

Introduction: empire of reason, or republic of common sense?

‘[I]f LAW be a *science*’, said Sir William Jones in 1781, ‘and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of *reason*’.¹ In *Goodisson v. Nunn* (1792), Lord Kenyon, in dealing with the then very controversial question of when contractual covenants were to be considered independent of each other, was faced with old cases apparently requiring a result that he thought was unjust. He was able to find that the old cases had impliedly been overruled by more recent cases:

The old cases . . . have been accurately stated, but the determinations in them outrage . . . common sense . . . I am glad to find that the old cases have been over-ruled; and that we are now warranted by precedent as well as by principle to say this action cannot be maintained.²

These two statements, eleven years apart, invite comparison. Both appeal to ‘principle’, but the word is used with different connotations. Jones spoke of principle as an essential component of the claim of the law – a claim of which Jones evidently approved – to be a rational science. There is no explicit place in this concept for individual judgment on the part of judges or of writers of what legal rules would, on general considerations, be beneficial or desirable in the interests of justice to the parties to a particular dispute or in the interests of society at large in the future. Lord Kenyon, on the other hand, though he also concludes his statement with an appeal to ‘principle’, was evidently motivated by a desire to avoid injustice to the defendant in the particular case, and to establish a rule that

1 Jones, *An Essay on the Law of Bailments*, 123 (emphasis in original). Every coherent subject of intellectual enquiry was supposed to have principles. See William Paley’s very influential *The Principles of Moral and Political Philosophy* (1785), Lord Kames, *Principles of Equity* (1760), and many titles of eighteenth-century books on scientific and religious subjects.
 2 *Goodisson v. Nunn* (1792) 4 TR 761, 764–5. The old cases cited by counsel were *Carton v. Dixon* (1640) Rol Abr 415, *Pordage v. Cole* (1669) 1 Wms Saund 319 and *Blackwell v. Nash* (1722) 1 Str 535.

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would, in his judgment, be beneficial in future cases. Personal opinion was engaged, as is shown by the use of the very strong phrase in reference to the old cases, that they ‘outrage common sense’, and in the next words, ‘I am glad to find that the old cases have been over-ruled’.

The two statements of Jones and Kenyon correspond to a long-lasting and continuing tension in contract law.³ Jones’s concept of law as a rational science planted a seed that found itself in very fertile ground during the succeeding century, and though, in the twentieth century, the claim of law to be a science faded, the claim that it was founded on principle did not. On the other hand, the ideas that the law must give attention to the particular circumstances of cases, and to what rules would be beneficial to society at large have also been prominent and persistent.

The statements of Jones and Kenyon both make implicit reference to the past. The word ‘principle’ means beginning (*principium*), but the tenor of Jones’s statement is that principles are to be discovered by recourse to reason rather than to actual historical research.⁴ The statement implies some degree of uncertainty about whether English law, as it stood in 1781, could successfully vindicate its claim to be a science (‘if it really deserve so sublime a name’). The history of English law was not, on this view, determinative. Principles might be deduced from other sources, and, if they proved inconsistent with the law, it would follow that the law ought to be brought into conformity with principle.

Lord Kenyon also made reference to the past, indeed to several conceptually distinct past periods. ‘The old cases’, he says, referring to cases decided between 1640 and 1722, ‘have been accurately stated’. These were the cases holding that a contracting party was bound to perform his or her side of a contract even if the other party had not performed. This was a perfectly logical position, and could well be said to be founded on reason, and, indeed, on principle. The defendant had made a promise; there was consideration for the promise; therefore the promise was binding, and the defendant was liable for damages for not performing it; if the defendant had any complaint of non-performance against the plaintiff (it might be urged), let him bring a separate counter-action. But the objection to this line of reasoning in Lord Kenyon’s mind was that it might lead, and had led, to absurd and unjust consequences, particularly where the claimant

3 See *The Golden Victory*, discussed in Chapter 7, p. 188, and Chapter 8, pp. 228–9, below.

4 See D. Ibbetson, ‘Sir William Jones and the Nature of Law’, in Burrows and Lord Rodger of Earlsferry (eds.), *Mapping the Law*, 619.

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was insolvent:⁵ the defendant would be compelled to perform in full and would be left without any real prospect of obtaining either the counter-performance, or compensation for its failure. So Lord Kenyon asserted that ‘the old cases’ (i.e. those of which he disapproved) had been impliedly overruled by more recent decisions, particularly that of Lord Mansfield in *Kingston v. Preston* (1773, but not immediately reported).⁶ Thus Lord Kenyon rejected the remote past by appealing to the more recent past.

In doing so, he said of the old cases: ‘I admit the principle on which they profess to go; but I think that the judges misapplied that principle.’ This reference to principle apparently denotes an even earlier time, before the old cases, in which a principle existed that later came to be ‘misapplied’. Three past periods seem to be envisaged: a period before the old cases, the era of the old cases, and the era of the more recent cases. But the actual existence or operation of the principle in the first of these periods was not tested and could not be tested by historical evidence, because any contrary evidence would automatically fall under the same condemnation as the old cases. In other words, the principle assigned to the first temporal period, and the first temporal period itself, were notional.

On the face of his reasoning, Lord Kenyon might seem simply to have been applying unchanging principle (i.e. the principle notionally prevailing before the old cases and recognized in *Kingston v. Preston*). But what purported to be a recognition that the law *had changed* (old cases ‘over-ruled’, and ‘we are *now* warranted’) itself constituted a significant contribution to establishing the change in question, and the very powerful condemnation of the old cases (the determinations in them ‘outrage common sense’) shows that general considerations of justice (as assessed in 1792), and judgment as to what rule was desirable for the future (also as assessed in 1792) were highly influential. Lord Kenyon himself recognized the significance of his own decision, saying, with reference to one of the older cases, ‘to the latter part of that judgment I cannot accede. It is our duty, when we see that principles of law have been misapplied in any case, to over-rule it’. His appeal to the past was very different from that of Jones, but the two were alike in one respect: neither was primarily conducting a historical enquiry.

5 Lord Kenyon makes express reference to bankruptcy on page 764, and to insolvency on page 765.

6 *Kingston v. Preston* (1773), reported as part of counsel’s argument in *Jones v. Barkley* (1781) 2 Doug 684. The date of publication of the first edition of Douglas’s reports was 1783–84 (BL catalogue).

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From the perspective of a subsequent observer, the decision in *Goodisson v. Nunn* was another significant event, and its date (1792) also significant in every subsequent account of the development of this branch of contract law. *Kingston v. Preston*, though decided in 1773, had not been immediately reported. It was reported anonymously in 1776 with Lord Mansfield's opinion given in very forceful and somewhat incoherent, ungrammatical and colloquial terms.⁷ In this form it was not easily usable as a precedent. The judgment was reported five years later by a different reporter, who included the names of the parties, and who gave the judgment at greater length and with much greater coherence and elegance, all reported as part of counsel's argument in a different case (1781). This suggests that the change in the law did not occur immediately when *Kingston v. Preston* was decided in 1773, but only when it gained general acceptance in the profession, something to which the second reporter both responded and contributed by adopting the artificial device of including Lord Mansfield's judgment, in a form much more usable as a precedent, as part of the report of counsel's argument in the case of 1781.⁸

Corbin, though he approved of the result in *Goodisson v. Nunn*, commented at considerable length and with some asperity on Lord Kenyon's reasoning:

Lord Kenyon, who is not suspected of being a radical judge, recognized that his decision was contra to many decisions of the past, decisions which he said 'outrage common sense'. At the same time he appeared not to believe that the law itself had changed. He said, 'I admit the principle on which they profess to go; but I think that the judges misapplied that principle'. This 'principle' he stated thus: 'Where they are dependent covenants, no action will lie by one party unless he have performed, or offered to perform his covenant'. To state a principle thus, in order to make the law appear to be static, is a mere unconscious juggling with words. It is no better than to say 'when covenants are dependent they are dependent'. The old judges did not misapply that principle, because it is not a principle and cannot be applied. The old rule was that the mutual covenants in a bilateral contract are independent and unconditional unless the parties, by some expression

7 As can be seen from the passage quoted in Chapter 4, p. 90, below, Lofft, 194, at 198. The first edition of Lofft was published in 1776. The case was indexed by Lofft not under 'contract' but under 'covenant' in the Table of the Principal Matters (n.p., following p. 814).

8 The background of *Kingston v. Preston* is discussed by James Oldham, 'Detecting Non-Fiction: Sleuthing among the Manuscript Case Reports for What was Really Said', in Stebbings (ed.), *Law Reporting in Britain*, 133, pointing out the often-overlooked report in Lofft, and giving a manuscript report from the Lincoln's Inn Library of the facts alleged and the arguments on both sides.

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of intention, make them otherwise. The new rule, one which Lord Kenyon was applying but did not state, is that when two performances, mutually promised in a bilateral contract, are the agreed equivalents of each other, and by custom or agreement are to be performed simultaneously, the promises are concurrently conditional and dependent.⁹

Corbin's observations on the use and misuse of principle are of interest in the context of the present study. It is true that the proposition quoted by Corbin ('Where they are dependent covenants, no action will lie by one party unless he have performed') cannot be the principle on which the old cases were decided. But, on a fair reading of the report, Lord Kenyon did not say that it was. He said that it was a proposition *conceded even by* the old cases ('it is admitted in them all'). The principle accepted by Kenyon on which the old cases 'profess to go' and to which (taking into account the instant decision) Lord Kenyon could assent, would be a generalized corollary of the proposition quoted, for example, that mutual covenants may be dependent or independent according to circumstances. With the principle so formulated, it would have been very appropriate to say that, from Kenyon's point of view, it had been misapplied. But Kenyon did not spell this out, and, later in his judgment, he did refer to the proposition quoted by Corbin as a principle. By this technique, as Corbin implied, he tended to smooth over the extent to which the law was changing. As Corbin also said, Kenyon in fact applied a different proposition ('the new rule'), which he did not precisely formulate.

As observations on Lord Kenyon in particular, Corbin's comments might seem harsh, especially as Corbin approved whole-heartedly of the result. In minimizing the extent of legal change, Kenyon was conforming to a common judicial convention, and, as we have seen, Kenyon went further than many judges have done in openly acknowledging that the law had changed and was changing. But this response does not answer the question why the claim to continuity with the past should have been thought so important as to have become conventional. Looking at the matter more broadly, Corbin's comment draws attention to an important and continuing feature of legal reasoning in the common law system. Legal change has been frequent, but has usually been accommodated by the formulation of a proposition (a 'principle'), presented as already existing, that can explain past decided cases, that justifies the instant decision and that is thought to set a beneficial rule for the future. Kenyon's reference to principle made it easier for his fellow judges to concur. Both, as it

⁹ *Corbin on Contracts*, s. 656 (1960 edition, vol. 3A, 147–8).

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happens, had been counsel, on opposite sides, in *Kingston v. Preston*. Buller J (losing counsel in *Kingston*) said ‘in truth if there had been no case in opposition to the antient cases, I should not have been afraid of making a precedent, the principle on which our decision is founded being universally admitted in all the cases’.¹⁰ Grose J said that ‘there is so much good sense in the later decisions, that it is too much to say that they are not law. There being several precedents in support of our decision, and those being founded in good sense and justice, I think we ought to take advantage of them’.¹¹ These comments demonstrate the close interrelation of principle, precedent, good sense, justice and policy.

Principle looked not only to the past, but also to the future. The judges in the late-eighteenth century were very conscious of their role in establishing appropriate legal rules for the future. Lord Mansfield is the judge best known as a reformer, but he was not alone in looking to the future: Buller J had, five years before *Goodisson v. Nunn*, associated the concept of principle with judicial rule-making, linking both with newly prevailing opinions:

From that time [i.e. in the past thirty years] we all know that the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future.¹²

Selection of ‘a guide for the future’ necessarily imports an element of personal judgment, but this cannot be reduced to any single perspective. It would be true to say that one of the effects of the new rule in *Goodisson v. Nunn* was to facilitate commercial transactions by making it safer (less costly) for persons to enter into executory agreements. It would not be wholly implausible to suppose that the court was influenced by this consideration, though not expressed in these terms. Lord Kenyon was partly looking to potential future transactions when he said: ‘Suppose the purchase money of an estate was £40,000, it would be absurd to say that the purchaser might enforce a conveyance without payment, and compel the seller to have recourse to him, who might be an insolvent person.’¹³ But it would not be true to say that the facilitation of future commerce was the sole reason, or the sole justification, for the decision, nor, standing alone, could it have been sufficient to constitute a legal principle. The judges were influenced also by the desire to do justice to

10 *Goodisson v. Nunn*, note 2, above, at 765.

11 *Ibid.*, at 766.

12 *Lickbarrow v. Mason* (1787) 2 TR 63, 73.

13 *Goodisson v. Nunn*, note 2, above, at 765.

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the particular parties before the court, and to persons who, before the decision, had entered into executory contracts that might subsequently result in disputes. Contract law has continually influenced commercial practice but has also been influenced by it, opposite effects that have been simultaneously contained in and confined by the concept of principle. Simon Deakin has made a similar point in saying that ‘the relationship between norms and behaviour is one of mutual interaction, that is to say, of coevolution’.¹⁴

It became common, from the perspective of the twentieth century, to visualize the nineteenth century as an era in which principles of contract law were established and achieved unchallenged dominance,¹⁵ followed by an era of scepticism, especially in American legal thinking, that, in its extreme forms, rejected all claims to principle in favour of various kinds of policy. In turn these views provoked a reaction in the late-twentieth century with a reassertion of principle, and, in some cases, a complete rejection of the concept of policy as a legitimate judicial consideration. Each of these opposing opinions and counter-opinions, while containing valuable insights, has tended to over-simplify the past, as successful intellectual movements often do in order to persuade readers of the weakness of the view they oppose and of the novelty and merits of the opinions newly offered. But the danger of this process is that, in seeking to correct what are perceived – often rightly – to be the errors of the past, the understanding of the past is itself distorted. It would be ironic if, under the influence of an over-simplified view of twentieth-century American legal realism, we should suppose that earlier legal reasoning really had been governed solely by formalistic considerations, for this would be to ignore the chief insight of the realists, namely, that legal results had, in the past, *not* been solely determined by formal considerations.¹⁶ As we have seen already, elements both of principle and of policy predated the nineteenth century, and, as subsequent chapters will show, both concepts continued to be influential during the nineteenth and twentieth centuries, in tension with each other, but at the same time complementary and mutually interdependent.

14 S. Deakin, ‘Contracts and Capabilities: an Evolutionary Perspective on the Autonomy-Paternalism Debate’ (2010) 3 *Erasmus Law Review* 141, 145.

15 A.W.B. Simpson, ‘Innovation in Nineteenth Century Contract Law’ (1975) 91 *LQR* 247, 250, reprinted in Simpson, *Legal Theory and Legal History* (1987) 171, 174.

16 See Tamanaha, *Beyond the Formalist-Realist Divide*, arguing that the history of American law has been severely over-simplified in this regard.

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There has been a complex interaction between precedent and principle. Very commonly the two concepts have been invoked together, as in Lord Kenyon's statement 'that we are now warranted by precedent as well as by principle to say this action cannot be maintained'. When invoked together the two concepts almost always point in the same direction, and this is not by chance. On the face of it principle and precedent operate as independent reasons in support of a conclusion (not only is the conclusion supported by principle, but *also* by precedent, or 'authority'). But the concepts have been interrelated: rarely has a proposition been described as a 'principle' unless it could be supported by an appeal to the past; and rarely has a past decision been recognized as an 'authority' unless it has been perceived (at the time of recognition) to be supported by principle. Lord Mansfield said that 'the law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles . . . and these principles run through all the cases',¹⁷ that is, a glossator might fairly add, all the cases that a subsequent court is prepared to recognize as authoritative.

Lord Mansfield said that precedents served to illustrate principles, but he did not say that precedents could be dispensed with as mere surplusage. Precedents may illustrate principles, but the interrelation of the ideas runs in both directions: the principles of English contract law cannot themselves be formulated, or articulated, without reference, express or implicit, to decided cases. Past law ('properly understood', it may be added) has been used both as a source of principle and as evidence of it. Any advocate, addressing Lord Mansfield or his successors on a point of contract law, would have been ill-advised to dispense entirely with reference to past cases, and the same may be said of students seeking to satisfy examiners, and of writers purporting to offer accurate accounts of the law at any point in its history.

This last proposition was put to the test by Henry Colebrooke, who published in 1818 a remarkable book entitled *Treatise on Obligations and Contracts*. Colebrooke, like Sir William Jones, had spent much of his life in India. He was an eminent Sanskrit scholar, had written a digest of Hindu law, and had held office as a judge in India.¹⁸ His book on contract law contains no preface, but it was evidently founded on the assumption that the law of contracts depended on and manifested universal principles, and that a satisfactory account could be offered of

¹⁷ *Jones v. Randall* (1774) Cowp 37, 39.¹⁸ *Dictionary of National Biography*.

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English contract law without reference to English cases. A note stated that ‘the preface, with other preliminary and introductory matter, will be published with the second part of the volume’, but the second part never appeared. The book is replete with references to Roman law, to the French Civil Code, to Hindu law and to civilian writers, including Barbeyrac, Pufendorf, Godefroy, Grotius, Domat, Pothier and Erskine. Marginal notes refer also to English writers, including Blackstone, Powell, Comyn and Newland, but there is scarcely a reference to any decided English case.

The book was not a success. It was privately printed, and the projected second part never appeared. ‘The second portion’, his son wrote in his biography, ‘was considerably advanced; but he received little encouragement to pursue his task’.¹⁹ His son offered an explanation for the failure, which probably reflected comments made to him and to his father by English lawyers and judges – or rather, the Colebrookes’ *perception* of the significance of those comments – that ‘the work is perhaps too succinct, and it is wanting in practical examples and illustrations’;²⁰ probably a courteous way of suggesting that a useful account of English law requires reference to decided cases. Colebrooke’s approach had the effect of abstracting, or detaching his account from the English law of contracts as a real social phenomenon, and his book, interesting as it is from several perspectives, offered little usable guidance to the actual content of English law in 1818. That such a book was unlikely to succeed in the legal marketplace may seem obvious in retrospect, but to Colebrooke himself it was evidently a severe disappointment. In 1823 he wrote in a private letter:

Nothing has been published by me on the law of Contracts, nor any other topic of jurisprudence, since the treatise on Obligations, which I published a few years ago, as the first part of a larger work. Shortly afterward, while I was preparing the sequel of it for the press, I became involved in [a troublesome lawsuit] . . . I have neither health nor spirits for the undertaking, and cannot bring myself to make the effort of setting about it . . . I have it in contemplation to prepare a preface and introduction to the Treatise on Obligations, as a single work, and give it with the notice of my final relinquishment of the greater work. The treatise is complete in itself, wanting nothing but a preface.²¹

19 Colebrooke, *Miscellaneous Essays*, 279. 20 *Ibid.*

21 *Ibid.*, 345–6 (letter to Sir Thomas Strange).

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Colebrooke's son wrote, of the *Treatise*:

Testimonies to its value have been repeatedly given by those who have followed the same path, and I think it was a matter of some disappointment to its author that it was not more generally appreciated. He had devoted to the subject much time and attention, and had compressed into the space of 250 closely printed pages an elaborate compendium of legal principles derived chiefly from the Roman jurisprudence, and had made considerable progress in a second volume.²²

The fate of Colebrooke's book must have been known to every subsequent nineteenth-century writer on English contract law. Chitty (1826), though he referred at several points to the civil law, gave priority to English cases. Addison wrote in his preface (1847) that English contract law was founded 'upon the broad and general principles of universal law' and that 'the law of contracts may justly indeed be said to be a universal law adapted to all times and races, and all places and circumstances, being founded upon those great and fundamental principles of right and wrong deduced from natural reason which are immutable and eternal'. He went on to compare English writings on contract law, to their disadvantage, with 'the elaborate and elegant works of Pothier'.²³ Following such a preface, the reader might have expected a book like Colebrooke's, but the text of Addison's treatise turned out to consist almost entirely of discussion of decided English cases, reflecting in part, no doubt, commercial considerations, but also the genuine impossibility of attempting to formulate principles of English contract law without regard to their formulation and reformulation in past judicial decisions.

The power of every court to formulate the proper, or true principle on which earlier cases were decided has often been used to accommodate changes in the law, as strikingly illustrated a century after *Goodisson v. Nunn*, by an assertion of Sir George Jessel, one of the most influential judges of the nineteenth century:

Now, I have often said, and I repeat it, that the only thing in a Judge's decision binding as an authority upon a subsequent Judge is the principle upon which the case was decided: but it is not sufficient that the case should have been decided on a principle if that principle is not itself a right principle, or one not applicable to the case; and it is for a subsequent Judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle. In that case the prior decision ceases

22 *Ibid.*, 315. 23 Addison, *A Treatise on the Law of Contracts*, preface, iv–v, vii.