BOOK REVIEW

The Law of Contract 1670-1870

Warren Swain (2010) Cambridge University Press. 252 pages. ISBN 9781107040762.

Books on doctrinal legal history are not numerous and any addition to the library is welcome, but for a review to be apposite a reviewer needs to identify a book's target audience. Dr Swain's *The Law of Contract 1670-1870* is not easy in that respect. One might expect a book for students or general readers to have a clear sense of direction, introductions and conclusions to chapters, and cross-references to guide the journey. A book for fellow scholars might be expected to have something new to say and, where the author differs from what others have written, to engage overtly with their work and explain why he disagrees. This book does none of those things very much and some of them not at all. Its Introduction says it is 'concerned' with the history of contract law during a period apparently chosen arbitrarily, or, at least, a period for which no explanation is offered, and that it will be 'doctrinal' though selective. It does not promise new themes or generalisations. Instead it will 'examine' the law of contract 'through some key themes' which include, perhaps most explicitly, 'wider debates including the supposed needs of merchants, the usury laws and the morality of gambling' – a somewhat eclectic set of choices, reinforcing from the beginning that general lessons are not being sought. Not much of what follows is new. Additional themes mentioned include that common law as we know it today was a product of a shift of responsibility from jury to judge, that from about the 1860s a newish style of text writing sought to systematise the results into a conceptually satisfying logical structure, but that as common law is judge-made, change (and its reversal) are sometimes explicable only on grounds of personal judicial preference. None of that is new either, though, of course, there is always room for new illustrations.

It is unclear how seriously Dr Swain means these themes to be taken. He does not attempt to establish that there was a wider debate about the needs of merchants, be they real or merely supposed, to which merchant-driven changes to the common law can be related so that, perhaps, legal change can be seen as part of something bigger. Instead his focus is narrowly on the courts. In particular he rehearses in some detail the familiar story of how (from the 1540s) merchants sued on bills of exchange in common law courts, whose concepts were less amenable to reaching the conclusions merchants assumed in their day-to-day business than local mercantile courts had been. Their litigation induced some changes in common law method and a drawn-out reception of some parts of the law merchant into the common law, accelerated by Lord Mansfield. So what is the relation between this narrative and the law of contract? Dr Swain says that 'the way in which bills of exchange and promissory notes came to be recognized within the Common Law was probably the most significant event *in the law of contract* in the first half of the eighteenth century' (75) (my emphasis) but offers no justification for this claim. He does not differ from the conventional view that the ultimate significance for the law of contract was that judges argued for a while and then carried on with it as before, declining to use bills of exchange law as an analogy for relaxation of the doctrines of consideration and privity, which had had to be evaded in the development of a full and systematic law of negotiable instruments. In short 'bills of exchange' became its own branch of the law. It had its own literature from the 1760s,

and when Pollock came to write his general treatise on Contract a century later he had no difficulty acknowledging that 'the complete solution of the problem, for which the ordinary law of contract is inadequate, is attained by the law merchant in the following manner . . .', with a footnote pointing out that statute had been needed to extend the law merchant to promissory notes. Similarly Dr Swain fleshes out the familiar analysis of eighteenth-century insurance law – that it was an amalgam of mercantile practice, continental jurisprudence and statute, as Michael Lobban puts it. Pollock was clear that contracts for marine insurance were 'peculiar' and did not afford 'grounds for any conclusions of general law'. That is from his first edition; later editions are simply black-letter, but Pollock did keep a passage saying that terms of insurance contracts were customary and had received a customary interpretation, different from interpretive principles normally applied – they were a shorthand embodiment of all that law, he wrote. So at the same time that there was a cohering law of contract, which is Dr Swain's focus, there was also differentiation.

When it comes to the usury theme, Dr Swain juxtaposes and interweaves lay and judicial commentary on its morality but does not commit himself to any view on whether there were fashions that can be correlated with trends in the intensity of judicial scrutiny. Without something like that the point of the 'wider debate' remains illusive. Nor is it clear that Dr Swain really means to make such a connection, because his account of usury is embedded in a chapter on equity and statutory regulation of unfairness in contracting. Yet if the inquiry is into the interplay of opinion and judicial decision-making it cannot be limited to intervention on grounds of fairness. The accepted way around the usury laws was by disguising what was functionally a loan in the clothes of what was technically a sale – an annuity re-purchasable by the seller/borrower. One can track its birth (and analyse how willing or begrudging judges were – Dr Swain does a bit of that), then its statutory regulation, then the further litigation, then the further regulation, and so on, asking not just 'did judges think it fair' but 'what did judges make of technical objections' – because it was technical stuff, full of pitfalls. Were judges strict when the fashion was against usurers and more lenient when it was not? One common law judge (it was mostly a common law jurisdiction) said late in the piece, 'Parliament has imposed upon us the duty of watching these proceedings most narrowly.' Was that always so? Did statute perhaps influence the Chancery jurisdiction to relieve against unfairness, or was the statutory regulation influenced by Chancery? Dr Swain does not ask these questions, because for him the usury context is merely an 'illustration' of Chancery activity. But why is that adequate? If the point is to show that Chancery developed techniques of relief that eventually found their way into a modernish law of contract why are we given merely an illustration rather than an analysis of the whole or, at least, a sample from different contexts (which would surely make the point better)? If an illustration is enough, is there a reason for choosing usury? There may be answers to these questions but a reader seeking to make something of the book would benefit from hearing them.

A writer who took 'contracting' for a focus could organise an account of legal change that accommodated narratives like these. We could call it Common Law if we liked, provided we recognized that all that we mean is the output of common law courts (and Chancery if we like) – an institutional rather than a philosophical or doctrinal unity. Even then we would have some difficulty with statute, which Dr Swain solves in the not uncommon way of letting it simply 'intervene', sometimes opportunely, sometimes inadequately, but rarely worth analysing for its influences, precursors and progenitors in the way judge-made law is thought to be. The difficulty, however, is that Dr Swain's focus is only sometimes on contracting. Probably more often it is on the formation of the law of contract, conceived of as a body of thought

that is conceptually and logically coherent or, at least, is working towards that or has the potential to do so. It is an idea, a part of intellectual history, the product of writers about the law, and the focus is on their books (and their influences and precursors). I shall call it Contract, capital C, and how to relate it to contracting is problematic.

So – if the focus is on books, and especially on the new wave of systematising books that began in 1860s, then *their* focus is on law reports, selected and more or less tortured to fit and advance a framework. The framework is relatively new in England, though not elsewhere, so Dr Swain explains what its antecedents were, which is interesting though familiar territory. But for text writers in the common law system a plausible framework is achievable only by stripping cases of their context – indeed generalising them out of their context is the essence of the enterprise. So it is not very clear what Dr Swain's purpose is in putting some of that context back in. Does it help us understand the enterprise of Contract-writing? Various answers are possible, and they might lead to different sorts of book, but Dr Swain does not ask the question. Alternatively, sometimes the text writers themselves put context back in – Pollock's remarks about bills of exchange and insurance show him doing that. But Pollock's purpose is then to exclude those cases: they are 'other' (like statute also is other.) So Contract is a rump, a 'general part', to be supplemented and sometimes contradicted by the bits that really matter to everyday practice. Seen in that light Dr Swain's assertion that 'lawyers were no longer thinking in terms of a law of contracts (in the plural), but rather the law of contract familiar today' (201) may be true but it is hollow: unity is achieved by hiving off and renaming bits that do not fit. Today we often group this miscellany as 'commercial law', with its own literature, professors and law courses. In one unguarded moment Dr Swain commits himself to the thought that perhaps legislation in the 1880s was tantamount to a code of 'commercial contract law' (270) but does not stop to ask how such a thing might relate to a unitary Contract. Note too that in his claim about a unitary law Dr Swain drifts from telling us what writers wrote to what 'lawyers' 'thought'. This too is problematic, because the Contract books had an uncertain function. Dr Swain sees this from the beginning when he mentions that Leake, the first modern Contract writer, 'was not satisfied with producing a reference work for practitioners' (203) — what dismissive academic superiority there is in that phrasing — but he does not attempt to assess what market these new books found outside the captive audience of students or establish criteria for assessing their impact outside the academy. Instead, when it comes to the point, he remarks that it is 'difficult, if not impossible, to demonstrate a conclusive link between legal writers and the development of legal doctrine' (228), throws in a few generalised references to Neil Duxbury's work on Pollock and stops. So he doesn't know what lawyers thought. Nor, evidently, does he think it worthwhile to try to build on Duxbury.

When he reaches the end Dr Swain is rather stuck for conclusions that on the one hand are not anodyne and on the other flow naturally from the topics he has chosen to fill his book. He takes a swipe at Crits who hope for glib and easy conclusions — he has a thing about Crits — and ends in the comforting arms of E P Thompson, who tells him that anyone with a thirst for tidy Platonism will soon become impatient with actual history. His situation, he somewhat hubristically implies, is a feature of conservative, doctrinal legal history generally. Well, before a conclusion like that is reached it would be good to look back at why *these* topics have been chosen. Why use regulation of pawnbroking as an instance of statutory intervention? It is too purposeless to call it an 'example' – it does not go anywhere. Why wagers as an example of judicial

development of public policy? Pollock's formal theory of Contract, empty of mandatory or presumptive content, would certainly be threatened if the courts did exercise a broad public policy jurisdiction, which is why Pollock worried about it. But by the time he wrote, wagers were dealt with by statute so it is a poor example. Why a section on rationalising money had and received, which reads like it has walked in from a history of restitution? In these cases Dr Swain is reusing text he has already published elsewhere, sometimes juggled around a little, sometimes extended a little, sometimes topped and tailed, but still used quite extensively and more or less verbatim. He has broken another of his articles into bits and redistributed much of it in various places in the book, often more or less verbatim. He makes a general acknowledgment (vii), which omits the piece on pawnbroking, but when he leads in to these passages he has no footnote to indicate their origin. There is no problem, of course, with reworking one's previous publications if by doing so value is added — it is a common way of working from the particular to the general. But Dr Swain is not producing 'general', as he says himself. So if (as I think is probably the case) the previous publications were written for a variety of differing reasons it is unsurprising that the book ends up lacking a sense of direction.

That, however, would be too negative a conclusion. If one works hard at it one can discern a thesis in some of Dr Swain's materials that would be worth testing. It is limited to activity we might broadly label commercial and roughly, just as a first approximation, it goes like this: (1) by the eighteenth century the common law courts were the usual and preferred venue for settling commercial litigation; (2) at much the same time a transfer of responsibility from jury to judge meant that common law courts were also more in the business of rule-making than before; (3) there could be tensions between (1) and (2), as the commercial imperative to provide acceptable outcomes could clash with the need to maintain a coherent set of rules; (4) again from much the same time, a broader range of legal commentators drew on a broader range of thought from other jurisdictions to explain and influence the production of rules; (5) synthesising all this was done through differentiation [this, I think, is the step Dr Swain did not take]; (6) some of the discrete areas were accommodated within common law and given names – the Law of Contract is one, the law of insurance another, the law of negotiable instruments a third; restitution wandered nameless and unrecognised until the twentieth century; (7) the aim (though to put it that way is unacceptably purposive) was for coherence within sectors rather than between them, so the price was overlaps and border disputes; (8) some discrete areas were developed through statute, either because common law was thought not to be doing it well or because it was not doing it at all. Within that framework the content of particular clumps of rules could be explained by investigating who was litigating and why, who was powerful and why, and how the answers to those questions changed over time. To understand the law of contract (or any other branch of law) you need to understand when it didn't have to be what it wasn't.

Stuart Anderson,
Faculty of Law,
University of Otago.