCK and F.W. MAITLAND: *The history of English Law before the time of Edward I*, Cambridge University Press, Cambridge, 1898, 149: “the further we go back, the larger seems the space which the possession of chattels fills in the eye of the law.” The change was in the quantity and nature of goods.

<sup>98</sup> BLACKBURN, *Contract of Sale...*, *op. cit.*, 1–2. See also SUGARMAN and RUBIN: *Towards a New History...*, *op. cit.*, 23–42.

<sup>99</sup> Such as George Joseph BELL; *Inquiries into the Contract of Sale of Goods and Merchandise as Recognised in the Judicial Decisions and Mercantile Practice of Modern Nations*, Edinburgh, 1845; William W. STORY: *A Treatise on the Law of Sales of Personal Property*, 1847; Leoni LEVI: *Commercial Law, Its Principles and Administration; or, the Mercantile Law of Great Britain*, William Benning & Co, London, 1850, which Goode rightly calls “a work of great erudition” (GOODE: *Next Millennium...*, *op. cit.*, 8 fn 7). See further G.R. RUBIN: *Levi, Leone (1821–1888) = Oxford Dictionary of National Biography*, Oxford University Press, 2004. Source: <http://www.oxforddnb.com/view/article/16551> (01.03.2017). See also RODGER: *Codification of commercial law...*, *op. cit.*, 572–573. Levi’s introductory plan of his *Commercial Law*, vol 1, v, refers to having based his outlining of the law of Great Britain to, *inter alia*, “Smith’s Mercantile Law” (presumably SMITH: *A Compendium of Mercantile Law...*, *op. cit.*), and “Blackstone’s Commentaries”, giving further indication of the paucity of texts on commercial law at the time.

<sup>100</sup> Catherine MACMILLAN: *Judah Benjamin: Marginalized Outsider or Admitted Insider?*, *Journal of Law and Society*, 42(2015)/1, 150–172.

<sup>101</sup> Judah BENJAMIN: *A Treatise on the Law of Sale of Personal Property; With References to the American Decisions and to the French Code and Civil Law*, London, 1868.

<sup>102</sup> The SGA 1893 merely replicated what was considered to be the law at the time: *Bank of England v Vagliano Bros* [1891] AC 107, 144–145 (Lord Herschell); HH Judge CHALMERS: *The Sale of Goods Act, 1893, including the Factors Acts, 1889 & 1890*, London, 1894, iii; LAW COMMISSION and SCOTTISH LAW COMMISSION: *Sale and Supply of Goods*, Law Com 160, Scot Law Com 104, 1987, paragraph 1.5; THOMAS: *Development of the Implied Terms on Quantity...*, *op. cit.*, 307.

although Benjamin justified his text by reference to the limitations with Blackburn's text,<sup>103</sup> like Blackburn he still took a property perspective.<sup>104</sup> Benjamin understood the broader commercial system,<sup>105</sup> rendering his focus on sale and property rather interesting as likely being an accurate representation of contemporary commercial practices and perspectives.<sup>106</sup>

A further explanation (and justification) for the late arrival of sale and its focus on property rests on long term developments from exchanges of goods to more complex commercial financing of such transactions. Britain (i.e. basically London) wrestled dominance of commerce—of financing—out of Dutch (i.e. basically Amsterdam) hands in the mid to late eighteenth century. At the same time rapid expansion in British domestic and international trade provided a foundation for utilisation of financial mechanisms to effectively translate the benefits of such trade—to move value from the middle market exchange lawyer to the upper layer of financial capitalism. The financial mechanisms deployed rested on the capacity of English law to draw property, as a concept, out of and away from tangible things, enabling wealth (in the form of “property”) to move in much greater volumes, and more swiftly, between the layers of material civilization. This can be seen with regard to various areas of commercial law;<sup>107</sup> here the focus (though this is an illustrative rather than exhaustive examination) is law governing the financing of transactions involving goods.<sup>108</sup>

Whilst specie/cash tended to have utility in lower-level exchanges,<sup>109</sup> non-specie payment mechanisms could be more efficient.<sup>110</sup> That this is so is unsurprising, bearing in mind the long history of bills of exchange as money-payment mechanisms, which enabled long-distance, arms-length trading in paper to occur.<sup>111</sup> To some extent these activities were

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<sup>103</sup> BENJAMIN: *Sale of Personal Property*..., *op. cit.*, iii.

<sup>104</sup> In this sense, LEVI: *Commercial Law*, *op. cit.*, was quite different

<sup>105</sup> MACMILLAN: *Judah Benjamin*..., *op. cit.*, 167.

<sup>106</sup> Cf. FRIEDMAN: *Formative Elements in the Law of Sales*..., *op. cit.*, 419–443

<sup>107</sup> *Ibid.* See also Ray B. WESTERFIELD: *Middlemen in English Business, particularly between 1660 and 1760*, Yale University Press, New Haven, 1915 (1968 Reprint).

<sup>108</sup> Cf. BRIDGE: *Evolution*..., *op. cit.*, 53 et seq. Bridge suggests delineation within the English case-law between the initial focus on small-scale transactions involving material integral to manufacturing processes, and the later developments of massively complex commodity transactions. It is tentatively suggested that there were more cases involving “small-scale” intra-supply-chain goods transactions, because they were more valuable. This meant that they became middle-layer exchanges, and that commodity transactions were themselves shifted up towards the shadow-layer of financial capitalism.

<sup>109</sup> BRAUDEL: *Wheels of Commerce*..., *op. cit.*, 549: “Economic needs of the overwhelming everyday kind forced [states] to set great store by precious metals: without these, the economy [i.e. the under-layer] would only too often have been paralysed.”

<sup>110</sup> QUINN: *Money, finance and capital markets*..., *op. cit.*, 151–154.

<sup>111</sup> See e.g. BRAUDEL: *Perspective of the World*..., *op. cit.*, 241–245.

the preserve of small groups of merchants,<sup>112</sup> and states,<sup>113</sup> but by the later eighteenth century there was “enhanced public awareness of the economic utility of credit”, for which circulation was fundamental: “So far as the great mass of property and business transactions was concerned, paper credit continued to flourish with the encouragement of the courts and without interference from government.”<sup>114</sup>

Documentary credit exemplifies commercial systems of networks and circuits.<sup>115</sup> Although documentary credit can come in a wide variety of forms,<sup>116</sup> the basic point is that a sale financed by documentary credit involves two circuits, of goods and of documents relating to the financing of the sale. So although there must be compliance between the letter of credit and the underlying sales transaction, the sale is formally distinct from the documentary transaction: “The bank is in no way concerned with any dispute that the buyer may have with the seller.”<sup>117</sup> This principle of autonomy, or independence principle, has the effect that when a documentary credit transaction takes off, it operates at a different velocity and is no longer tied to the underlying sale in quite the same fashion: “[bank obligations] are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain ... The machinery and commitments of the banks are on a different level.”<sup>118</sup> The courts should not “intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand”,<sup>119</sup> for “[o]therwise trust in international commerce could be irreparably damaged.”<sup>120</sup> The letter of credit thus functions as a carrier of the value of the underlying sales transaction.

These modern understandings of documentary credit are continuities from earlier practices. Milne’s examination of Liverpoolian commercial practices is revealing as to the general commercial practices in England in the early to mid-nineteenth century. Then

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<sup>112</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 66–67 (bills of exchange may cross continents, but not cultures).

<sup>113</sup> Stephen QUINN: *Money, finance and capital markets = The Cambridge Economic History of Modern Britain: Vol. I: Industrialisation, 1700-1860*, eds. Roderick FLOUD and Paul JOHNSON, Cambridge University Press, Cambridge, 2004, chapter 6; LANGFORD: *A Polite and Commercial People*, *op. cit.*, 692–693. For a critical examination of this process, see e.g. GRAEBER: *Debt...*, *op. cit.*, especially chapter 11.

<sup>114</sup> LANGFORD: *A Polite and Commercial People...*, *op. cit.*, 568.

<sup>115</sup> MCCURDY: *Commercial Letters of Credit...*, *op. cit.*, 539: “The commercial letter of credit has a long mercantile history ... [but] [i]t has a much shorter legal history.” Rufus James TRIMBLE: *The Law Merchant and the Letter of Credit*, *Harvard Law Review*, 61(1947-48)/6, 981–1008, 982: “In the absence of adequate historical and archaeological research by persons trained in the law, the history of these instruments has been a controversial subject.” More recently, see e.g. ROGERS: *Early History of the Law of Bills and Notes...*, *op. cit.*

<sup>116</sup> Cf. William E. MCCURDY: *Commercial Letters of Credit*, *Harvard Law Review*, 35(1922)/5, 539–592, 542.

<sup>117</sup> *Power Curber International Ltd v National Bank of Kuwait* [1981] 1 WLR 1233, 1241 (Lord Denning MR).

<sup>118</sup> *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, 155-56 (Kerr J).

<sup>119</sup> *Intraco Ltd v Notis Shipping Corp (The Bhoja Trader)* [1981] 2 Lloyd’s Rep 256, 257 (Donaldson LJ)

<sup>120</sup> *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, 156 (Kerr J).



mercantile and trading corporate forms and capitalisation thereof were particularly reliant on reputation and information. The primary credit relationships were between traders themselves rather than between traders and banks: the role of banks, including the Bank of England, was as “information brokers rather than lenders.”<sup>121</sup> This had a dual effect:

First, the entire system relied on a pool of information on the reliability and financial strength of trading firms, which enabled traders to decide whether those approaching them for extended credit were to be trusted or not. Secondly, bills of exchange, when discounted and signed on frequently in times of extreme financial speculation, could be used to construct houses of cards, liable to collapse should any of a number of parties involved in complicated transactions suffer a commercial setback.<sup>122</sup>

Since this would appear to contradict any principle of autonomy between banks and traders, a reasonable explanation might be that the notion of autonomy developed as a policy choice, based on a necessary fiction, for the protection of the parties (especially the financing parties). Thus the letter of credit transaction is founded on a policy of “instrumentality”, of meeting the “desires of both the buyer and the seller” *as well as* the financier in the middle.<sup>123</sup> This much can be drawn from *Pillans v Van Mierop* in 1765,<sup>124</sup> which though flawed,<sup>125</sup> did set the foundations for the inexorable doctrinal development of the autonomy principle in bills of exchange and the more specific later concept of letters of credit.

The division between the different layers of market exchange and financial capitalism was thus conceptualised in terms of knowledge and information about the particular layers. If a party was involved with an aspect of a transaction that sat in one layer (market exchange – the sale) then they would not know—or would be deemed not to know—about those aspects of the same general transaction which resided in the other layer (financial capitalism – the financing of the sale). The division between merchant and financier was central to this: the different parties are on different vectors in the chain of transactions. These circuits do not flow in the same direction, and the networking of these circuits occurs at certain intersectional nodes. Such nodal points are where the tangible assets (goods) and intangible

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<sup>121</sup> MILNE: *Trade and traders...*, *op. cit.*, 154.

<sup>122</sup> *Ibid.*

<sup>123</sup> MCCURDY: *Commercial Letters of Credit...*, *op. cit.*, 542. See generally Julian HOPPIT: *Risk and Failure in English Business 1700-1800*, Cambridge University Press, Cambridge, 1987.

<sup>124</sup> (1765) 3 Burr 1663; 97 ER 1035.

<sup>125</sup> The failure was in terms of explaining away consideration as merely an evidential requirement: see e.g. MCCURDY: *Commercial Letters of Credit...*, *op. cit.*, 565.

assets (documents) can efficiently and appropriately meet and be exchanged.<sup>126</sup> This is why it is perhaps best to explain documentary credit transactions as banks' lending credit, and not lending funds.<sup>127</sup> This process of exchange at the intersections of the different layers is not a fully free-flowing connection. The autonomy principle at the core of bills of exchange, letters of credit, and later documents of title, operates as a sort of non-return valve in the intersectional nodes between the market exchange and financial capitalism layers. The value of the transaction can flow in either direction, but the risk element, which can (and if the risk crystallizes, *will*) reduce the transaction's value cannot be given such freedom to migrate from one layer to another. Information about credit-worthiness, the nature of the object of the transactions, or any other impact on the value of the transaction, is only useful if it is not corrupted. The autonomy principles thus help protect against the negative impact of bad information.

This outline of financing sales indicates first the extent of circularity and movement necessary to operate the system completely, and second the distinction between the financing transaction and the underlying sale. The importance of these elements becomes clearer when we consider the impact of a failure of a transaction. If the sales transaction is flawed, then the risk will fall as between buyer and seller depending on the nature of the flaw (in terms of explicit doctrine and the sales contract where pertinent). But this flaw does not impact so directly on the documentary transaction. It is only by impugnation of the documents themselves, and not implicitly by pointing to the goods, that documentary transactions can be susceptible to failure.

This is not the only protective mechanism. Notions of commercial honour were often raised: "banks displayed a meticulous solicitude in honouring their obligations. From the commercial point of view however the mere possibility of revocation was unsettling at best."<sup>128</sup> Participants in informal commercial clubs were willing to ignore apparent failures in a circuit in order to maintain capital flows. The interconnected nature of commercial actions meant there were rational reasons to act cooperatively to avoid failures, even if this may lead to greater losses and resulted in a system potentially "open to abuse."<sup>129</sup> Correlatively, this

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<sup>126</sup> BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 343 (profit as the approximate intersection point, as it is the consequence of exchange (though collision might be a better term) between the different layers of material civilization).

<sup>127</sup> MCCURDY: *Commercial Letters of Credit...*, *op. cit.*, 585, citing F. SILVER: *Commercial Banking and Credits*, New York, 1920, 190.

<sup>128</sup> Philip W. THAYER: *Irrevocable Credits in International Commerce: Their Legal Nature*, Columbia Law Review 36(1936)/7, 1031–1060, 1034.

<sup>129</sup> MILNE: *Trade and traders...*, *op. cit.*, 159–160: traders could easily trade despite substantial losses.

cooperative system helped to avoid smaller traders being crushed, as they were seen as serving important purposes that larger firms could not achieve. This understanding may help to provide a more likely justification than mere honour for low volumes of disputes in this field, though of course there were multiple factors affecting litigation rates.<sup>130</sup> There is also a degree of correlation with the behaviour evident in the trade in corporate stock and sales in the nineteenth century, where there was considerable volumes of transactions that were technically illegal (such time sales of stock) or void for informality (under the Statute of Frauds 1677), but were not thrown up due to the strength of private ordering practices within commercial clubs such as the Stock Exchange.<sup>131</sup> Weisberg's extensive analysis of the early history of the voidable preference rule indicates a number of factors that impact on this analysis. Changes in cultural and regulatory responses to bankruptcy from the sixteenth century (which had a strict, rule-bound, complex, pro-creditor system which differentiated between trades and merchants), demonstrate an "ideology of commerce that took hold in the eighteenth century and turned the morally questionable and perceptually elusive phenomena of trade and credit into necessities, and then into virtues."<sup>132</sup> The uncertainty of credit rendered sympathetic what was once considered suspicious: if things went wrong it was the "corruption of credit."<sup>133</sup> This shift was undergirded by the trend towards creating effective means of shifting value from market exchange to financial capitalism layers. The shifting morality of credit (and its twin, debt), specifically in a commercial context, was a precursor of specific doctrinal change, but was itself a reflection of commercial practices, developed over the *longue durée*, operating in the shadows due to their often formal illegality.

Graeber persuasively argues that as the core conceptual issue is debt, non-specie payment mechanisms provided better means to express longer-term relationships of debt and obligation. There have been shifts between credit and specie over time: the mid fifteenth century represented a shift from credit to specie (with the current era being a shift back to credit).<sup>134</sup> This had interesting and often contradictory or even paradoxical effects: in a typical English village "trust was everything. Most money literally was trust [i.e. credit] ...

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<sup>130</sup> BURSET: *Merchant Courts...*, *op. cit.*

<sup>131</sup> Robert B. FERGUSON: *Commercial Expectations and the Guarantee of the Law: Sales Transactions in Mid-Nineteenth Century England = Law, Economy and Society, 1750–1914: Essays in the History of English Law*, eds. G.R. RUBIN and David SUGARMAN, Professional Books Ltd, Abingdon, 1984, 192.

<sup>132</sup> Robert WEISBERG: *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, Stanford Law Review, 39(1986)/1, 3–138, 32. See also HOPPIT: *Risk and Failure...*, *op. cit.*

<sup>133</sup> WEISBERG: *Commercial Morality ... op. cit.*, 32.

<sup>134</sup> GRAEBER, *Debt...*, *op. cit.*, chapters 8–11. See also SIMARD: *The Birth of a Legal Economy...*, *op. cit.*, 1089–1090 (noting the 'dearth of a medium of exchange' in the early US). Cf. LANGFORD: *A Polite and Commercial People...*, *op. cit.*, 449 (noting the growth in volume of available specie).

Cold hard cash was employed largely between strangers, or when paying ... superiors ... [which] led to an increasing disjuncture of moral universes .... [between those who did not use cash and distrusted it, and those, in say the legal institutions, for whom] cash exchange was normal and it was debt that came to be seen as tinged with criminality.”<sup>135</sup> Yet on the other hand, how is it that “almost all the elements of financial apparatus that we’ve come to associate with capitalism – central banks, bond markets, short-selling, brokerage houses, speculative bubbles, securization, annuities – came into being not only before the science of economics, ... but also before the rise of factories, and wage labor itself.”<sup>136</sup> In other words, how come there was capitalism before capitalism?

This chapter analysed merely an obscure element of that question. The nineteenth century (with the usual fuzziness around the edges) saw the creation of dual credit/debt and specie economies, particularly in Britain. Cash began to be treated as entirely fungible and interchangeable, with explicit justifications of this based on the needs of commercial circulation.<sup>137</sup> Non-specie payment mechanisms like documentary credit, however, rested on long-term practices coalesced into a mentality or culture;<sup>138</sup> its soft-law status in contemporary law shows how little has changed.<sup>139</sup> A similar focus on long-term practices and cultures as generative bases can also be identified with documents of title;<sup>140</sup> there antecedents are classically (though not entirely accurately) identified in thirteenth century Italy and beyond.<sup>141</sup> Might this practice-focused development indicate how English commercial law was merely *enhancing* the generation of shadow-layers of commercial activity?<sup>142</sup> Law created documentary payment mechanisms that limited the infectious nature of risk as well as preventing unnecessary diffusion of value between the layers, by restricting the directional flow of interconnections between the different layers of market exchange and

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<sup>135</sup> GRAEBER, *Debt...*, *op. cit.*, 328–339.

<sup>136</sup> *Ibid.*, 345.

<sup>137</sup> *Miller v Race* (1758) 1 Burrow 452; 97 ER 398.

<sup>138</sup> See e.g. Frederick Rockwell SANBORN: *Origins of the Early English Maritime and Commercial Law*, The Century Co., New York, 1930, 400; William MITCHELL: *An Essay on the Early History of the Law Merchant*, Cambridge University Press, Cambridge, 1904, 157–158.

<sup>139</sup> UCP 600, into force 1 July 2007. The first UCP was published in 1933.

<sup>140</sup> *Lickbarrow v Mason* (1787) 2 TR 63; 100 ER 35 (bill of lading was a document of title because of mercantile usage).

<sup>141</sup> See generally ROGERS: *Early History of the Law of Bills and Notes...*, *op. cit.* See also e.g. SANBORN: *Origins...*, *op. cit.*, 348–350, 397–399; TRIMBLE: *The Law Merchant and the Letter of Credit...*, *op. cit.* For a broader historical examination, BRAUDEL: *Wheels of Commerce...*, *op. cit.*, is replete with examples of such commercial practice throughout Europe and beyond, and GRAEBER: *Debt...*, *op. cit.*, chapter 10, gives a good overview of the Islamic and Chinese developments in this field.

<sup>142</sup> See generally Michael E. TIGAR and Madeline R. LEVY: *Law & the Rise of Capitalism*, Monthly Review Press, New York, 2000.

the financial layer. This enabled the presentation of commercial law as being about speed:<sup>143</sup> this mentality had developed and stuck though long before the nineteenth century, before affecting later understandings of sale within commercial law.<sup>144</sup> As Baker suggests of the fourteenth century, records of clearly mercantile disputes provide insufficient detail about the “nature of the underlying transaction”, but “mercantile instruments” were recognised. They could provide an evidential role in discharging a “pre-existing obligation”, which had the benefit of flexibility and convenience. The absence of formal enforceability was a “secondary consideration.”<sup>145</sup> Parallels with modern documentary credit practice are considerable; changes in contract formalities result in enforceable agreements but they remain as distinct obligations to the underlying (goods) transaction.

**Conclusion.** Braudel’s suggestion of a layered relationship between non-market economy, market exchange, and a shadow-layer of financial capitalism, provides an appropriate normative framework for examining the relationship in English commercial law between the different layers. The focus here was on the specific nodal points of interconnection between the different layers of market exchange and financial capitalism. The connections between the different layers do exist, but their connections are not always fully multi-directional. By this I mean that English law has particular commercial methods operating as safety-valves, allowing value, but not risk, to travel swiftly up the layers. Yet this was neither novel nor unique to English law: it was the consequence of developments over much longer time periods and across wider space, encompassing various social, cultural and economic structures. Sale’s arrival as a discrete topic in English law corresponded with the result of a long-term socio-economic process of enhancing the quality and durability of tangible things, along with the drawing out by commentators and courts of property as a separable aspect of sale. This enabled abstract values to be extrapolated from things and then sent out into their own commercial network.

The inspiration for this study was serendipity: crossing Braudel’s phraseology of shadows with literature on “shadow banking.”<sup>146</sup> For example, Johnston considered the role

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<sup>143</sup> See e.g. LIEBERMAN: *Property, commerce and the common law...*, *op. cit.*, 151 (citing CHITTY, *Bills of Exchange...*, *op. cit.*).

<sup>144</sup> See e.g. BRAUDEL: *Perspective of the World...*, *op. cit.*, 155: : “Discounting ... as established in eighteenth-century England, was in fact a revival of ancient practices”

<sup>145</sup> BAKER: *Law Merchant...*, *op. cit.*, 302–306.

<sup>146</sup> Specifically Andrew JOHNSTON: *Regulating Hedge Funds for Systemic Stability: The EU’s Approach*, *European Law Journal* 21(2015)/6, 758–786. This field of literature is considerable and growing, but economy precludes further analysis.

of hedge funds in the repo market, where multiple recollateralisation of assets increases liquidity as well as interconnections in the network. The assets (such as bonds) in the hedge fund repo market were, however, flimsy and value-unstable. Yet a regulatory failure to govern considerable moral hazard shifted risk away from the hedge funds.<sup>147</sup> This story mirrors the earlier history of sales. The severity and brutality of the consequences seen in the hedge fund repo market is probably just a mere blip in what might be a much longer and slower process of network formulation between different layers of market civilisation. The layers of material civilization, and the institutional structures, forms and intersections attendant to such layers and their nodal points, are to a considerable degree those created by long-term historical conditions. The shadows they create remain with us today.

The final words here are perhaps best left to Braudel:

Venice was from the start trapped by the logic of its own success. The true doge of Venice, standing opposed to all the forces of change, was the city's own past, the precedents to which reference was made as if they were the tablets of the law. And the shadow looming over Venice's greatness was that of her greatness itself. This has some truth. Could the same not be said of twentieth-century Britain? Leadership of a world-economy is an experience of power which may one day blind the victor to the march of history.<sup>148</sup>

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<sup>147</sup> *Ibid.* See generally PURCELL JR.: *Capitalism and Risk...*, *op. cit.*

<sup>148</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 132.

Sean Thomas

## English Commercial Law: Chasing Shadows

**Introduction: On the possibility of Big Legal History.** If commercial law is “the totality of the law’s responses to mercantile disputes”,<sup>149</sup> what is the “totality” in historical perspective? The historicity of commercial law is of clear importance if we accept the following three statements by the doyen of commercial law, Professor Sir Roy Goode: “In the history of the world few influences have been as powerful as the driving force of trade”,<sup>150</sup> “The history of commercial law is one of constant reinvention of the wheel”,<sup>151</sup> and “Part of the fascination of commercial law lies in its seemingly infinite capacity for change.”<sup>152</sup> In providing a brief historical outline of English commercial law, he ties in initial continental developments of *lex mercatoria*, before nineteenth century crystallisation led to the contemporary position of a mature commercial jurisdiction.<sup>153</sup> This outline is expanded within Goode’s Hamlyn lectures: English commercial law increased in “scope and sophistication”, with various concepts and tools from law and equity helping create a full-service commercial law.<sup>154</sup> English commercial law developed in response to commercial practice, and by means – at least until modern times – of judicial rather than statutory intervention in a way that “[a] civil lawyer would surely find ... truly astonishing”.<sup>155</sup>

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<sup>149</sup> Roy GOODE: *Commercial Law in the Next Millennium*, Sweet & Maxwell, London, 1998, 8. Cf. Ewan MCKENDRICK: *Goode on Commercial Law*, Penguin, London, 2010, xxi (a reprint of the Preface to the Third Edition): “[T]he primary objective of commercial (as opposed to consumer) law is to respond to the legitimate needs of the mercantile community and of the markets which are central to its activities.”

<sup>150</sup> GOODE: *Next Millennium ...*, *op. cit.*, 1.

<sup>151</sup> *Ibid.*, 3.

<sup>152</sup> MCKENDRICK: *Goode (2010) ...*, *op. cit.*, xxi.

<sup>153</sup> Ewan MCKENDRICK: *Goode on Commercial Law*, Penguin, London, 2016, 3-8.

<sup>154</sup> GOODE: *Next Millennium ...*, *op. cit.*, 9.

<sup>155</sup> *Ibid.*, 11. Cf. Boris KOZOLCHYK: *The Commercialization of Civil Law and the Civilization of Commercial Law*, Louisiana Law Review, 40(1979)/1, 3-47; Geoffrey SAMUEL: *Civil and Commercial Law: a Distinction Worth Making?*, Law Quarterly Review, 102(1986)/3, 569-584. It is possible that legislation had an identifiable impact, such as the Warehousing Act 1803, which increased trade by shifting the liability for import duties from the point of importation to that of disposition, or the repeal of the Navigation Acts in 1849: Graeme J. MILNE, *Trade and traders in mid-Victorian Liverpool: Mercantile business and the making of a world port*, Liverpool University Press, Liverpool, 2000, 80-81; 147-148.

However:

History is barren if directed only to showing the course and change of institutions; equal attention must be paid to the more puzzling question of *why* one institution rather than another persisted, *why* one new variant rather than another has emerged. And legal history loses most of its value if it is obscured by an attempt to compress into one flat plane of analytical synthesis half a century of decisions that grow out of the one plane into another and another.<sup>156</sup>

Llewellyn's notion of planes of synthesis justifies a particular examination of the history of commercial law: utilising Braudel's structural conceptualisation of material civilization over the *longue durée* to evaluate the structural nature of English commercial law.<sup>157</sup> In *The Structures of Everyday Life*, Braudel argued that there are three levels of material civilisation: the shadow under-layer, concerning unrecorded transactions; the open middle layer, concerning market exchange; and the third "shadowy" over-layer, of global financial capitalism.<sup>158</sup> The connection between these layers is provided by exchanges of goods, and it is these connecting points that will be the focus of this chapter. It is at those points that the system of English law demonstrates a capacity to generate doctrinal forms which regulate flows of value as between the layers.

English commercial law demonstrates continuity of practices, of business and legal institutions,<sup>159</sup> contextualised by long-term historical change. Yet for sale, its late arrival as a

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<sup>156</sup> Karl Nickerson LLEWELLYN: *Cases and Materials on the Law of Sales*, Callaghan and Co., Chicago, 1930, xii.

<sup>157</sup> There are probably infinite possible approaches to this task. Here, Braudel's approach was chosen for use; others were not. So be it.

<sup>158</sup> Fernand BRAUDEL (trans. Siân REYNOLDS): *Civilization & Capitalism 15th-18th Century: The Structures of Everyday Life: The Limits of the Possible*, Harper Row, New York, 1981. This theme of a shadow over-layer is common to historians from left- and right-wing persuasions: see e.g. Karl POLANYI: *The Great Transformation: The Political and Economic Origins of Our Time*, (1944), Beacon Press, Boston, 2001; Niall FERGUSON: *The World's Banker: The History of the House of Rothschild*, Weidenfeld & Nicolson, London, 1998. Cf. David GRAEBER: *Debt: The First 5,000 Years*, (2011), Melville House Publishing, London, 2014, 127: "we end up with a sanitized view of the way actual business is conducted. The tidy world of shops and malls is the quintessential middle-class environment but at either the top or the bottom of the system, the world of financiers or of gangsters, deals are often made in ways not so completely different from ways that [can be seen in supposedly primitive non-commercial societies]."

<sup>159</sup> E.g. GOODE: *Next Millennium...*, *op. cit.*, 5. Cf. John H. BAKER: *The Law Merchant and the Common Law before 1700*, 8(1979)/2, *Cambridge Law Journal*, 295–322; James Stephen ROGERS: *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law*, Cambridge University Press, Cambridge, 1995. For a recent analysis of the failure of attempts to develop merchant courts, see Christian M. BURSET: *Merchant Courts, Arbitration, and the Politics of Commercial Litigation in the Eighteenth-Century British Empire*, 34(2016)/3, *Law and History Review*, 615–647. See also Justin SIMARD: *The Birth of a Legal Economy: Lawyers and the Development of American Commerce*, *Buffalo Law Review*, 64(2016)/5, 1059–1134 (the ordinary practice of lawyers created the structures and institutions for economic development). This chapter focuses on other aspects of the development of commerce and commercial law.



discrete area of law,<sup>160</sup> can be explained by a signal turning point in the *longue durée*: the changes evident in the eighteenth and nineteenth. Whilst it is perhaps too much to talk of a “birth” of consumption,<sup>161</sup> there was a shift in consumption patterns: multiple things were bought and sold (exchanged) at markets serving radically different purposes to the fairs and markets that had been part of commercial life until this point.<sup>162</sup> Things also became more durable,<sup>163</sup> and consisted of more complex and different elements requiring equally complex supply chains. Things made other things, and things drew value not just from their use-value but from other intangible elements (such as brands).<sup>164</sup> This all led, eventually, to a quantitative explosion of things, and of exchange-value attached to (and generated by) things. These exchanges of things needed institutions—legal concepts, in order to properly situate them within material civilisation. This meant that “the law ... [had to meet] face to face the problems of business usage and policy posed by the times.”<sup>165</sup>

The creation of sale as a discrete body of doctrine prioritised a doctrinal structure, codified as the Sale of Goods Act 1893,<sup>166</sup> which was an ossification of legal responses to different consumption patterns resting on much older paradigms.<sup>167</sup> However, English commercial law was already structured to enable the value-shifting from the middle layer to the upper law.<sup>168</sup> The sales law was a reaction; the law on *financing* sales was already designed, based on many customs of practice, to *pull* the value up (sale itself did not and could not *push* the value up) to the higher layer. Sales law’s crystallisation as a discrete topic would complement the more readily formed law on financing, by providing a strong property core to the sale concept, as the property concept was central to financing. Property provided the edifice which would create the shadows within which capitalism operated.<sup>169</sup>

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<sup>160</sup> Lawrence M. FRIEDMAN: *Formative Elements in the Law of Sales: The Eighteenth Century*, Minnesota Law Review, 44(1960)/3, 411–460, 413–419

<sup>161</sup> Cf. Neil MCKENDRICK, John BREWER, J. H. PLUMB: *The Birth of a Consumer Society: Commercialization of Eighteenth Century England*, Indiana University Press, Bloomington, 1982.

<sup>162</sup> Frank TRENTMANN: *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-first*, Allen Lane, London, 2016, 1.

<sup>163</sup> *Ibid.*, 29: “Possessions were becoming more numerous and refined [by the fifteenth century].”

<sup>164</sup> *Ibid.*, chapter 2.

<sup>165</sup> FRIEDMAN: *Formative Elements in the Law of Sales...*, *op. cit.*, 460.

<sup>166</sup> For an instance of how the Sale of Goods Act 1893 merely replicated prior (error-ridden) doctrine, see e.g. Sean THOMAS: *The Development of the Implied Terms on Quantity in the Law of Sale of Goods*, The Journal of Legal History, 35(2014)/3, 281–318.

<sup>167</sup> See e.g. Grant GILMORE: *On The Difficulties of Codifying Commercial Law*, The Yale Law Journal, 57(1948)/8, 1341–1358.

<sup>168</sup> For analysis of a slightly earlier era: Donald O. WAGNER: *Coke and the Rise of Economic Liberalism*, The Economic History Review, 6(1935)/1, 30–44.

<sup>169</sup> Cf. Edward A. PURCELL JR.: *Capitalism and Risk: Concepts, Consequences, and Ideologies*, Buffalo Law Review, 64(20016)/1, 23–59, 26: “One could usefully see the distinctive core of capitalism as three interrelated ideas about private property and the dynamic tendencies those ideas generated: first, the idea that property can

Is it really possible to put forward such a grand theory of commerce, methodologically speaking? Certainly, as Armitage and Guldi argue, a (re)turn to the *longue durée* has “great [...] critical potential ... [Its] return ... is imperative.”<sup>170</sup> Shorter-term analyses are limited, and cannot “formulat[e] a turning point of consequence.”<sup>171</sup> The problem of universality in legal history though is subject to a penetrating analysis by Sugarman and Rubin.<sup>172</sup> They examine the complexity and evidential uncertainty as to whether and to what extent law facilitated economic development in the period concerned.<sup>173</sup> In particular, they question the claim (often presented as axiomatic) that legal certainty and predictability was both essential to and wanted by commercial actors. Thus regardless of the changes wrought throughout the nineteenth century to the complicated and contradictory doctrine and practice concerning commercial and corporate law, “[t]he bulk of British trade and industry continued as previously.”<sup>174</sup> Yet claims as to the irrelevance of law to commercial behaviour may well be “erroneous ... [as] the law, both instrumentally and ideologically, might directly or indirectly impinge upon every stratum in society.”<sup>175</sup> Furthermore, the law’s effect on “every stratum” may also be negative, i.e. “the state legal system might co-operate in its partial or complete suppression.”<sup>176</sup> Moreover:

Facilitative laws are but one instance of a wider phenomenon, namely, the role of the law in the facilitation and legitimization of a plurality of semi-autonomous realms – a role which has yet to be fully chronicled. The law simultaneously exemplified such a realm and defined and reproduced a mode of thought and practice which promoted a variety of

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be abstract and liquid, appear in a multitude of forms, and be exchanged systemically through numbers written on paper; second, the idea that individuals should use property to create commodities for sale and profit rather than for their own consumption; and third, the idea that individuals should pursue their own self interest and strive to amass the largest amount of property as possible because doing so is both a social and moral good.” The chapter focuses on ideas one and two.

<sup>170</sup> Cf. David ARMITAGE and Jo GULDI: *The Return of the Longue Durée. An Anglo-American Perspective* (a translation of David Armitage, Jo Guldi, « Le retour de la longue durée: une perspective anglo-américaine », *Annales. Histoire, Sciences Sociales* 2015/2 (70th Year) 289-318), 221. Source: [http://www.cairn-int.info/article-E\\_ANNA\\_702\\_0289--the-return-of-the-longueduree.htm](http://www.cairn-int.info/article-E_ANNA_702_0289--the-return-of-the-longueduree.htm)). Armitage and Guldi want to marry the conceptual basis of *longue durée* with the technological tools available to modern historians. Though an entirely laudable aim, it is not that of this chapter.

<sup>171</sup> *Ibid.*, 221.

<sup>172</sup> David SUGARMAN and G.R. RUBIN: *Towards a New History of Law and Material Society in England, 1750-1914 = Law, Economy and Society, 1750-1914: Essays in the History of English Law*, eds. G.R. RUBIN and David SUGARMAN, Professional Books Ltd, Abingdon, 1984, 1. To a considerable extent that essay replicates and builds on David SUGARMAN: *Law, Economy and the State in England, 1750-1914: Some Major Issues = Legality, Ideology and The State*, ed David SUGARMAN, Academic Press, London, 1983, 213.

<sup>173</sup> SUGARMAN and RUBIN: *Towards a New History...*, *op. cit.*, 3 et seq.

<sup>174</sup> *Ibid.*, 6.

<sup>175</sup> *Ibid.*, 7.

<sup>176</sup> *Ibid.*, 9.

semi-autonomous realms ... [F]acilitative laws ... built upon as well as were imbricated within the long-standing tradition of semi-autonomous realms.<sup>177</sup>

This notion of a “semi-autonomous realm”, and the role of laws, is particularly useful in conceptualising the issues at hand here. It is also valuable to remind ourselves that any legal authority (or, indeed, its absence) will invariably have involved “the marginalisation, suppression, qualification or consolidation of pre-existing social relations.”<sup>178</sup> Here the consolidation of pre-existing social relations to be examined is that of commercial law. This chapter, in an attempt to “transcend the confines of lawyers’ legal history”,<sup>179</sup> and provide an alternative to the twin manacles of legal history – empiricism and functionalism,<sup>180</sup> endeavours to provide a “more inter-disciplinary and theoretically informed history of law and material society.”<sup>181</sup> This is not a claim to a perfect theoretical framework or empirical basis. Rather it is just an attempt to “tell us more about the extent to which law is imbricated in and constitutive of social and economic relations.”<sup>182</sup> The broad approach taken in this chapter appears viable, as it looks not just at the instrumentality of specific areas of doctrine, but instead takes specific doctrinal examples contextualised within broader socio-economic structures, of being illustrative of a far broader trend impacting on society as a whole.

The argument herein is not that English law on sales financing shows one style of capitalist law. Rather, increased exchange-value attaining to goods was enabled by doctrinal structures and mechanisms drawing on pre-existing and long-standing practices. In this sense then, this chapter progresses not on the basis that, as per Horwitz, the eighteenth century English contract law was “essentially antagonistic to the interest of commercial classes”<sup>183</sup> and that this changed in the following century, but on the grounds that any nineteenth century doctrine which seems peculiarly apt for that period’s style of capitalism is really just because such styles of capitalism are continuations of much older social practices in material civilization. The contemporary perspective of eighteenth century England might well have

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<sup>177</sup> *Ibid.*, 10.

<sup>178</sup> *Ibid.*, 112.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*, 119: “The militantly positivist-empiricist methodology of orthodox legal history....” Cf. n. 22 above.

<sup>181</sup> *Ibid.*, 120.

<sup>182</sup> *Ibid.*, 123.

<sup>183</sup> Morton J. HORWITZ: *The Historical Foundations of Modern Contract Law*, Harvard Law Review, 87(1974)/5, 917–956, 927.

been that people felt they were in an era of change,<sup>184</sup> and to some extent they were, but in Simpson's words: "the picture of a loss of primeval innocence appears most implausible."<sup>185</sup>

**Commerce: Vertical and Horizontal Shadows.** For Braudel, an appropriate metaphor for his analytical structure was that of a multi-storied house: the lowest levels were of material life, which sat underneath layers of "economic life", before moving on to the highest level of all, the action of capitalism."<sup>186</sup> Yet these layers also intersect at multiple points:

the contact surface ... takes the form of thousands of humble points of intersection: markets, stalls, shops. Each point marks a break: on one side is economic life with its commerce, its currencies, its nodal points and its superior equipment – great trading cities, Stock Exchanges and fairs; on the other 'material life', the non-economy, imprisoned within self-sufficiency. The economy begins at the fateful threshold of 'exchange value'.<sup>187</sup>

For Braudel, the task was to study "the borderlines of the social, the political and the economic."<sup>188</sup> What he said about mid-eighteenth century Amsterdam pertains to the whole task:

[We need] to see how this entire network, which I see as a superstructure, connected at lower levels with lesser economies. It is with these connections, meeting points and multiple links that we shall be particularly concerned, since they reveal the way in which a dominant economy can exploit subordinate economies, while not soiling its own hands with the less profitable activities or types of production, or even, most of the time, directly supervising the lesser links in the chain of trade.<sup>189</sup>

The questions are: can the nodal points be identified, and what can they tell us about the layers of material civilisation? In such analysis, one needs to be aware of "the variable value of the weapons of domination: shipping, trade, industry, credit, and political power or violence."<sup>190</sup>

The connecting factor of price (money) in the role of exchange helps create a permeable interface between different layers of material civilisation. Price enables under-

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<sup>184</sup> See e.g. Paul LANGFORD: *A Polite and Commercial People: England 1727-1783*, (1989), Oxford University Press, Oxford, 1992.

<sup>185</sup> A.W.B. SIMPSON: *The Horwitz Thesis and the History of Contracts*, University of Chicago Law Review, 46(1979)/3, 533-601, 541.

<sup>186</sup> Fernand BRAUDEL (trans. Siân REYNOLDS): *Civilization & Capitalism 15th-18th Century: The Wheels of Commerce*, vol 2, (1979), Phoenix Press, London, 2002, 21.

<sup>187</sup> BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 21.

<sup>188</sup> *Ibid.*, 21.

<sup>189</sup> *Ibid.*, 248.

<sup>190</sup> *Ibid.*, 35.

layers of shadow-material transactions to become valued and thus move to the middle layer of open, market exchange.<sup>191</sup> The value aspect of that exchange then entails to the shadow over-layer of finance. Yet there is in essence a hierarchy of power in these relationships, whereby an upper layer governs any lower layers by virtue of the money-exchange connection:

capitalism implies above all hierarchy, and it takes up a position at the top of the hierarchy, whether or not this was created by itself. Where it appears only belatedly, it merely requires a way in ... the connection is made, the current transmitted ... [or] by means of 'forays' or 'liaisons' ... capitalism inserts itself into the chain leading from production to wholesale trade, not seeking to take over entire responsibility for them, but to occupy the strategic points controlling the key sectors of accumulation.<sup>192</sup>

This is not really a modern phenomenon, nor is it a revolutionary change in human activity. The Champagne fairs, which sat (geographically and economically) between the twelfth and thirteenth century poles of the Low Countries and the Italian Mediterranean, they were less about the goods on sale as they were about the opportunity for credit markets.<sup>193</sup> Such fairs were arguably just an "interlude",<sup>194</sup> but what followed had same basic structures, just on a different scale in later centuries. They were nodal points, shifting value from middle to upper lawyers of exchange, and the shadows cast by such exchanges were small but growing.

The changes were slow, because the commercial and productive activity of the Mediterranean and northern Europe remained basically unchanged until, roughly, the eighteenth century.<sup>195</sup> Over the *longue durée* there was a growth in the volume of trade, but

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<sup>191</sup> Cf. Fernand BRAUDEL (trans. Siân REYNOLDS): *Civilization & Capitalism 15th-18th Century: The Perspective of the World*, vol 3, (1979), William Collins Sons & Co Ltd, London, 1984, 96: "Towns spelled money, the essential ingredient of the [12th century] commercial revolution." For a critical examination of money see e.g. GRAEBER: *Debt...*, *op. cit.* (money existed in a formal, accounting, sense, but was not relevant in real commercial activity).

<sup>192</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 65. See also BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 378: "This pyramid of trade, always identifiable, a society within a society, can be found anywhere in the West, and in any period. It had its own laws of motion. Specialization and division of labour usually operated from the bottom up. If modernization or rationalization consists of the process whereby different tasks are distinguished and functions subdivided, such modernization began *in the bottom layer of the economy*." And at 432-433: capital's essential feature, the capacity to efficiently move towards a sector of high profit, to obtain that money-flow for the higher layer.

<sup>193</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 112.

<sup>194</sup> *Ibid.*, 115.

<sup>195</sup> *Ibid.*, 36: "The basic distances, routes, delays, production, merchandise and stopping places – everything or almost everything had remained the same." Niels STEENSGAARD: *The growth and composition of long-distance trade of England and the Dutch Republic before 1750 = The Rise of Merchant Empires: Long-Distance Trade in the Early Modern World 1350-1750*, ed. James TRACY, Cambridge University Press, Cambridge, 1990, 102-152, 106: "remarkable continuity"; TRENTMANN: *Empire of Things...*, *op. cit.*, 33: "There was more of everything ... but a household in 1600 still mostly had the same kind of things as two hundred years earlier."

no significant change in the types of commodities imported into northern European ports. What changes that occurred were “nearly all ... to do with the superstructure – which is at once important and almost nothing, even though this ‘almost nothing’ – money, capital, credit, increased or diminished demand for a given product – may govern ordinary, ‘natural’, day-to-day living.”<sup>196</sup> Then around the mid-seventeenth to mid-eighteenth centuries there was an evident shift to imports from Asia and America, primarily resulting from colonialism.<sup>197</sup> The re-exporting trade, so long centred in Italy, shifted to northern Europe, where it would start to have substantial impact on consumption patterns,<sup>198</sup> in a similar manner to narrower but still profound changes wrought to consumption patterns of textiles in the mid-sixteenth to mid-seventeenth century following expansion of the English East Indian Company.<sup>199</sup> The effect of these long-term trends married to shorter-term changes was profound: “in 1800 [compared to 1500], twenty-three times as many goods were floating on the world’s oceans.”<sup>200</sup>

These broad changes can be observed (over the *longue durée*), in first Dutch, then British trade. Amsterdam was a world-city, perhaps *the* world-city, of the early eighteenth century.<sup>201</sup> World-cities are centres, focused on commerce, trade and exchange, sucking in assets and debt/credit. World cities operate on the primary nodal points of networks and circuits, and thus provide the best places to operate the translation function inherent in the processing between the different layers of material civilization. Amsterdam during the late seventeenth and early eighteenth century rested its commerce on non-specie commerce.<sup>202</sup> The mechanisms of commerce, the acceptance trade, were, however, transferable across the North Sea, not least because they were built on foundations developed long before the eighteenth century; the eighteenth century being merely a period of acceleration.<sup>203</sup> For Braudel, Amsterdam went “chasing shadows” by providing financial services at the expense of developing trade, and in doing so it “dropped the bird in the hand”, i.e. the economics of

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<sup>196</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 36.

<sup>197</sup> See also TRENTMANN: *Empire of Things...*, *op. cit.*, chapter 3 on the role of Empire on consumption.

<sup>198</sup> STEENSGAARD: *Growth and composition of long-distance trade...*, *op. cit.*, 151.

<sup>199</sup> *Ibid.*, 123–128.

<sup>200</sup> TRENTMANN: *Empire of Things...*, *op. cit.*, 23.

<sup>201</sup> The focus here is necessarily restricted to the “Western” world.

<sup>202</sup> Cf. Carla Rahn PHILLIPS: *The Growth and Composition of Trade in the Iberian Empires, 1450–1750 = Merchant Empires...*, TRACY *op. cit.*, 34–101, 87 (noting the correspondence between the Dutch golden age and war and political disruption amongst their rivals).

<sup>203</sup> Fernand BRAUDEL: *Afterthoughts on Material Civilization*, Johns Hopkins Press, Baltimore, 1977, 27–28.

entrepôt, leaving space for London.<sup>204</sup> From the mid-eighteenth century on, London became and remained preeminent and unchallenged until the start of the twentieth century, not least because London had the advantage of an enormous and growing domestic and colonial market (of production and consumption).

This history enables interpretation of the “mechanisms through which capitalism and the market economy can coexist and interpenetrate one another without always merging entirely.”<sup>205</sup> Domination of local economies by dominant cities or zones “rests upon a dialectic between a market economy developing almost unaided and spontaneously, and an over-arching economy which seizes these humble activities from above, redirects them and holds them at its mercy. .... *Any means that worked were used, in particular the granting of judicious credit.*”<sup>206</sup> That credit, as a specific commercial tool, was vital, is clear at a general level. But what were the specific conditions for Britain? For Braudel, a vital point was the shifting nature of the pound sterling in the seventeenth and early eighteenth century; specifically, the overvaluation of gold relative to silver and the consequent export of silver to areas where it had an important function in commerce,<sup>207</sup> the emerging de facto gold standard (long before a de jure gold standard) corresponding to the access to volumes of Portuguese-Brazilian gold following Lord Methuen’s 1703 treaty with Portugal, put the British economy in a position to easily shift to a paper based-economy and thus reduce friction between the middle and upper layers of material civilization. Thus, “[p]aper money’s real guarantee was undoubtedly neither gold nor silver but the huge output of the British Isles. It was the goods created by British industry and the profits from British trade ... The stability of the pound was a weapon.”<sup>208</sup> But it was not the only weapon.

The nodal points of connection and intersection between the layers are (at least partially) institutional.<sup>209</sup> One particular institution that needs examination is that of law: how law, as an institution, can and does respond to commerce, itself an institution.<sup>210</sup> It is a case of institutional interaction, in vertical and horizontal ways. The vertical interaction, the

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<sup>204</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 246. London would itself later undertake the same shift from entrepôt to finance: Sean THOMAS: *The Origins of the Factors Acts 1823 and 1825*, 32(2011)/2, *The Journal of Legal History*, 151–187.

<sup>205</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 36.

<sup>206</sup> *Ibid.*, 38 (emphasis added).

<sup>207</sup> See e.g. Ward BARRETT: *World bullion flows, 1450–1800...*, *op. cit.*, 224–254, 250–251 (noting the movement of silver to the Baltic).

<sup>208</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 364–65.

<sup>209</sup> *Ibid.*, 27–31.

<sup>210</sup> Cf. Ajay K. MEHROTRA: *A Bridge Between: Law and the New Intellectual Histories of Capitalism*, *Buffalo Law Review*, 64(2016)/1, 1–22, 15: “Not only do legal rules and categories, like property and contract, come to define economic and social relations, legal institutions and processes provide the rational and routinized system of governance that is so critical to an effective market economy.”

intersections between the different layers, meshes with horizontal interactions, between the different participants and actors within a particular layer. Sometimes one or the other is more visible: with the material and economic layers the circulation of goods is “visible on first observation without difficulty” and is the market economy.<sup>211</sup> The visibility of these interactions varies with one’s perspective: it is arguably easy now to observe the circulation (or lack thereof) of non-material wealth—finance—between one and another layer.<sup>212</sup> Yet, legal doctrine can sometimes be blind to history.<sup>213</sup>

On the other hand, law can be revelatory: this is what an examination of the borderlines reveals following acknowledgment they are both created by and consist of law.<sup>214</sup> The presence and nature of borders and intersection matters, but so does understanding how connections were made between different state institutions and characters;<sup>215</sup> how “networks and circuits combine to make up a system ... Everything was conceived with a view to movement.”<sup>216</sup> There is a vast literature on networks, with evidence of many different types of network succeeding and failing. Sometimes strong institutions provide an appropriate framework of social closure,<sup>217</sup> sometimes weak, transitory ties operating to provide information flows will not require such institutional strength.<sup>218</sup> Here though the type of

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<sup>211</sup> BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 22. See also, at 582: “The preconditions of any form of capitalism have to do with circulation.”

<sup>212</sup> *Ibid.*, 25-26. See further e.g. W.E. SCHEUERMAN: *Global Law in Our High Speed Economy = Rules and Networks: The Legal Culture of Global Business Transactions*, eds. R.P. APPLEBAUM, W.L.F. FELSTINE and V. GESSNER, Hart Publishing, Oxford, 2001, chapter 3, 104–105.

<sup>213</sup> Ron HARRIS: *The Encounters of Economic History and Legal History*, *Law and History Review*, 21(2003)/2, 297–346, 340: “Each piece, or legal rule, interrelates with other, at times seemingly unrelated, pieces, in a thick legal-historical context.” See also Frederick POLLOCK: *Essays in Jurisprudence and Ethics*, MacMillan and Co., London, 1882, 198: “Lawyers, again, are for the practical purposes of their business concerned with the laws as they are, not as they have been.”

<sup>214</sup> Cf. MILNE: *Trade and traders...*, *op. cit.*, 114–115: “Historians have bemoaned” the volume of consignments to order; 153: a key area of inter-trader reliance was credit-worthiness, but this is an area “strangely invisible in much historical writing.” See also Frank TRENTMANN: *Introduction = The Oxford Handbook of the History of Consumption*, ed. Frank TRENTMANN, Oxford University Press, Oxford, 2012, 1–19, 15: ‘Historical engagement with ... law has been ... patchy’.

<sup>215</sup> Cf. BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 419: “it was within the context of the modern economy that a certain capitalism and a certain version of the modern state first appeared”, 515: the state had “to exert control over economic life, both near and far, to arrange for the circulation of goods, with as much coherence as possible”; GRAEBER: *Debt...*, *op. cit.*, especially 50–52: markets are bound up by violence, in an triangular relationship with institutions of states and taxation.

<sup>216</sup> BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 168. See also *ibid.*, at 142–149, noting the role of bills of exchange as connecting trade circuits, as well as closing them off when completed.

<sup>217</sup> E.g. Avner GREIF: *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade*, Cambridge University Press, Cambridge, 2006.

<sup>218</sup> E.g. Emily ERIKSON and Sampsa SAMILA: *Networks, Institutions, and Encounters: Information Flow in Early-Modern Markets*, Working paper, December 2015. Source: [https://www.law.yale.edu/system/files/area/center/privatelaw/document/erikson\\_networks\\_market\\_expansion.docx](https://www.law.yale.edu/system/files/area/center/privatelaw/document/erikson_networks_market_expansion.docx).



network is of less interest than the connections within and between networks; the intersections between different layers of material civilisation. This is where law comes in.

Consider what Goode wrote of the history of commercial law:

This constant rediscovery of rules and techniques developed by our ancestors reflects a point of some importance, namely that commercial law evolves from the usages of business, so that the level of its influence and the degree of its subtlety at any one time are a function of the volume of economic activity and the complexity of the practices that drive commercial law. ... The sophistication of modern commercial law is thus a function of the size and independence of modern markets rather than of intellectual progression.<sup>219</sup>

The role of change and development in the history of commercial law is clear; the more intricate issue is the extent and nature of this role. Certainly, the systemic revolution in litigation, from procedural to substantive disputes, needs accounting for.<sup>220</sup> Furthermore, as Bridge argues, the variety in types of sales transactions, from small-scale deals between individuals through to massive, complex international commodity trades, makes “[t]he unity of these diverse transactions ... sometimes precarious as allowance has be made” for this variation.<sup>221</sup> Yet complex commercial transactions per se, or the variation between types of commercial transaction, are not really modern phenomena. What therefore can we draw out about sales in the broader context of commerce, over the *longue durée*?

It is tentatively suggested here that a key turning point was a shift in the nature and role of fixed capital (by which is meant tangible property, from goods to housing) in societies.<sup>222</sup> Braudel suggests that the transformation of fixed capital, in terms of becoming more durable (and thus also more costly) positively affected production within societies.<sup>223</sup> Such changes provide not just the opportunity for commercial growth, but they also identify

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<sup>219</sup> GOODE: *Next Millennium...*, *op. cit.*, 4. See also BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 575: alongside the usual touchstone of double-entry bookkeeping, other commercial instruments were an accumulation of practice, yet “[m]ore significant than the innovating spirit of entrepreneurship were the increased volume of trade, the frequent inadequacy of the money supply, etc.” As to the question of the changing complexity of doctrine, compare Patrick DEVLIN: *The Relation Between Commercial Law and Commercial Practice*, *Modern Law Review*, 14(1951)/3, 249–266, 251 with Peter BIRKS: *English and Roman Learning in Moses v Macferlan*, *Current Legal Problems*, 37(1984)/1, 1–28, 1–2.

<sup>220</sup> Cf. Robert B. FERGUSON: *The Adjudication of Commercial Disputes and the Legal System in Modern England*, *British Journal of Law and Society*, 7(1980)/2, 141–157.

<sup>221</sup> Michael G. BRIDGE: *The evolution of modern sales law*, *Lloyd’s Maritime and Commercial Law Quarterly*, (1991), 52–69, 52.

<sup>222</sup> See e.g. Sean THOMAS: *Mortgages, fixtures, fittings and security over personal property*, *Northern Ireland Legal Quarterly*, 66(2015)/4, 343–365.

<sup>223</sup> BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 247, 338. See also e.g. Judith FLANDERS: *The Making of Home*, Atlantic Books, London, 2014. The increased quality of goods is a possible reason for changes in quality obligations: Paul MITCHELL: *The development of quality obligations in sale of goods*, *Law Quarterly Review*, 117(2011)/3, 645–663, 655. The story of goods at the lowest layer of material civilisation is admittedly more varied: Sara PENNELL: *Material Culture in Seventeenth-Century ‘Britain’: The Matter of Domestic Consumption* = *Oxford Handbook ...*, TRENTMANN, *op. cit.*, 64–84.

with greater clarity potential targets for commerce, i.e. fixed capital. However, the capacity of things to hold value relative to their movement within the system, combined with existing and sophisticated ways of managing the transfer of things along networks and circuits, required close control of such processes of transfer. This much is clear from Milne's description of the port of Liverpool in the mid-nineteenth century:

Making money from trade could require complex arrangements for overseeing multi-lateral commodity flows, which might or might not actually involve the goods themselves appearing in the trader's home port. This was the vital point. The continued prosperity of a port like Liverpool required the maintenance of control over the trading process on a number of levels. Traders had to define their markets, allowing their customers – industrialists, primary producers and consumers, at home and abroad, to influence but never control the trading chain.<sup>224</sup>

With greater commercial complexity came the division of control and ownership of the things moving: at different stages of the circuit exchanges between differing controllers and owners occur (whether through fair means or foul). Multiple methods were used to minimise the inevitable risk, such as financing using trusted personal/family connections,<sup>225</sup> or by using often location-specific (if not necessarily novel) work-arounds.<sup>226</sup> However, the capacity of exchanges in complex commercial transactions to provide a translating function, an institutional nodal point between different layers of material civilisation, matters. The process of exchange can shift value from one layer of material civilisation to another. Yet as Braudel notes, merchants used to continually change roles, following the highest profits, which hindered the growth the highest capitalist layer. This did not prevent financing from arising though; it was just that the lower layers of material civilisation were insufficiently secure or broad to support a coherent and consistent upper layer. It was only really during the first half of the nineteenth century period that the upper layer of financial capitalism became a fixture.<sup>227</sup> This was a consequence of the changes in fixed capital, which enabled effective reinvestment of funds into fixed capital which generated income.<sup>228</sup> Another form of reinvestment was in financing the sales transactions themselves.<sup>229</sup> In this context, the

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<sup>224</sup> MILNE: *Trade and traders...*, *op. cit.*, 21.

<sup>225</sup> *Ibid.*, 124–125.

<sup>226</sup> *Ibid.*, 134–145 on the peculiar nature of joint ownership of ships, justified in Charles ABBOTT: *A Treatise of the Law Relative to Merchant Ships and Seamen*, London, 1802, 82–83. This sub-divided joint ownership mirrors Venetian practice 500 years before: BRAUDEL: *Perspective of the World...*, *op. cit.*, 129.

<sup>227</sup> BRAUDEL: *Afterthoughts...*, *op. cit.*, 58–62.

<sup>228</sup> See generally e.g. Thomas PIKETTY (trans. Arthur GOLDHAMMER): *Capital in the Twenty-First Century*, Harvard University Press, Cambridge, Mass., 2014.

<sup>229</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 246.

mechanisms of financial capitalism, such as bills of exchange, bearer and non-bearer documents, rules concerning endorsement and obligations, and so on, were *already in place*.<sup>230</sup> The changes in trade meant that the light generated by commerce became bright enough to create the shadows in which the exchanges, from the middle to the upper layer of material civilisation, could operate most effectively.

**English Commercial Law: Chasing Shadows.** The development of English commercial law is a story of incredible complexity affected not just by the massive changes wrought by the industrial revolution, but by other regional and global historical trends (such as the shifts away from the Mediterranean towards northern Europe in the early modern period),<sup>231</sup> as well as by peculiarities specific to the UK (such as the law/equity division;<sup>232</sup> the relationship between Scotland and England).<sup>233</sup> For Goode, three factors had (at least some) causal impact on the “pre-eminence” of English commercial law: the growth in commercial activity; political and social stability; and relative non-interference by the legislature combined with a pro-commercial judicial attitude.<sup>234</sup> A further factor that needs to be accounted for is the formularisation of commercial practice and thought into doctrine,<sup>235</sup> and doctrine into dogma.<sup>236</sup>

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<sup>230</sup> Dave DE RUYSSCHER: *From Usages of Merchants to Default Rules: Practices of Trade, Ius Commune and Urban Law in Early Modern Antwerp*, 33(2012)/1, 3–29, 15–16, 25.

<sup>231</sup> See generally BRAUDEL: *Structures of Everyday Life...*, *op. cit.*; BRAUDEL: *Wheels of Commerce...*, *op. cit.*; BRAUDEL: *Perspective of the World...*, *op. cit.* See also TRACY: *Merchant Empires...*, *op. cit.*

<sup>232</sup> GOODE: *Next Millennium...*, *op. cit.*, 4.

<sup>233</sup> As to the Scottish influence of Lord Mansfield, oft seen as the progenitor of modern English commercial law, see generally James OLDHAM: *The Mansfield manuscripts and the growth of English law in the eighteenth century*, University of North Carolina Press, Chapel Hill, 1992.

<sup>234</sup> GOODE: *Next Millennium...*, *op. cit.*, 5–7; Robert B. FERGUSON: *Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes*, *British Journal of Law and Society*, 4(1977)/1, 18–38.

<sup>235</sup> BRIDGE: *Evolution...*, *op. cit.*, 52: “the sale of goods ... has been formed by ideas drawn from mercantile dealings, with the market-place bulking large in its development.” Contrast DE RUYSSCHER: *Usages of Merchants...*, *op. cit.*, 3 (what were often presented as customs were actually default (legal) rules); David LIEBERMAN: *Property, commerce and the common law: Attitudes to legal change in the eighteenth century = Early Modern Conceptions of Property*, eds. John BREWER and Susan STAVES, Routledge, London, 1996, 144–158 (eighteenth century English commentators understood the impact and nature of commerce, and the division really stood as between real property and commercial law). This debate is part of the argument over whether there really was a *lex mercatoria*: Emily KADENS: *The Myth of the Customary Law Merchant*, *Texas Law Review*, 90(2012)/5, 1153–1206; Emily KADENS: *The Medieval Law Merchant: The Tyranny of a Construct*, *Journal of Legal Analysis*, 7(2015)/2, 251–289.

<sup>236</sup> BRIDGE: *Evolution...*, *op. cit.*, 52–53: case-law provides a foundation for later commentary. See also Alan RODGER: *The codification of commercial law in Victorian Britain*, *Law Quarterly Review*, 108(1992)/3, 570–590.

The initial English commercial texts (i.e. those going beyond mere records of mercantile practices<sup>237</sup>) include important works such as Chitty's 1799 text on bills of exchange,<sup>238</sup> Charles Abbott's 1802 text on shipping,<sup>239</sup> avoided sales as a discrete topic, and other less valuable compendia merely offered sales as a single chapter.<sup>240</sup> The early formalism of English law meant the "substantive mercantile law ... had no existence as a coherent system of principles before the common law itself developed the means of giving it expression."<sup>241</sup> However, Blackburn's 1845 text on sale arguably changed this.<sup>242</sup> However, Bridge queried this text: it was "not easy to reconcile with a commercial sales ethic" as it rejected "the historical values of personal property law", and involved an "enthronement of property represent[ing] an attempt to create a sophisticated intellectual structure" for sale.<sup>243</sup> However, Blackburn's property focus was not a "rejection" of historical practice,<sup>244</sup> but arguably an illustration of the increasing importance of goods as stores of wealth,<sup>245</sup> and a useful touchstone to ascertain liability and interests.<sup>246</sup> By focusing on the concept of property, there was the possibility of distinguishing different types of commercial relationships vis-à-vis goods. This impacted on interconnections between layers of material exchange and financial capital.

Although other texts began appearing,<sup>247</sup> it was monumental, career-rescuing,<sup>248</sup> 1868 tome that captured the market: Benjamin's *Treatise on the Law of Sale of Personal*

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<sup>237</sup> Cf. e.g. BAKER: *Law Merchant...*, *op. cit.*, 296 fn 7: 'G. Maylnes, *Lex Mercatoria* (1622), which is not a law book but a compendium, of current practice compiled by a merchant.' Baker later notes, at 297 that there was a 'flood of textbooks on commercial law which followed [Lord Mansfield's] retirement [1793]'.

<sup>238</sup> JOSEPH CHITTY: *A Treatise on the law of Bills of Exchange, Checks on Bankers, Promissory Notes, Bankers' Cash Notes, and Bank-Notes*, London, 1799.

<sup>239</sup> ABBOTT: *Law Relative to Merchant Ships...*, *op. cit.*

<sup>240</sup> See e.g. H.W. WOOLRYCH: *A Practical Treatise on the Commercial and Mercantile Laws of England*, London, 1829; J.W. SMITH: *A Compendium of Mercantile Law*, London, 1834.

<sup>241</sup> BAKER: *Law Merchant...*, *op. cit.*, 321. Compare Roman law, which treated sale distinctly: see e.g. Reinhard ZIMMERMANN: *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford University Press, Oxford, 1996.

<sup>242</sup> COLIN BLACKBURN: *A Treatise on the Effect of the Contract of Sale, on the Legal Rights of Property and Possession in Goods, Wares, and Merchandize*, London, 1845.

<sup>243</sup> BRIDGE: *Evolution...*, *op. cit.*, 63.

<sup>244</sup> Cf. BAKER: *Law Merchant...*, *op. cit.*, 299: "Lord Mansfield's law was binding on his successors; and so, to the extent that it embodied mere current usage, it froze the practice of Georgian merchants as the permanent law of England." Or, did it merely replicate customs and practices that come up again and again in different contexts?

<sup>245</sup> That goods *could be* stores of wealth was not a new concept, Sir Frederick POLLOCK and F.W. MAITLAND: *The history of English Law before the time of Edward I*, Cambridge University Press, Cambridge, 1898, 149: "the further we go back, the larger seems the space which the possession of chattels fills in the eye of the law." The change was in the quantity and nature of goods.

<sup>246</sup> BLACKBURN, *Contract of Sale...*, *op. cit.*, 1–2. See also SUGARMAN and RUBIN: *Towards a New History...*, *op. cit.*, 23–42.

<sup>247</sup> Such as George Joseph BELL; *Inquiries into the Contract of Sale of Goods and Merchandise as Recognised in the Judicial Decisions and Mercantile Practice of Modern Nations*, Edinburgh, 1845; William W. STORY: *A Treatise on the Law of Sales of Personal Property*, 1847; Leoni LEVI: *Commercial Law, Its Principles and*

*Property*.<sup>249</sup> It provided a conceptualisation of sale; one of such significance that the current English law on sale is merely a minor modification of Benjamin's scheme.<sup>250</sup> This is important due to the clear connection between Blackburn and Benjamin's texts. However, although Benjamin justified his text by reference to the limitations with Blackburn's text,<sup>251</sup> like Blackburn he still took a property perspective.<sup>252</sup> Benjamin understood the broader commercial system,<sup>253</sup> rendering his focus on sale and property rather interesting as likely being an accurate representation of contemporary commercial practices and perspectives.<sup>254</sup>

A further explanation (and justification) for the late arrival of sale and its focus on property rests on long term developments from exchanges of goods to more complex commercial financing of such transactions. Britain (i.e. basically London) wrestled dominance of commerce—of financing—out of Dutch (i.e. basically Amsterdam) hands in the mid to late eighteenth century. At the same time rapid expansion in British domestic and international trade provided a foundation for utilisation of financial mechanisms to effectively translate the benefits of such trade—to move value from the middle market exchange lawyer to the upper layer of financial capitalism. The financial mechanisms deployed rested on the capacity of English law to draw property, as a concept, out of and away from tangible things, enabling wealth (in the form of “property”) to move in much greater volumes, and more swiftly, between the layers of material civilization. This can be seen with regard to various areas of commercial law;<sup>255</sup> here the focus (though this is an

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*Administration; or, the Mercantile Law of Great Britain*, William Benning & Co, London, 1850, which Goode rightly calls “a work of great erudition” (GOODE: *Next Millennium...*, *op. cit.*, 8 fn 7). See further G.R. RUBIN: *Levi, Leone (1821–1888)* = *Oxford Dictionary of National Biography*, Oxford University Press, 2004. Source: <http://www.oxforddnb.com/view/article/16551> (01.03.2017). See also RODGER: *Codification of commercial law...*, *op. cit.*, 572–573. Levi's introductory plan of his *Commercial Law*, vol 1, v, refers to having based his outlining of the law of Great Britain to, *inter alia*, “*Smith's Mercantile Law*” (presumably SMITH: *A Compendium of Mercantile Law...*, *op. cit.*), and “*Blackstone's Commentaries*”, giving further indication of the paucity of texts on commercial law at the time.

<sup>248</sup> Catherine MACMILLAN: *Judah Benjamin: Marginalized Outsider or Admitted Insider?*, *Journal of Law and Society*, 42(2015)/1, 150–172.

<sup>249</sup> Judah BENJAMIN: *A Treatise on the Law of Sale of Personal Property; With References to the American Decisions and to the French Code and Civil Law*, London, 1868.

<sup>250</sup> The SGA 1893 merely replicated what was considered to be the law at the time: *Bank of England v Vagliano Bros* [1891] AC 107, 144–145 (Lord Herschell); HH Judge CHALMERS: *The Sale of Goods Act, 1893, including the Factors Acts, 1889 & 1890*, London, 1894, iii; LAW COMMISSION and SCOTTISH LAW COMMISSION: *Sale and Supply of Goods*, Law Com 160, Scot Law Com 104, 1987, paragraph 1.5; THOMAS: *Development of the Implied Terms on Quantity...*, *op. cit.*, 307.

<sup>251</sup> BENJAMIN: *Sale of Personal Property...*, *op. cit.*, iii.

<sup>252</sup> In this sense, LEVI: *Commercial Law*, *op. cit.*, was quite different

<sup>253</sup> MACMILLAN: *Judah Benjamin...*, *op. cit.*, 167.

<sup>254</sup> Cf. FRIEDMAN: *Formative Elements in the Law of Sales...*, *op. cit.*, 419–443

<sup>255</sup> *Ibid.* See also Ray B. WESTERFIELD: *Middlemen in English Business, particularly between 1660 and 1760*, Yale University Press, New Haven, 1915 (1968 Reprint).

illustrative rather than exhaustive examination) is law governing the financing of transactions involving goods.<sup>256</sup>

Whilst specie/cash tended to have utility in lower-level exchanges,<sup>257</sup> non-specie payment mechanisms could be more efficient.<sup>258</sup> That this is so is unsurprising, bearing in mind the long history of bills of exchange as money-payment mechanisms, which enabled long-distance, arms-length trading in paper to occur.<sup>259</sup> To some extent these activities were the preserve of small groups of merchants,<sup>260</sup> and states,<sup>261</sup> but by the later eighteenth century there was “enhanced public awareness of the economic utility of credit”, for which circulation was fundamental: “So far as the great mass of property and business transactions was concerned, paper credit continued to flourish with the encouragement of the courts and without interference from government.”<sup>262</sup>

Documentary credit exemplifies commercial systems of networks and circuits.<sup>263</sup> Although documentary credit can come in a wide variety of forms,<sup>264</sup> the basic point is that a sale financed by documentary credit involves two circuits, of goods and of documents relating to the financing of the sale. So although there must be compliance between the letter of credit and the underlying sales transaction, the sale is formally distinct from the documentary transaction: “The bank is in no way concerned with any dispute that the buyer may have with the seller.”<sup>265</sup> This principle of autonomy, or independence principle, has the effect that when a documentary credit transaction takes off, it operates at a different velocity

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<sup>256</sup> Cf. BRIDGE: *Evolution...*, *op. cit.*, 53 et seq. Bridge suggests delineation within the English case-law between the initial focus on small-scale transactions involving material integral to manufacturing processes, and the later developments of massively complex commodity transactions. It is tentatively suggested that there were more cases involving “small-scale” intra-supply-chain goods transactions, because they were more valuable. This meant that they became middle-layer exchanges, and that commodity transactions were themselves shifted up towards the shadow-layer of financial capitalism.

<sup>257</sup> BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 549: “Economic needs of the overwhelming everyday kind forced [states] to set great store by precious metals: without these, the economy [i.e. the under-layer] would only too often have been paralysed.”

<sup>258</sup> QUINN: *Money, finance and capital markets...*, *op. cit.*, 151–154.

<sup>259</sup> See e.g. BRAUDEL: *Perspective of the World...*, *op. cit.*, 241–245.

<sup>260</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 66–67 (bills of exchange may cross continents, but not cultures).

<sup>261</sup> Stephen QUINN: *Money, finance and capital markets = The Cambridge Economic History of Modern Britain: Vol. 1: Industrialisation, 1700-1860*, eds. Roderick FLOUD and Paul JOHNSON, Cambridge University Press, Cambridge, 2004, chapter 6; LANGFORD: *A Polite and Commercial People*, *op. cit.*, 692–693. For a critical examination of this process, see e.g. GRAEBER: *Debt...*, *op. cit.*, especially chapter 11.

<sup>262</sup> LANGFORD: *A Polite and Commercial People...*, *op. cit.*, 568.

<sup>263</sup> MCCURDY: *Commercial Letters of Credit...*, *op. cit.*, 539: “The commercial letter of credit has a long mercantile history ... [but] [i]t has a much shorter legal history.” Rufus James TRIMBLE: *The Law Merchant and the Letter of Credit*, Harvard Law Review, 61(1947-48)/6, 981–1008, 982: “In the absence of adequate historical and archaeological research by persons trained in the law, the history of these instruments has been a controversial subject.” More recently, see e.g. ROGERS: *Early History of the Law of Bills and Notes...*, *op. cit.*

<sup>264</sup> Cf. William E. MCCURDY: *Commercial Letters of Credit*, Harvard Law Review, 35(1922)/5, 539–592, 542.

<sup>265</sup> *Power Curber International Ltd v National Bank of Kuwait* [1981] 1 WLR 1233, 1241 (Lord Denning MR).

and is no longer tied to the underlying sale in quite the same fashion: “[bank obligations] are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain ... The machinery and commitments of the banks are on a different level.”<sup>266</sup> The courts should not “intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand”,<sup>267</sup> for “[o]therwise trust in international commerce could be irreparably damaged.”<sup>268</sup> The letter of credit thus functions as a carrier of the value of the underlying sales transaction.

These modern understandings of documentary credit are continuities from earlier practices. Milne’s examination of Liverpoolian commercial practices is revealing as to the general commercial practices in England in the early to mid-nineteenth century. Then mercantile and trading corporate forms and capitalisation thereof were particularly reliant on reputation and information. The primary credit relationships were between traders themselves rather than between traders and banks: the role of banks, including the Bank of England, was as “information brokers rather than lenders.”<sup>269</sup> This had a dual effect:

First, the entire system relied on a pool of information on the reliability and financial strength of trading firms, which enabled traders to decide whether those approaching them for extended credit were to be trusted or not. Secondly, bills of exchange, when discounted and signed on frequently in times of extreme financial speculation, could be used to construct houses of cards, liable to collapse should any of a number of parties involved in complicated transactions suffer a commercial setback.<sup>270</sup>

Since this would appear to contradict any principle of autonomy between banks and traders, a reasonable explanation might be that the notion of autonomy developed as a policy choice, based on a necessary fiction, for the protection of the parties (especially the financing parties). Thus the letter of credit transaction is founded on a policy of “instrumentality”, of meeting the “desires of both the buyer and the seller” *as well as* the financier in the middle.<sup>271</sup> This much can be drawn from *Pillans v Van Mierop* in 1765,<sup>272</sup> which though flawed,<sup>273</sup> did set the foundations for the inexorable doctrinal development of the autonomy principle in bills of exchange and the more specific later concept of letters of credit.

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<sup>266</sup> *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, 155-56 (Kerr J).

<sup>267</sup> *Intraco Ltd v Notis Shipping Corp (The Bhoja Trader)* [1981] 2 Lloyd’s Rep 256, 257 (Donaldson LJ).

<sup>268</sup> *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, 156 (Kerr J).

<sup>269</sup> MILNE: *Trade and traders...*, *op. cit.*, 154.

<sup>270</sup> *Ibid.*

<sup>271</sup> MCCURDY: *Commercial Letters of Credit...*, *op. cit.*, 542. See generally Julian HOPPIT: *Risk and Failure in English Business 1700-1800*, Cambridge University Press, Cambridge, 1987.

<sup>272</sup> (1765) 3 Burr 1663; 97 ER 1035.

<sup>273</sup> The failure was in terms of explaining away consideration as merely an evidential requirement: see e.g. MCCURDY: *Commercial Letters of Credit...*, *op. cit.*, 565.

The division between the different layers of market exchange and financial capitalism was thus conceptualised in terms of knowledge and information about the particular layers. If a party was involved with an aspect of a transaction that sat in one layer (market exchange – the sale) then they would not know—or would be deemed not to know—about those aspects of the same general transaction which resided in the other layer (financial capitalism – the financing of the sale). The division between merchant and financier was central to this: the different parties are on different vectors in the chain of transactions. These circuits do not flow in the same direction, and the networking of these circuits occurs at certain intersectional nodes. Such nodal points are where the tangible assets (goods) and intangible assets (documents) can efficiently and appropriately meet and be exchanged.<sup>274</sup> This is why it is perhaps best to explain documentary credit transactions as banks' lending credit, and not lending funds.<sup>275</sup> This process of exchange at the intersections of the different layers is not a fully free-flowing connection. The autonomy principle at the core of bills of exchange, letters of credit, and later documents of title, operates as a sort of non-return valve in the intersectional nodes between the market exchange and financial capitalism layers. The value of the transaction can flow in either direction, but the risk element, which can (and if the risk crystalizes, *will*) reduce the transaction's value cannot be given such freedom to migrate from one layer to another. Information about credit-worthiness, the nature of the object of the transactions, or any other impact on the value of the transaction, is only useful if it is not corrupted. The autonomy principles thus help protect against the negative impact of bad information.

This outline of financing sales indicates first the extent of circularity and movement necessary to operate the system completely, and second the distinction between the financing transaction and the underlying sale. The importance of these elements becomes clearer when we consider the impact of a failure of a transaction. If the sales transaction is flawed, then the risk will fall as between buyer and seller depending on the nature of the flaw (in terms of explicit doctrine and the sales contract where pertinent). But this flaw does not impact so directly on the documentary transaction. It is only by impugnation of the documents themselves, and not implicitly by pointing to the goods, that documentary transactions can be susceptible to failure.

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<sup>274</sup> BRAUDEL: *Wheels of Commerce...*, *op. cit.*, 343 (profit as the approximate intersection point, as it is the consequence of exchange (though collision might be a better term) between the different layers of material civilization).

<sup>275</sup> MCCURDY: *Commercial Letters of Credit...*, *op. cit.*, 585, citing F. SILVER: *Commercial Banking and Credits*, New York, 1920, 190.



This is not the only protective mechanism. Notions of commercial honour were often raised: “banks displayed a meticulous solicitude in honouring their obligations. From the commercial point of view however the mere possibility of revocation was unsettling at best.”<sup>276</sup> Participants in informal commercial clubs were willing to ignore apparent failures in a circuit in order to maintain capital flows. The interconnected nature of commercial actions meant there were rational reasons to act cooperatively to avoid failures, even if this may lead to greater losses and resulted in a system potentially “open to abuse.”<sup>277</sup> Correlatively, this cooperative system helped to avoid smaller traders being crushed, as they were seen as serving important purposes that larger firms could not achieve. This understanding may help to provide a more likely justification than mere honour for low volumes of disputes in this field, though of course there were multiple factors affecting litigation rates.<sup>278</sup> There is also a degree of correlation with the behaviour evident in the trade in corporate stock and sales in the nineteenth century, where there was considerable volumes of transactions that were technically illegal (such time sales of stock) or void for informality (under the Statute of Frauds 1677), but were not thrown up due to the strength of private ordering practices within commercial clubs such as the Stock Exchange.<sup>279</sup> Weisberg’s extensive analysis of the early history of the voidable preference rule indicates a number of factors that impact on this analysis. Changes in cultural and regulatory responses to bankruptcy from the sixteenth century (which had a strict, rule-bound, complex, pro-creditor system which differentiated between trades and merchants), demonstrate an “ideology of commerce that took hold in the eighteenth century and turned the morally questionable and perceptually elusive phenomena of trade and credit into necessities, and then into virtues.”<sup>280</sup> The uncertainty of credit rendered sympathetic what was once considered suspicious: if things went wrong it was the “corruption of credit.”<sup>281</sup> This shift was undergirded by the trend towards creating effective means of shifting value from market exchange to financial capitalism layers. The shifting morality of credit (and its twin, debt), specifically in a commercial context, was a precursor

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<sup>276</sup> Philip W. THAYER: *Irrevocable Credits in International Commerce: Their Legal Nature*, Columbia Law Review 36(1936)/7, 1031–1060, 1034.

<sup>277</sup> MILNE: *Trade and traders...*, *op. cit.*, 159–160: traders could easily trade despite substantial losses.

<sup>278</sup> BURSET: *Merchant Courts...*, *op. cit.*

<sup>279</sup> Robert B. FERGUSON: *Commercial Expectations and the Guarantee of the Law: Sales Transactions in Mid-Nineteenth Century England = Law, Economy and Society, 1750–1914: Essays in the History of English Law*, eds. G.R. RUBIN and David SUGARMAN, Professional Books Ltd, Abingdon, 1984, 192.

<sup>280</sup> Robert WEISBERG: *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, Stanford Law Review, 39(1986)/1, 3–138, 32. See also HOPPIT: *Risk and Failure...*, *op. cit.*

<sup>281</sup> WEISBERG: *Commercial Morality ... op. cit.*, 32.

of specific doctrinal change, but was itself a reflection of commercial practices, developed over the *longue durée*, operating in the shadows due to their often formal illegality.

Graeber persuasively argues that as the core conceptual issue is debt, non-specie payment mechanisms provided better means to express longer-term relationships of debt and obligation. There have been shifts between credit and specie over time: the mid fifteenth century represented a shift from credit to specie (with the current era being a shift back to credit).<sup>282</sup> This had interesting and often contradictory or even paradoxical effects: in a typical English village “trust was everything. Most money literally was trust [i.e. credit] ... Cold hard cash was employed largely between strangers, or when paying ... superiors ... [which] led to an increasing disjuncture of moral universes .... [between those who did not used cash and distrusted it, and those, in say the legal institutions, for whom] cash exchange was normal and it was debt that came to be seen as tinged with criminality.”<sup>283</sup> Yet on the other hand, how is it that “almost all the elements of financial apparatus that we’ve come to associate with capitalism – central banks, bond markets, short-selling, brokerage houses, speculative bubbles, securization, annuities – came into being not only before the science of economics, ... but also before the rise of factories, and wage labor itself.”<sup>284</sup> In other words, how come there was capitalism before capitalism?

This chapter analysed merely an obscure element of that question. The nineteenth century (with the usual fuzziness around the edges) saw the creation of dual credit/debt and specie economies, particularly in Britain. Cash began to be treated as entirely fungible and interchangeable, with explicit justifications of this based on the needs of commercial circulation.<sup>285</sup> Non-specie payment mechanisms like documentary credit, however, rested on long-term practices coalesced into a mentality or culture;<sup>286</sup> its soft-law status in contemporary law shows how little has changed.<sup>287</sup> A similar focus on long-term practices and cultures as generative bases can also be identified with documents of title;<sup>288</sup> there antecedents are classically (though not entirely accurately) identified in thirteenth century

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<sup>282</sup> GRAEBER, *Debt...*, *op. cit.*, chapters 8–11. See also SIMARD: *The Birth of a Legal Economy...*, *op. cit.*, 1089–1090 (noting the ‘dearth of a medium of exchange’ in the early US). Cf. LANGFORD: *A Polite and Commercial People...*, *op. cit.*, 449 (noting the growth in volume of available specie).

<sup>283</sup> GRAEBER, *Debt...*, *op. cit.*, 328–339.

<sup>284</sup> *Ibid.*, 345.

<sup>285</sup> *Miller v Race* (1758) 1 Burrow 452; 97 ER 398.

<sup>286</sup> See e.g. Frederick Rockwell SANBORN: *Origins of the Early English Maritime and Commercial Law*, The Century Co., New York, 1930, 400; William MITCHELL: *An Essay on the Early History of the Law Merchant*, Cambridge University Press, Cambridge, 1904, 157–158.

<sup>287</sup> UCP 600, into force 1 July 2007. The first UCP was published in 1933.

<sup>288</sup> *Lickbarrow v Mason* (1787) 2 TR 63; 100 ER 35 (bill of lading was a document of title because of mercantile usage).

Italy and beyond.<sup>289</sup> Might this practice-focused development indicate how English commercial law was merely *enhancing* the generation of shadow-layers of commercial activity?<sup>290</sup> Law created documentary payment mechanisms that limited the infectious nature of risk as well as preventing unnecessary diffusion of value between the layers, by restricting the directional flow of interconnections between the different layers of market exchange and the financial layer. This enabled the presentation of commercial law as being about speed:<sup>291</sup> this mentality had developed and stuck though long before the nineteenth century, before affecting later understandings of sale within commercial law.<sup>292</sup> As Baker suggests of the fourteenth century, records of clearly mercantile disputes provide insufficient detail about the “nature of the underlying transaction”, but “mercantile instruments” were recognised. They could provide an evidential role in discharging a “pre-existing obligation”, which had the benefit of flexibility and convenience. The absence of formal enforceability was a “secondary consideration.”<sup>293</sup> Parallels with modern documentary credit practice are considerable; changes in contract formalities result in enforceable agreements but they remain as distinct obligations to the underlying (goods) transaction.

**Conclusion.** Braudel’s suggestion of a layered relationship between non-market economy, market exchange, and a shadow-layer of financial capitalism, provides an appropriate normative framework for examining the relationship in English commercial law between the different layers. The focus here was on the specific nodal points of interconnection between the different layers of market exchange and financial capitalism. The connections between the different layers do exist, but their connections are not always fully multi-directional. By this I mean that English law has particular commercial methods operating as safety-valves, allowing value, but not risk, to travel swiftly up the layers. Yet this was neither novel nor unique to English law: it was the consequence of developments over much longer time periods and across wider space, encompassing various social, cultural and economic

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<sup>289</sup> See generally ROGERS: *Early History of the Law of Bills and Notes...*, *op. cit.* See also e.g. SANBORN: *Origins...*, *op. cit.*, 348–350, 397–399; TRIMBLE: *The Law Merchant and the Letter of Credit...*, *op. cit.* For a broader historical examination, BRAUDEL: *Wheels of Commerce...*, *op. cit.*, is replete with examples of such commercial practice throughout Europe and beyond, and GRAEBER: *Debt...*, *op. cit.*, chapter 10, gives a good overview of the Islamic and Chinese developments in this field.

<sup>290</sup> See generally Michael E. TIGAR and Madeline R. LEVY: *Law & the Rise of Capitalism*, Monthly Review Press, New York, 2000.

<sup>291</sup> See e.g. LIEBERMAN: *Property, commerce and the common law...*, *op. cit.*, 151 (citing CHITTY, *Bills of Exchange...*, *op. cit.*).

<sup>292</sup> See e.g. BRAUDEL: *Perspective of the World...*, *op. cit.*, 155: : “Discounting ... as established in eighteenth-century England, was in fact a revival of ancient practices”

<sup>293</sup> BAKER: *Law Merchant...*, *op. cit.*, 302–306.

structures. Sale's arrival as a discrete topic in English law corresponded with the result of a long-term socio-economic process of enhancing the quality and durability of tangible things, along with the drawing out by commentators and courts of property as a separable aspect of sale. This enabled abstract values to be extrapolated from things and then sent out into their own commercial network.

The inspiration for this study was serendipity: crossing Braudel's phraseology of shadows with literature on "shadow banking."<sup>294</sup> For example, Johnston considered the role of hedge funds in the repo market, where multiple recollateralisation of assets increases liquidity as well as interconnections in the network. The assets (such as bonds) in the hedge fund repo market were, however, flimsy and value-unstable. Yet a regulatory failure to govern considerable moral hazard shifted risk away from the hedge funds.<sup>295</sup> This story mirrors the earlier history of sales. The severity and brutality of the consequences seen in the hedge fund repo market is probably just a mere blip in what might be a much longer and slower process of network formulation between different layers of market civilisation. The layers of material civilization, and the institutional structures, forms and intersections attendant to such layers and their nodal points, are to a considerable degree those created by long-term historical conditions. The shadows they create remain with us today.

The final words here are perhaps best left to Braudel:

Venice was from the start trapped by the logic of its own success. The true doge of Venice, standing opposed to all the forces of change, was the city's own past, the precedents to which reference was made as if they were the tablets of the law. And the shadow looming over Venice's greatness was that of her greatness itself. This has some truth. Could the same not be said of twentieth-century Britain? Leadership of a world-economy is an experience of power which may one day blind the victor to the march of history.<sup>296</sup>

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<sup>294</sup> Specifically Andrew JOHNSTON: *Regulating Hedge Funds for Systemic Stability: The EU's Approach*, European Law Journal 21(2015)/6, 758–786. This field of literature is considerable and growing, but economy precludes further analysis.

<sup>295</sup> *Ibid.* See generally PURCELL JR.: *Capitalism and Risk...*, *op. cit.*

<sup>296</sup> BRAUDEL: *Perspective of the World...*, *op. cit.*, 132.

