
Introduction

Fundamental change [in the law] happens slowly and by stages so small that nobody at the time could see them as in any way important . . . legal history more than most kinds of history, depends upon the assumptions by which the materials are read . . . people do not formulate their assumptions for themselves, let alone spell them out for the benefit of future historians, and in the case of the law there is never the occasion to write down what everybody knows.¹

This book is concerned with the history of contract law over a two hundred year period stretching between 1670 and 1870. Inevitably it is also about how the Common law and Equity develops and evolves during that time.² The period concerned witnessed profound political, economic, cultural and social change. It would be surprising if the law of contract was unaffected. Legal change cannot be reduced to statistics. It is extremely difficult to measure. Not least of these challenges is identifying what the law is at any given time. It is not uncommon for there to be different possible rules or formulations of rules operating at the same time.³ The fact that a change has occurred at all is often only apparent later on. The law develops slowly. Rather than a sudden leap forward the law usually shifts by degrees, little by little. Sometimes these small shifts collectively alter the overall direction of contract law. This can be expressed in the idea of a ‘tipping point’.⁴ But things are not always

¹ S.F.C. Milsom, *The Natural History of the Common Law* (New York: Columbia University Press, 2003), pp. 75–6.

² For an excellent discussion of legal change viewed historically with a focus on the twentieth century, see Paul Mitchell, ‘Patterns of Legal Change’ (2012) 65 *Current Legal Problems* 177.

³ David Ibbetson, ‘What is Legal History a History of?’, in Andrew Lewis and Michael Lobban (eds.), *Law and History* (Oxford: Oxford University Press, 2004), pp. 39–40.

⁴ David Ibbetson, ‘Comparative Legal History: A Methodology’, in Anthony Musson and Chantal Stebbings (eds.), *Making Legal History* (Cambridge: Cambridge University Press, 2012), p. 140.

what they seem. Even apparently drastic shifts can take a while to bed in.⁵ It is quite common for an apparent change in direction to occur which is then overturned by a reassertion of the *status quo*. The pull of the past is extremely strong in the psychological make-up of lawyers. At times it is sufficiently powerful to stifle innovation. There is often a tension between old and new. Nowhere is this better illustrated than by the survival of the old doctrine of consideration into modern times. Even when a very obvious and unequivocal adjustment has occurred, for example as the result of a statute, existing attitudes can be very difficult to shake off.⁶

Identifying the reasons behind those changes is even more difficult. Motives are usually, but not always, hidden. Throughout history, legal development has been a battle between conservative and reformist instincts. Lawyers during the period concerned, and indeed later, tend towards the former. Human nature tends to favour the familiar.⁷ It is understandable that lawyers in particular should think like this. They are after all trying to win the case for their clients and not, unless it achieves this objective, to bring about changes in the law. Judges are not usually by inclination radical innovators. It is what makes those individual judges who are exceptions so remarkable and memorable. The law almost always evolves without any discernible pattern or master plan. Judges are not legal theorists, although they may on occasion be swayed by philosophical ideas.⁸ This may just be a matter of rationalising an existing rule in a new way. Sometimes new ideas can have an impact but this should probably not be overstated. The intellectual climate generated by the Enlightenment may in part help to explain why lawyers were becoming more receptive to new ideas. By its nature such a claim about intellectual influence is always going to be a speculative one.

⁵ A very good example is provided by the famous *Slade's Case* (1602) 4 Co Rep 92, David Ibbetson, 'Sixteenth Century Contract Law: Slade's Case in Context' (1984) 4 *Oxford Journal of Legal Studies* 295.

⁶ Perhaps the best modern example of this is the way in which, despite the Land Registration Act 1925, a great deal of real property was still subject to the old unregistered regime for many decades. The survival of unregistered land was one of the factors behind the Land Registration Act 2002.

⁷ This point need not be laboured to anyone who has spent a substantial amount of time in universities. These are institutions about which F.M. Cornford, *Microcosmographia Academica* (Cambridge: Bowes & Bowes, 1908), remains as relevant today as it ever was. The same point has been made in relation to working class culture, Richard Hoggart, *The Uses of Literacy* (London: Penguin, 2009).

⁸ The precise role that theory ought to play remains contentious in the modern law. For a sophisticated defence of theory, see Ronald Dworkin, *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006), pp. 49–74.

Lawyers operate within the constrictions of the legal system of their own times. Eighteenth century judges were not contained by the rigid system of precedent in the modern sense. There was still a very clear notion that previous cases mattered. Chief Justice Hale had talked about the notion of *stare decisis* as early as the 1670s.⁹ Long before precedent in a strict sense became so important, lawyers were prepared to resort to the idea of common learning.¹⁰ The past had political significance as well. Lawyers of the seventeenth century were keen to represent the Common law as such a venerable institution because this was the best way of consolidating their own professional position.¹¹ The idea that the Common law was an ancient institution continued to be influential. It represents a further reason for resisting change which only really began to unravel in the nineteenth century.

There were structural constraints on lawyers too. The legal system was still dominated by the forms of action and the old pleading rules. It was not until the end of the period discussed that fusion between the two jurisdictions, Chancery and the Common law, was a realistic prospect. Chancery was concerned with some matters which we now think of as contractual. This court played a significant role in loan transactions and elsewhere. But the relationship between Equity and the Common law is not entirely captured in the idea of two jurisdictions side-by-side. Equitable ideas and doctrine were taken up by Lord Mansfield and others and integrated into the Common law. There was no jury in the Court of Chancery. As a result it is often easier to identify substantive legal doctrine. The procedures of the central Common law courts were quite different. Before the nineteenth century, contract cases were decided by juries. Substantive questions were not, at least not very often, clearly enunciated. The jury also introduced an element of chance. It would be unrealistic to expect jurors to ignore their own past experiences. A jurymen who has in the past bought a defective horse is unlikely to be sympathetic when a horse merchant finds himself a defendant in an action for breach of contract for selling a defective horse.¹² During the eighteenth century it became easier to challenge a jury verdict. The

⁹ *Hanslap v. Carter* (1673) 1 Vent 243; *Kirkbright v. Curwin* (1676) 3 Keb 611.

¹⁰ J.H. Baker, *The Law's Two Bodies* (Oxford: Oxford University Press, 2001), pp. 64–86.

¹¹ These ideas are fully explored in J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century*, 2nd edn (Cambridge: Cambridge University Press, 1987).

¹² Much in the manner of the old adage 'a conservative is just a liberal who has been mugged'.

process still took time and involved expense at the risk of an outcome that still might not be favourable.

Any work of history involves an effort of imagination. The legal historian of the eighteenth and nineteenth century is in an advantageous position. There is no lack of evidence. Printed reports of varying standards of reliability exist.¹³ Cases are readily reported in newspapers. Some of the trial notes of judges and barristers survive. A few are readily accessible.¹⁴ Many are not.¹⁵ The emergence of a print culture in the eighteenth century saw a growing number of law books.¹⁶ As the cost of production and paper fell in the nineteenth century the market was flooded with legal treatises.¹⁷ The growth in law reports and literature in the nineteenth century presents its own challenges. The enormous increase in electronic resources has had a significant impact on legal historical research.¹⁸ At times it is difficult not to feel overwhelmed. A great deal is still lost to us. For example, relatively little is known about the civil trial process. *Nisi prius* cases were not regularly reported until around 1800.¹⁹ All we are left with are glimpses of the central, not always harmonious,²⁰ relationship between judge and jury but not much more. This can be frustrating.

¹³ There are sometimes vital differences between reports. The most famous example in this period is the case of *Stilk v. Myrick* (1809) 2 Camp 317, 6 Esp 129.

¹⁴ Most obviously some of Lord Mansfield's trial notes, James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, 2 vols. (Chapel Hill: University of North Carolina Press, 1992).

¹⁵ Extensive trial notes from the collection of Serjeant George Hill, nicknamed Serjeant Labyrinth, are preserved as LI MS Hill; for details, see J.H. Baker, *English Legal Manuscripts*, 2 vols. (London: Inter Documentation Co., 1978), vol. II, pp. 80–90. These are also available on microfiche. Lord Hardwicke's trial notes at *nisi prius* and in Chancery are another major collection which is not transcribed (BL Add MS 33935–36227). For a discussion of Lord Hardwicke's *nisi prius* papers, see Henry Horwitz, 'The *Nisi Prius* Trial Notes of Lord Chancellor Hardwicke' (2002) 23 *Journal of Legal History* 152.

¹⁶ Roy Porter, *Enlightenment* (London: Penguin, 2000), pp. 72–95.

¹⁷ S.H. Steinberg, *Five Hundred Years of Printing*, 3rd edn (London: Penguin, 1974), pp. 277–81.

¹⁸ The electronic versions of the English Reports and the Making of Modern Law database are particularly significant. On the former, see James Oldham, 'Jury Research in the English Reports in CD-ROM', in John Cairns and Grant McLeod (eds.), *The Dearest Birth Right of the People of England: The Jury in the History of the Common Law* (Oxford: Hart, 2002), pp. 131–54.

¹⁹ James Oldham, 'Law Making at *Nisi Prius* in the Early 1800s' (2004) 25 *Journal of Legal History* 221.

²⁰ Oldham, *Mansfield Manuscripts*, vol. I, p. 90.

The approach adopted in this book is unashamedly doctrinal. Some will find this ‘excruciatingly tedious’.²¹ Undoubtedly it cannot provide a full account. The emphasis is largely on the courts at Westminster. It was in these courts that contract doctrine was developed. In practice, the local courts of various kinds were much closer to the everyday experience of many litigants. The Courts of Requests, or Courts of Conscience as they were sometimes known, were popular in low value contract claims. In 1846 this court was replaced by the new County Court which was also very well used. Although records survive giving details of how many claims and what sort of claims were brought, how much was claimed and the nature of the decision-making process in these courts is lost to us. At best we can guess that there was some rough and ready justice.²² Some litigation did not even get to trial. Arbitration was increasingly popular by the eighteenth century.²³ Once again, the principles that were applied are hidden from us and there is no way of finding out what they were. Despite these limitations, and others, doctrinal legal history does have considerable value. As the late Brian Simpson observed in his *History of the Common Law of Contract*:

Doctrinal legal history . . . is a special branch of the history of ideas, of their reception, evolution and interaction, and the study of these processes in the context of contract law has . . . an importance wider than that of merely illustrating the detailed elaboration of the complex moral principles which underlie one particular legal institution. Additionally it contributes to an understanding of how a sophisticated legal system works and, at a more profound level, in what it consists.²⁴

Writing just before he died, Simpson said of his earlier work that ‘it belongs to a genre that has become unfashionable, and proceeds on the assumption that law can legitimately be studied as an autonomous discipline’.²⁵ The ‘unfashionable’ approach advocated by Simpson is often characterised as internal legal history. Legal development is

²¹ William MacNeil, ‘Living on: Borderlines – Law/History’ (1995) 6 *Law and Critique* 167, 173.

²² Some clues about the County Courts emerge from the 1850s from reports in local newspapers, see Patrick Polden, *A History of the County Court 1846–1971* (Cambridge: Cambridge University Press, 1999), p. 41.

²³ Henry Horwitz and James Oldham, ‘John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century’ (1993) 36 *Historical Journal* 137.

²⁴ A.W. Brian Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*, pbk edn (Oxford: Oxford University Press, 1987), p. vii.

²⁵ A.W. Brian Simpson, *Reflections on the Concept of Law* (Oxford: Oxford University Press, 2011), p. 132.

examined from within the law from the perspective of those who are part of the legal process, namely, the litigants, lawyers, judges and legal writers. Internal legal history is sometimes contrasted with external legal history or that which looks at legal development from outside the legal system. This division is sometimes seen as reflecting a difference in the methodology between those who are trained historians and those who are trained lawyers.²⁶ The leading English legal historians from Maitland through to Milsom and Baker are almost exclusively in the second category.²⁷ Whether or not a legal historian is trained as a lawyer or a historian is bound to have a major influence on how the evidence is approached. All the same the division is never really an absolute one. Even legally trained legal historians are perfectly well aware that legal development occurs within a social context.²⁸

A different sort of legal history began to emerge in the 1970s.²⁹ It went much further than anything that had been attempted before. Its supporters criticised the conservatism of traditional forms of legal history³⁰ and saw themselves as setting a new agenda.³¹ It was argued that the law was not politically neutral. Rather, ideology drove legal change. It was contended that lawyers and judges were allies of the wealthy commercial elite. These works grew out of the Critical Legal Studies movement.³² The most celebrated product of this period is Morton Horwitz's *The Transformation of American Law 1780–1860*.³³ It was followed a few

²⁶ David Sugarman, 'Great Beyond His Knowing: Morton Horwitz's Influence on Legal Education and Scholarship in England, Canada, and Australia', in Daniel Hamilton and Alfred Brophy (eds.), *Transformations in American Legal History: Law, Ideology and Methods. Essays in Honor of Morton J. Horwitz*, 2 vols. (Cambridge, Mass.: Harvard University Press, 2010), vol. II, p. 511.

²⁷ S.F.C. Milsom, 'Pollock and Maitland: A Lawyer's Retrospective', in John Hudson (ed.), *The History of English Law: Centenary Essays on Pollock and Maitland* (Oxford: Oxford University Press, 1996), pp. 243–59.

²⁸ For a brilliant example, see S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976).

²⁹ For an account of the legal historiography of the last fifty years, see K.J.M. Smith and J.P.S. McLaren, 'History's Living Legacy: An Outline of Modern Historiography of the Common Law' (2001) 21 *Legal Studies* 251.

³⁰ Morton Horwitz, 'The Conservative Tradition in the Writing of American Legal History' (1973) 17 *American Journal of Legal History* 275.

³¹ Robert Gordon, 'Historicism in Legal Scholarship' (1980–1981) 90 *Yale Law Journal* 1017; Robert Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57.

³² For a very useful overview, see Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Oxford University Press, 2001), pp. 421–510.

³³ (Cambridge, Mass.: Harvard University Press, 1977). This was not the only significant historical work from this period. Others include, Duncan Kennedy, 'The Structure of

years later by Patrick Atiyah's *The Rise and Fall of Freedom of Contract*³⁴ which focused on England and was not so overtly political. Atiyah was more contract theorist than legal historian.³⁵ He nevertheless accepted some of the premises of Horwitz's book.³⁶ The most important of these was the way in which contract law shifted away from an essentially equitable model around 1770. Whereas at one time judges had placed value on fairness, they now placed greater emphasis on freedom of contract and enforcing contracts. These works are broad in scope and ambitious in intent. They have influenced a whole generation of legal historians, particularly in the United States.

The Critical Legal Studies movement has never made any attempt to disguise the political sympathies of its adherents.³⁷ It is unlikely to include many cheerleaders for unrestrained free market economics.³⁸ Political partisanship aside, the significant methodological flaws in these works are well documented. The use of case law is patchy. Some of the arguments are supported by a handful of authorities which are often decades apart.³⁹ Facts were sometimes passed over in the cause of a good story. Horwitz would later concede that he paid insufficient attention to cultural factors.⁴⁰ By definition, if the law is being used covertly to further the interests of particularly powerful groups, then it is going to be difficult to find historical evidence that this is so.

The other main body of literature of external legal history grew out of the Law and Society movement. Writers like Willard Hurst regarded

Blackstone's Commentaries' (1979) 28 *Buffalo Law Review* 205; Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Washington D.C.: Beard Books, 2006).

³⁴ (Oxford: Oxford University Press, 1979).

³⁵ Atiyah has produced two major volumes of contract theory: P.S. Atiyah, *Promises, Morals, And Law* (Oxford: Oxford University Press, 1981); P.S. Atiyah, *Essays on Contract* (Oxford: Oxford University Press, 1986).

³⁶ Atiyah attended some of Horwitz's seminars at Harvard and has acknowledged his influence: Patrick Atiyah, 'An Autobiographical Fragment', in Geoffrey Wilson (ed.), *Frontiers of Legal Scholarship* (Chichester: Wiley, 1995), pp. 45–6.

³⁷ Duxbury, *Patterns*, pp. 428–35; Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100 *Yale Law Journal* 1515.

³⁸ Such hostility to free market capitalism is not confined to those on the political left, at least in England, as convincingly demonstrated in Martin Weiner, *English Culture and the Decline of the Industrial Spirit 1850–1980*, 2nd edn (Cambridge: Cambridge University Press, 2004).

³⁹ For a detailed refutation of Horwitz using the case law, see A.W.B. Simpson, 'The Horwitz Thesis and the History of Contracts' (1979) 46 *University of Chicago Law Review* 533.

⁴⁰ Morton Horwitz, *The Transformation of American Law 1870–1960* (Oxford: Oxford University Press, 1992), p. vii.

legal history which focused on the courts as too narrow. It was necessary to look at a wider range of agencies. The relationship between law and society was a complex one, but a failure to address these issues was said to give an incomplete picture. Legal history of this sort works best on a small scale. Hurst's study of the lumber industry in Wisconsin is perhaps the most outstanding example.⁴¹ This sort of history is nevertheless open to the objection that it fails to recognise the 'autonomous internal dynamics of the legal process'.⁴²

This book is different. It attempts to examine the law of contract during this period through some key themes. It is not intended to be a comprehensive account of every aspect of contract doctrine during this period. In doing so, developments in contract are situated within wider debates including the supposed needs of merchants, the usury laws and the morality of gambling. These wider themes do not just reflect practical concerns. There are intellectual concerns too. The rise of contract theory can only be fully understood when set against the growth of interest in the works of the Natural lawyers across Europe in the eighteenth century.⁴³ By the nineteenth century this naturally leads to consideration of the role of legal writers in shaping the direction of legal doctrine. This is a question that still resonates today.⁴⁴

The period under investigation is a significant one in the history of the law of contract. By the late nineteenth century a body of contract law doctrine had emerged which is still recognisable to modern lawyers. Rather than viewing this process as part of some master plan, whether conscious or not, it is better to see these changes as the product of numerous factors which are often pulling in different directions. Perhaps the most important of these was the decline of the jury. As judges wrestled control from the jury, issues of fact and law came into sharper focus. Questions which in earlier centuries fell to be decided by the jury in the guise of whether the parties had entered into an agreement came instead to be seen as matters of legal doctrine. The emergence of

⁴¹ James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin 1836–1915* (Cambridge, Mass.: Harvard University Press, 1964).

⁴² Mark Tushnet made these remarks in a review of another significant book to come out of the Wisconsin school, 'Perspectives on the Development of American Law: A Critical Review of Friedman's *A History of American Law*' [1977] *Wisconsin Law Review* 81, 83.

⁴³ This is itself part of an older tradition which can be traced back to Aristotle: James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Oxford University Press, 1991).

⁴⁴ Warren Swain, 'Unjust Enrichment and the Role of Legal History in England and Australia' (2013) 36 *New South Wales Law Journal* 1030.

the rules about offer and acceptance, vitiating factors and even rules about contractual interpretation can all be explained in this way. This left a gap. Doctrine had to be formulated without any historical precedents. It was fortunate that there was a ready-made structure into which the law could be slotted. This was known as the Will Theory. It was built on the simple notion that contracts were formed from a meeting of wills. From this simple definition everything else flowed. The extent to which contract doctrine genuinely reflected these ideas is more dubious. There were many instances which could not fit into the new structure. The most obvious was the well-established doctrine of consideration. The Will Theory undoubtedly shaped the way that lawyers and legal writers thought about contract law. It also helped to give the law an appearance of coherence which it never entirely possessed. Other legal historians have placed too much weight on these changes. Rather than a revolution in the law of contract, the nineteenth century is better interpreted as an evolution on the law of an earlier period. There was certainly not the kind of major shift that writers like Horwitz and Atiyah claimed occurred.

Fifty years ago, in his Hamlyn Lecture *Judge and Jurist in the Reign of Victoria*, Cecil Fifoot argued that ‘Law, no more, than any other human creation, is the automatic result of natural forces or intellectual movements. It is made by men . . . English lawyers of all men, should believe in the power of the great judge.’⁴⁵ History which recognises the contribution of individuals, and even legal biography, may just be starting to come back into favour after many years where it was unpopular.⁴⁶ Individuals can and do have a central role to play in legal development. This argument should not be pressed too hard however. Lord Mansfield was not always the reformer of popular perception. Judges, like everyone else, could be inconsistent. They often had to deal with heavy case-loads over relatively short periods of time which left little time for reflection. The emphasis on ‘big’ figures like Lord Mansfield should not mean that the role of others be overlooked. Many judges played significant parts in shaping contract doctrine. Those who resisted change are often overlooked, but they are just as important as those who urged reform.

Developments in the law of contract between 1670 and 1870 do not conform to any artificial model. There is no convincing evidence that

⁴⁵ (London: Sweet & Maxwell, 1959), p. 12.

⁴⁶ R. Gwynedd Parry, ‘Is Legal Biography Really Legal Scholarship?’ (2010) 30 *Legal Studies* 208.

judges were more or less inclined towards the interests of the individual or commercial parties in 1670 or 1870. In truth, at various times and in various ways, judges came to decisions which both served the interests of merchants and offered protection from exploitation. The idea that the law of contract was equitable before 1770 is particularly unconvincing. The law of contract did evolve. As the jury declined, legal doctrine became much more prominent. The chapters that follow will attempt to address such fundamental questions about cause and consequence. What occurred cannot be written off as a series of accidents,⁴⁷ but some of the developments were certainly the result of a serendipitous combination of factors and forces coming together at the same moment. This book explores some of them.

⁴⁷ The role of ‘accidents’, and more broadly cause, in history is controversial, E.H. Carr, *What Is History?*, 2nd edn (London: Penguin, 1988), pp. 98–108; Richard Evans, *In Defence of History* (London: Granta, 1997), pp. 129–60.