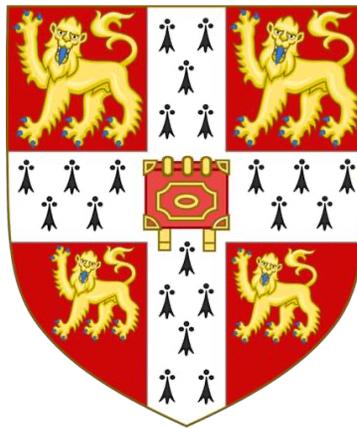


Contract Law in the Age of Complexity



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Declaration

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the preface and specified in the text. It is not substantially the same as any work that has already been submitted, or is being concurrently submitted, for any degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

Abstract

This thesis provides a new account of the development of contract law between 1750 and 1914. Using a combination of doctrinal and quantitative methods, it shows how a vast quantity of law was produced in the late 18th and early 19th century. This wave of law deeply affected the legal system: the procedures, legal methods, reporting, weight and nature of precedent, court hierarchy, and underlying philosophy were all radically transformed. It began a new period termed ‘the Age of Complexity’ in which the total volume of cases far outstripped the cognitive capacities of the 18th century legal profession. In this new world, authority became formal, reporting made ultra-selective, and legal literature systematised. The thesis adopts contract law as the central case study, arguing its development can be understood in the context of the 18-19th century generation of law. It provides three key motivators behind the creation of contract law: the logistical burden of more law on a small judicial cohort; the constitutional position of the courts relative to an increasingly assertive Parliament; and the influence of liberal economic ideas. Altogether, the thesis shows the causes, pathways, and effects of increasing legal complexity in the 18th, 19th, and 20th centuries.

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Introduction

From the 17th century to the early 20th English jurists revered contract law as the perfect legal subject.¹ Its quasi-mathematical structure was seen as self-evident and applicable to all peoples, lands, and ages.² No fundamental axiom was as natural as private agreement, no set of doctrinal derivations as universal. These geometrically perfect rules greased the slave markets of Ancient Rome and the sprawling factories of Victorian England, animated the national spirit of 19th century nations and kingdoms, and at the turn of the century ordered the manic industrialisations of Meiji Japan and Soviet Russia. The law of bargains came as close to being ‘solved’ as any legal doctrine in history. From these dizzy heights, not only has modern contract law lost its crown as the ‘Queen of Legal Sciences’, but the hope any doctrinal subject could claim such a crown has vanished. I attempt several things in this thesis. I explain the process which makes a legal concept, and network of concepts, appear ‘objective’ or ‘geometric’; I explore the evolution of contract law in England from 1750-1914 under the turbulent conditions of the industrial revolution; and I trace the processes inherent in that evolution which served to eventually undermine and destroy the notion of legal truth itself. Underneath all three trends is a common thread: the production of legal complexity and its management.

My hypothesis is as follows: the translation of social to legal complexity is mediated by legal procedures, which in turn develop to meet the practical needs of litigants. Up until the late 18th century, the English legal system adopted procedures which deliberately limited legal complexity. The majority of difficult questions were conveniently diverted to a body incapable of making law: the jury. The industrial revolution forced the English judiciary to alter their 18th century strategies as commercial litigants increasingly went to law. The ensuing reforms triggered a positive feedback loop: increasing societal complexity led to new legal procedures to accommodate longer and more intricate cases, leading in turn to higher legal complexity and the need, yet again, for new procedures. By 1880, this cycle had run its course, leaving in its wake a radically different system to that in 1680, one capable of serving a far more complex, technologically-sophisticated economy. It is this system – remarkably unchanged over the centuries – which governs us today.

Contract law was forged in the process and offers the ideal case-study in the production and management of legal complexity. The vast, unplanned generation of law following procedural reform in the late 18th

¹ (JW Smith 1834) iii-v; (Powell 1790) v-vi; (Leake 1861); 14/07/2025 10:02:0014/07/2025 10:02:00see (Ibbetson 2001), 220-1; (Gordley 1993), 161-2
² (Addison 1847), iv-v; (Brougham 1838), 477-8

century was mostly commercial: contract law was said to – and did, in fact – make up ‘half our law.’³ The relatively free organisation and mastery of this material, using new ‘scientific methods’ imported from the continent, gave the impression of conceptual purity to the treatise writer.⁴ By the mid-19th century, however, not only had the majority of the structure been worked out, but the sources of law had become formally binding and increasingly statutory. It no longer made sense to regard contract law as a conceptually pure artefact when it could be so easily warped, modified, and re-shaped by fallible law-makers. The vast growth of legal complexity, triggering new modes of law reporting, law-creation, court hierarchy, procedure, evidence, academic literature, and legal-precedent, had tipped the balance from ‘reason’ to ‘authority.’⁵

In telling this story, I introduce several innovations. The most important is the foregrounding of *logistics* as a central subject and causal factor in legal history. I use it as a novel explanation for many of the procedural changes from 1780-1870. To the extent procedure also shapes doctrine, logistics partially explains the eventual shape of English contract law. The contractual ‘general part’ was thin, abstracting away the content of agreements and the motives, identities, and social position of the parties. Instead, the focus was on the free agreement of ‘individuals’: how it is made, how it can be vitiated, and how it is to be interpreted. I attribute this to a combination of factors: a distinctly liberal 19th century political economy, locked-in early by judges and treatise writers; perceptions about judicial law-making in the shadow of an increasingly assertive, well-informed Parliament; and concerns over the unmanageable production of legal doctrine outstripping the capacity of a judicial cohort smaller, possibly, than any other industrialising nation in Europe.⁶ In short: the English judiciary did not want to plan the economy, nor did they believe they were logistically or constitutionally competent to do so.

The structure of the thesis proceeds from the general to the specific:

1. **Chapter 1** outlines the methodology and models used. It explores what it means to ‘count laws’, and the relation of legal quantity to complexity; develops a model behind the production of law called the ‘*Feedback Model*’; and provides an outline of how contract law operates within it.

³ (Jelf 1897), 19

⁴ (Milsom, 1981), 11-12

⁵ (Ibbetson 2015)

⁶ *Judicial Statistics 1894*, 16; many thanks to Zeynep Caglar for sharing her prosopography of the 19th German and English judicial cohort.

2. **Chapter 2** explores the quantitative changes in the English legal system, tracing the sharp rise in case reports from 1760-1850 and the precipitous fall from 1850 to 1870. It then explains these changes using a combination of procedural reform, formalised precedent, legal literature, and economic change.
3. **Chapter 3** connects these institutional and statistical trends to common law academic contract literature. In particular, it explores the growth of the ‘legal treatise’, contrasting the pre-growth legal manuals of the 18th century to the post-growth scientific treatises of the 19th. It outlines the creation of the ‘general part’, the rules said to apply to all contracts regardless of content, by treatise writers and the role of liberal economic theory.
4. **Chapter 4** explores the doctrinal structure of the general part in detail. It takes a ‘lexi-generative’ approach, contrasting different ways that legal rules could be produced under the feedback model. The three main pathways studied are: status rules; regulatory rules; and default rules. In Chapter 4, I explore the status and regulatory rules of contract as species of unavoidable ‘mandatory rules.’
5. **Chapter 5** continues the exploration of the general part, turning to the complex ‘default rules’ of contract law. These rules are too voluminous to consider fully, so I use four case studies in the law of formation; interpretation; performance, and damages. Overall, I argue the judiciary actively sought to limit the generation of law, and that this project was closely related to both legal logistics and a liberal political economy.
6. **Chapter 6** concludes with a survey of the specific contracts from 1750-1914, exploring, as with the previous chapters, the factors behind their production. It provides several explanations as to why some economic sectors produced specific contracts whilst others did not: (1) the involvement of government regulation; (2) the role of law in assisting private coding strategies; and (3) connections to the wider environment of business planning and dispute resolution.

I conclude with a survey of the limitations of my project. Above all, the numerous prospective questions I could not answer: is the growth of legal complexity inevitable in modern society? Can we create new methods for its management, as we did in the 19th century? Finally: what kind of radical changes might these methods bring to the power, politics, and logistics of the legal system, and what kind of trade-offs

are we willing to make? Although unsuitable for a historical thesis, I hope some of the following will provide insights into how this process unfurled, and may yet unfurl, in our modern legal order.

Chapter 1: How Much Law?

If an 18th century lawyer was transported to the 20th he would be immediately pleased by the continuity of the legal system. All his old friends - the King's Bench, House of Lords, even the 'County Courts' – have survived the centuries. Yet the moment he begins looking deeper, at the law itself and the process of legal reasoning, he will enter a strange new world. Before being hit by the alien, industrial content, or the new formalised legal culture, he will be humbled by a legal system far larger and complex than his own. In 1776 there were around 150 volumes of reports covering the whole of English legal history; a mere century later there were over ten times that number.⁷ His homely, local legal order is gone, replaced with a cavernous cathedral of law, unrecognisably denser, more technical, and more specialised. Although our bamboozled time-travelling lawyer makes for an intuitive example, what does it actually mean to say there is 'more law' in the 20th century than the 18th? How do we determine 'how much law' there is in the first place? What does the amount of law have to do with its complexity, and what causes their mutual increase? I will answer these questions and more in the following three sections.

Part 1: Counting Laws as if they were Beans

The qualities of 'legal quantity' and 'complexity' are conceptually distinct although have close connections. It is easier to explain complexity before observing how it is related to quantity. The subject of complexity forms its own jargon-laden academic discipline⁸ and I have avoided tiring the reader with a long theoretical discussion. Instead I use the term 'complexity' in a straightforward manner: the phenomenon whereby individual elements in a system interrelate to produce a network of relationships larger than its constituent parts.⁹ On this account, a 3000-page phone book is not complex but a 100-page rulebook for a boardgame certainly is. This notion of 'interrelation' helps fill out the older, canonical definition of 'legal complexity' created by Schuck:

"I define a legal system as complex to the extent that its rules, processes, institutions, and supporting culture possess four features: density, technicality, differentiation, and indeterminacy or uncertainty."¹⁰

⁷ (Fox 1913), 7. Fox, using Wallace's figures - (Wallace 1855), 24 – suggested there were around 150 volumes in 1776; for 1895, he used Pollock's estimate of 1825.

⁸ For the sub-field of *legal complexity*, see (Schuck 1992); (Webb 2014); (Murray, Webb, and Wheatley 2018).

⁹ (Ruhl and Katz 2015), 25-6, citing (Miller and Page 2009), 27. (Ruhl 2008), 892.

¹⁰ Schuck, *supra* (n8), 3.

The basic gist of Schuck's approach is that complexity comes from two places. First, more laws covering more scenarios (density), which are more finely drawn and use more precise definitions (technicality). Second, law coming from a greater number of law-making sources, each with its own special rules (institutional differentiation).¹¹ Under Schuck's definition, complexity is basically any factor which increases a lawyer's cognitive load. We can develop his criteria by noting that it is not these factors *per se* which increase complexity but the fact they allow for more interconnections between elements. To see this, consider a simple thought experiment:

The list systems: Legal System **A** has a single statute with four distinct provisions governing different scenarios. Legal System **B** also has a single statute, but has eight, rather than four, provisions. Is it right to say that Legal System **B** is more complex?

Whilst Legal System **B** is arguably 'more complex', this seems to miss the *non-linear* aspect of complexity. If System **B** increased its statute's provisions to 16, it would feel wrong to say it was merely twice as complex. This becomes clear when we analyse the scenario in greater detail. Assume that in both systems the provisions of the statutes are interrelated – such that each provision can interact with one or more other provisions. For example, in Legal System **A**, provision A1 can interact with provision A2, or provision A1 with provision A2 and A3 &c. Here, System **A** would have 11 possible provision-interactions, whereas System **B** would have 247 (or 65519 with 16 provisions). And that is assuming there is only one type of interconnection! This non-linear dynamic is at the heart of the term "greater complexity."

From the list systems thought experiment, it is clear that increasing the total number of laws (or 'volume') will increase complexity, so long as there are interrelations between them. So how much law was there in 1750? How about 1914? It is obviously impossible to count laws like they were coins, beans, or litres of water. Law is a slippery, abstract entity which requires more subtle methods. One literal-minded approach is to count the total amount of written text said to be legal. A variety of metrics are available to measure: total statutes and reports; statutory provisions and cases; pages; words; even letters.¹² An advantage of text-counting is that it is easy to compute and is fairly intuitive. The 20th century had more law than the 18th because the total volume of text in cases and statutes was larger. The problem here is that not all law is contained within written text, nor does the same amount of text always contain the same amount of law. Consider legal rules understood according to oral consensus, and vast, lengthy judgments which 'waffle

¹¹ (Yalnazov 2018) 13, 36 described as 'hierarchical complexity.'

¹² Cf Ruhl and Katz, *supra* (n9), for a 'text-counting' approach.

on’ compared to more dense, directly reasoned alternatives.¹³ To answer ‘how much law’ requires a more sophisticated account.

A better approach is to break ‘the law’ into two connected and quantifiable forms. The first is to count the number of different legal statuses, and the number of different conditions required for each status to apply. For example, a legal system which has hundreds of different crimes has ‘more law’ than one which only has three or four. Similarly, although two legal systems might have the same number of types of property, one may contain more conditions for ascertaining what constitutes property. With this definition, ‘counting laws’ becomes a somewhat fraught exercise. Legal concepts and their conditions are typically expressed in ‘legal norms’ – that is, rules and standards – which are often implicit across large bodies of legal text. Determining the conditions for a type of contractual breach, for example, may require several cases applied analogically. In addition to this ‘specification’ problem, there is another difficulty. More statuses and more conditions do not necessarily mean there is more law. Consider another thought experiment:

The vague system: a legal system with a large menu of norms can remain quite simple. Imagine a legal system with a hundred thousand distinct legal rules, but each is more indeterminate than the last. In such a system, any rule could be acceptably applied to any fact pattern. Determining a status of a set of facts would be straightforward because any fact pattern could have any array of classifications.

Although inelegant, the system would not contain a large amount of law. Rather, very little, to the extent it would resemble a system with a single norm: “the judge must do what she believes is best.” What is the missing ingredient? Here, we begin to gesture towards the second dimension of ‘countable law.’ Law can also be conceptualised as a way of reducing uncertainty. Take an example which will be common throughout this thesis: we look at various agreements and ask ‘are they enforceable in a court?’ The more possible agreements for which we can give an answer to this question, the greater the reduction in legal uncertainty. Here law becomes a species of information. “More law” is another way of saying that the legal system has clear answers for more sets of facts. Thus, the more ambitious the legal system – the more space it regulates with greater certainty – the more law there is. As with the first form, however, this is not sufficient to measure ‘more or less’ law. Consider one last thought experiment:

The single-norm system: a legal system with very certain norms may nonetheless remain quite simple. Imagine a legal system with a single norm: “all human activity is illegal.”

¹³ nb Schuck, *supra* (n8) 26-7, a possibility captured pithily in the *RC Practice and Proceedings, First Report*, (1829), 72-47.

This system would express what is and is not illegal to many facts with great certainty but we would hardly call it complex. The same is true of a system with an immense list of particularistic, highly certain norms which nonetheless do not interact with one another. Taking these thought experiments together, it seems for a legal system to have ‘more law’ it must (1) produce a large array of legal concepts and conditions for their application; and (2) those conditions must be certain enough to clearly indicate the status of different facts. Further, for it to be complex, it must also involve (3), the statuses and conditions must interact with one another. When all three are present, the legal system works like an enormous machine: it draws many distinctions with great precision over wide expanses of varied facts.

What, then, do these forms of law have to do with the available and seductively countable legal text? Neither form needs to be expressed as written text, and there is no necessary ratio between the two. Nonetheless, there are common patterns. In modern legal systems the law is overwhelmingly expressed as text, to the extent legal practice is described as a fundamentally textual exercise. Not only is this proportion huge, but it is also increasing. From the 16th century onwards, accelerating in the 18th, the role of oral consensus has been steadily reduced in the place of information-rich formal text. This slow process is known as ‘textualization’ and is a precondition for the 18th century explosion in the total amount of law. Methodologically, it also helps us assess how representative mere text-counting is for estimating ‘how much law there is.’ *Textualization* is therefore worth considering in some detail, especially as it will become relevant in the next chapter. Defined carefully, the textualization of law relates to how much law is constituted by written texts. We can contrast two different ways law can be constituted which involve written text (or two different ‘social ontologies’ of law).¹⁴ The first is where a community’s **social consensus** anchors the legal rules in the system.¹⁵ Baker’s description of ‘common learning’ is a straightforward example of this kind of social ontology:

“If a proposition or maxim derived from common learning was right, it was not because Bereford or Gascoigne or Littleton had affirmed it, though that might tip the balance if a point was unclear. It was because the proposition was commonly felt to be right—because no one who had taken the course could think otherwise.”¹⁶

This kind of legal order continues to use texts – for example, as an *aide memoire*¹⁷ - to help stabilise consensus. Nonetheless, this text is not the law: it was the common learning of the community which

¹⁴ The following ontology is that of (Epstein 2015)

¹⁵ *ibid*

¹⁶ (Baker 2001), 76 another example is Simpson’s description of the 17th and 18th century ‘customary’ legal system in England (Simpson 1987), 359-383

¹⁷ (Lobban 1991), 59; (Lewis 1930), 422 suggesting citations to precedents were usually ‘appeals to memory.’

constituted the legal norms.¹⁸ It is clearly possible for a communally-fixed legal norm to be highly certain, this is testified by the early, intricate system of feudal estates. Nonetheless, informational format *is* indispensable for geographical and temporal accessibility. Information held in common learning, and other kinds of social consensus, is prone to drift over time because it is uncodified.¹⁹ Further, it is difficult to communicate over long distances because the only way to reliably verify a legal rule is to speak to a member of the community.

The second ontology, in contrast, is where **legal texts** play the primary role in anchoring legal rules. This obtains in legal systems with formally authoritative legal texts. To give a basic example, statutes passed by the King in Parliament were binding law in the 19th century regardless of what anyone thought about them – or, indeed, if anyone even knew about them.²⁰ They were law solely because the correct procedure had been used to produce them,²¹ and what was commonly felt about them did not change this. A clear example is in the mid-19th century concern over unpublished legal sources becoming universally binding. Take the unpublished and obscure case manuscript:

“How pleasant it must be for men of fortune to reflect that the tenure of their estates may depend on the chance turning up of the worm-eaten commonplace book of some fourth-rate old lawyer, whose statement of a point of law no one, perhaps, would have relied on for a moment in his own day, but which becomes most important and trustworthy by the time it is a hundred years old!”²²

In addition to new concerns over verification and distribution, textualisation brought important changes to accessibility. Text, provided it can be mechanically reproduced and a single copy is designated as authoritative, is immune to textual drift. As a result, formal legal texts can be communicated across large distances with no information loss in its contents: anyone who received the text, regardless of their knowledge of some communal consensus, knew they had access to a legally binding source.²³

There is a danger of drifting into a kind of clockwork model of law here. With textualization you can know, when you receive a text, that the words printed are a ‘binding legal source.’ You cannot be sure, however, how others will interpret the contents of that source.²⁴ Textualisation is merely about the legal

¹⁸ (Lewis 1931) 422.

¹⁹ On textual drift, (Eisenstein 1980)

²⁰ Many thanks to Dan Ward for sharing his unpublished article on this topic, ‘Rule of Recognition and Ordinary Law: Attitude and Information’ (2023).

²¹ (Cornish, Lobban, and Smith 2010), 41-2. The incorporation of these ‘secondary rules’, supplemented by the Interpretation Acts, marks the ‘closure’ of the legal system.

²² (Anon 1848a), 236.

²³ See (Vismann 2008), 3, 7, 8.

²⁴ E.g. (Sacco 1991), 22.

status of writing, it tells us little about how that text is received. For the latter, a separate process called *autonomisation*²⁵ is key. An interpretation will always be a combination of the information contained in the communication itself (the ‘text’) and other information, such as contextual cues or the interpreter’s pre-existing knowledge. Autonomisation reduces how much context outside the text is required to correctly understand a message.²⁶ The paradigmatic example of ‘autonomous language’ is a bomb-disposal expert giving verbal instructions to someone over a one-way radio on how to defuse a bomb. The expert knows virtually nothing about the recipient, and the recipient knows nothing about the expert; nonetheless, it is possible for the latter to communicate via ‘autonomous’ instructions like ‘cut the red wire marked 3A-12.’²⁷ In contrast, non-autonomous language requires context to understand: for example, a statement like ‘do what you did last time, but slower, like the boss’; or, to give a legal example, ‘we all know that is not the law, and I need only refer you to our previous discussions on the topic.’

The 19th century saw both textualisation and autonomisation. The source of law, as we will find in Chapter 2, became increasingly formal and detached from oral consensus. Technical ‘meta-rules’ were established governing what was, and was not, a correct source of law. The 19th century legal system also incorporated more autonomous language into these formal texts.²⁸ Much of this language was drawn from technical fields, like medicine,²⁹ chemistry,³⁰ economics,³¹ geography,³² veterinary and human medicine,³³ psychiatry,³⁴ and social systems, such as state bureaucracy,³⁵ business and private organisational practice, professional expertise and the market.³⁶ In return, these processes radically altered the foundations of the legal system. First, they vastly increased the total amount of information which could be stored. Very quickly, the bulk of text exceeded that which any single person, or even group of persons, could memorise. Gone were the days of the judge retaining, like an old law-speaker, the complete legal corpus in his head.³⁷ The new lawyer didn’t know the law, but knew where to find it.³⁸ Second, they ensured less acculturation was required to understand legal texts, in turn allowing for a wider, more distributed, and

²⁵ (Kay 1977)

²⁶ (D’Amato 1893), 4.

²⁷ Example from Kay, *supra* (n25), nb (Haworth 2015), 535

²⁸ (Golan 1999)

²⁹ (Golan 1998); (Ibbetson and Bell 2012), 104.

³⁰ (Fullmer 1980); (Burney 1999)

³¹ See Chapter 4.2.1b. nb (Winfield 1928), 94, noting the decisions were often “museums of fossil economic theories

³² (Pontin 2012), (Molle 2009)

³³ Chapter 6.3.2c

³⁴ Chapter 4.1.1B

³⁵ A simple example is the ‘best evidence’ for the age of an infant: in the 18th century, the test for ‘full age’ was according to ‘common speech’, Bacon, *A New Abridgment*, Vol 3 118, (b) Lit Sect 104, 259; conversely, in the 19th century, the register of baptism was taken as the ‘best evidence’ *Borthwick v Carruthers* (1786) 1 T.R. 648.

³⁶ Chapter 5.3.4

³⁷ (Twiss 1844), 464. Lord Eldon was said to be ‘in person the main depository of the law of Lord Thurlow’s Age’ (c. 1778-1792); nb (Sugarman 1987), 17 citing the Royal Property Commission statement that at most six persons understood the laws of real property.

³⁸ (Jelf 1900)

less homogenous community.³⁹ Third, textualization altered the balance of power within the legal system. It created new spaces of discretion and power for those editing, organising, and dispersing this increasingly unmanageable mass.⁴⁰ As we will find in the next chapter, these concerns triggered a revolution in legal method, forcing lawyers to devise methods for validating and tracking these cases.

After this interlude, you may be tempted to assume, once again, that ‘text = law.’ It is true that the growing volume of legal statuses and conditions, and their precision, was a direct result of textualization. It is also true that this improves the reliability of counting law *qua* text. Nonetheless, we must not fall into the trap of thinking that this new formal, autonomised text *is* the law. Doing so elides two important features of law. Take the bygone, but nonetheless useful, notion of ‘legal elegance.’⁴¹ Elegant legal writing is that which expresses the legal statuses and conditions precisely over the relevant facts in the least text possible. Such a notion of elegance – or more mundane ‘efficiency’⁴² – is only possible if there is a distinction between text and the legal knowledge it is meant to express. We will consider some of the ingenious and elegant Victorian methods designed to reduce the text of the law in Chapter 3. Here, it is worth looking at one as an example in detail: legal organisation.⁴³ This process involves grouping similar rules together under abstract categories. For instance, collecting numerous rules around agreements and abstracting out a common feature - such as ‘contract’ or ‘contractual formation’ to produce a reified category:

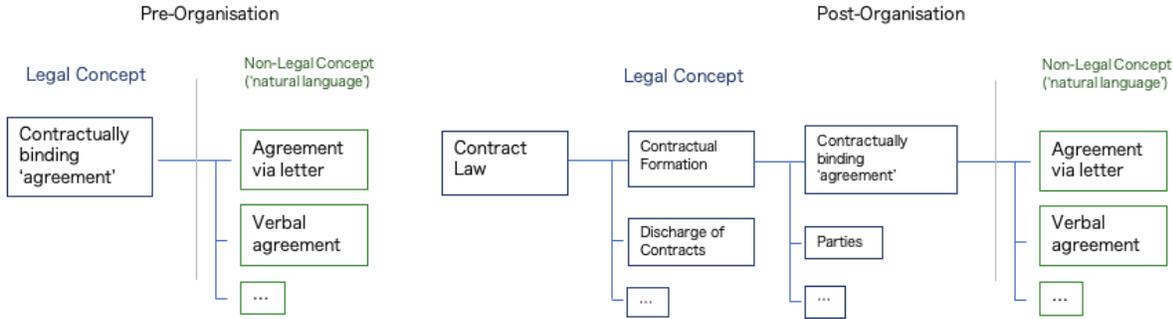


Fig 1a. Organisational Method of Legal Science

³⁹ For a list of factors producing a breakdown in oral culture, see Simpson, *supra* (n16), 380-1; (Heydon 2018), 94-6 lists several more, including increases in judicial numbers, more substantive law produced in the universities, diversity on the bench, and the need to restrain individualistic judges.
⁴⁰ (Berman 2009), the use of text renders its intended meaning more fragile as the author has less control over their distributed writing. This introduces new requirements in the system, Vismann, *supra* (n23), discussing Transmission, Storage, Protocol, and Cancellation of files.
⁴¹ The classic discussion is ‘Elegance in Law’ in (Stein 2003)
⁴² E.g. (Chieveley 1999) 171 and (Dicey 1883), 20. This subtractive work is hidden in the inherent formulation of the rule, much like Arabic numerals, giving the appearance of simplicity - see (Branwen 2016), (Law 1992), 385. This may be what produces the sensation of mathematical beauty, Stein, *ibid* 12-14, and was a central goal of Francis Bacon, (Manzo 2014), 2-3.
⁴³ For an excellent analysis of categorisation, (Bowker and Star 2000)

As explored in detail below, each of the new, more general categories conveys features about its sub-categories, thus usefully compressing information. One unexpected development of the 19th century is the usefulness of continental methods of legal science – in turn, adopted from the ancient Romans – to manage the local English problem of ‘too many case reports.’ These changes undermine the use of mere ‘text volume’ as a measure of how much law there was. A mere 500-page legal treatise with dense subcategories and rigorous definitions can contain far more ‘law’ than tenfold those pages in a bulk of routine case reports.

The second feature obscured by ‘text = law’ is the fluidity of law. The precision of legal rules is constantly fluctuating. The certainty with which a rule can be applied to a concept depends on the users of that concept. Collective intuitions become destabilised, expert knowledge alters, and new disputes always emerge.⁴⁴ Rather than a series of static boxes, legal concepts should be treated as culturally dependent, fluctuating, and overlapping, capable of both large areas of certainty and persistent fuzziness.⁴⁵ Taking this fluidity into account suggests a counterintuitive insight: the volume of law can change, sometimes radically, without changes to the legal texts. Counting laws as if they were beans misses the fact that what you are counting is a constantly moving target. In addition, it ignores the fact much of law exists ‘between the dots’ in the use of analogy and interconnections between sources. A quintessential legal technique is the drawing of comparisons between like cases, premised on the desirability that the legal system exhibit internal coherence.⁴⁶ This drive makes ‘bean-counting’ impossible: a legal text is never alone, but fitted into a much wider web of other legal rules.

The ‘web of law’ is essential for understanding how expansive the law is. It enables argumentative techniques capable of increasing precision, such as analogy to ‘similar’ cases or statutes;⁴⁷ the application of legal principles extracted from the run of past sources;⁴⁸ and fitting new sources into more abstract general frameworks⁴⁹ and ‘doctrinal institutions.’⁵⁰ Equally, it produces techniques for maintaining openness and discretion, often by distorting or distancing the facts of supposedly ‘similar cases.’ Many 19th century treatise writers took advantage of such tactics, ‘massaging’ judgments in cases to support legal propositions their authors likely never intended. The addition of a single case can therefore have

⁴⁴ Referred to as ‘precedent decay’, or ‘precedent half-life.’ D’Amato, *supra* (n26), 10; (Landes and Posner 1976); (Dari-Mattiacci and Deffains 2007), 629ff.

⁴⁵ Undermining, for instance, the dream of “calculating with our concepts [begriff]”, expressed by Von Savigny. (Savigny 1831), 45.

⁴⁶ For the relation of grammarian debates and deeper legal philosophy, see (Stein 1972); nb, (Balganesh and Zhang 2021); and Sacco *supra* (n24) for the ‘internal view.’

⁴⁷ On the techniques of manipulating precedent, (Levi 1948), 501-7, 519; (K. N. Llewellyn 1960), 73-6 on ‘cutting down’ and ‘building up’ precedents; cf *Judicial Statistics* 1856, 3 and the view of Bramwell B.

⁴⁸ For consideration of the nature of ‘legal principles’: (Waddams 2011); (Shapiro 2007); (Gardner 2012)

⁴⁹ Nb the concept of ‘paradigms’ in (Ibbetson 2005), 874

⁵⁰ Ibbetson and Bell *supra* (n29), 5

quite an unpredictable effect, being shaped by nearby cases and shaping them. New cases must always be taken in context: whilst the text of individual precedents, like statutes, seem to have become more precise over the 19th century, legal sources always remained capable of diverse readings. A new precedent, or piece of legislation enjoyed a period of flux before becoming firmly pinned down by subsequent interpretations.⁵¹ The extent of freedom was variable and depended both on the available legal techniques and the number and ‘fixedness’ of the surrounding points. As we will find in Chapter 4, a jurist in the late-19th century attempting a new innovation was in a very different position to one in the late-18th.

Does this mean it is impossible to count laws? Certainly not. It remains possible to take the textual measure as an imperfect proxy for the total amount of law. Throughout Chapter 2 I will allude to such numerical measures: the amount of litigation; the total number of case reports; the growing number of statutes; and the pages within each report. It is essential to remember, however, that this is merely a proxy. The true figure – currently empirically impenetrable – will vary moment to moment depending both on legal culture and on the particular lawyers you were to ask. Where this crude numerical metric ends, my narrative history will begin, contextualising the text within its social home.

Part 2: Law as a *Sui Generis* Creature

We now have a sketch of how to estimate ‘how much law’ there is in a legal system. But a gauge which only goes up and down is of little interest. What we care about are the causes of things not merely their characteristic symptoms. Unsurprisingly, the abstract nature of law renders its origins and causes vague. Law does not grow independently of human beings like a plant nor is it constructed deliberately like a machine. It lacks the hyper-legibility of a scientifically-planned engine and the precise deductions of mathematics. The production of law is a collective endeavour, representing the indissoluble product of numerous clients, lawyers, judges, interest groups, and legislators, both past and present. In the place of imprecise metaphor, let us instead turn to a model of legal change and creation. Currently, the most sophisticated is the ‘feedback model’ developed by Ibbetson and Bell in their 2019 *European Tort Law Project*. The model is multifactorial with five key components: legal doctrine (‘law in the books’); legal outcomes; legal institutions; legal culture; and the environment.⁵²

⁵¹ Baker, *supra* (n16), 7-9

⁵² Ibbetson and Bell *supra* (n29), 45.

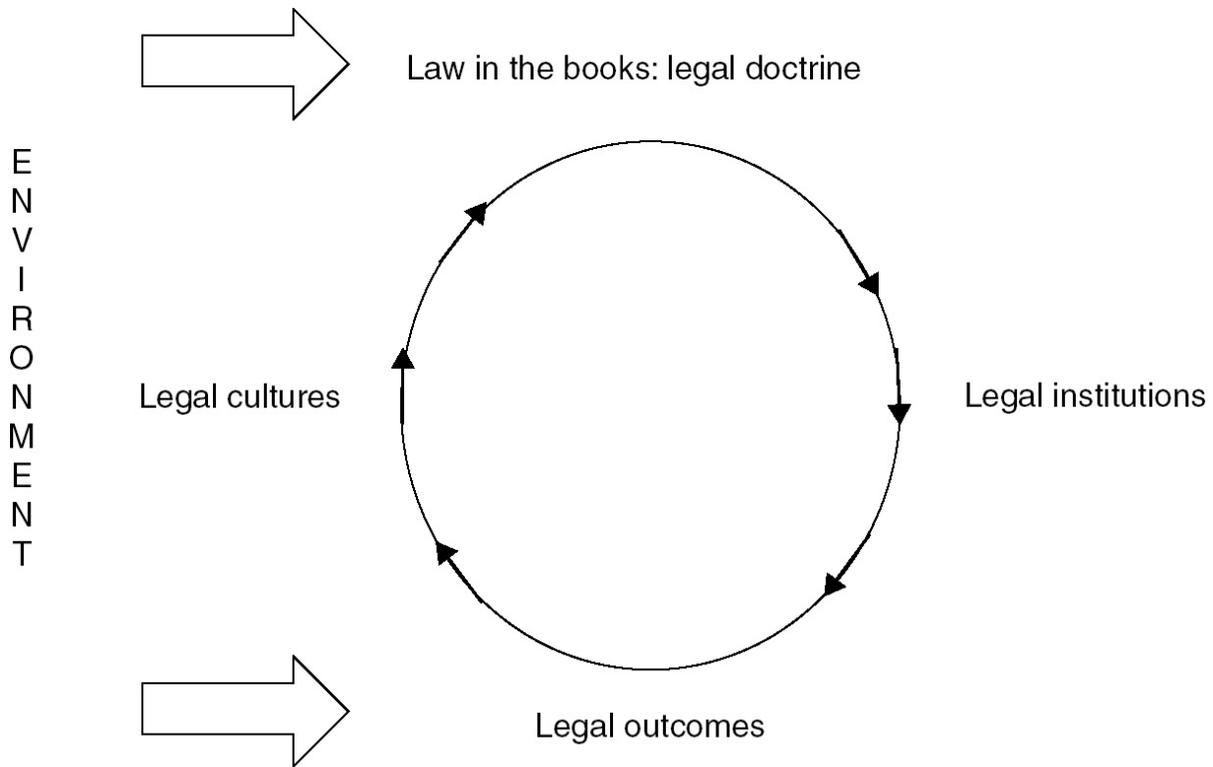


Fig 1b. The Feedback Model

Each of these factors is complex. Three steps are necessary to understand its full operation. First, I compare the different dynamics of law *creation* and law *change*. Are there different forces at play when we consider how much law there is versus how often it changes? Second, I consider each factor, or ‘component’ in detail. Although they appear reasonably straightforward, there are subtle differences in their interpretation. Third, I will re-integrate them into a single system, with an intuitive dynamic of *tension, pressure* and *change*.

2.1 How Hard Is It To Change the Law?

Ibbetson and Bell’s feedback model was initially designed to track a general concept of ‘legal development.’ Their main focus was on legal change but, as noted above, I am interested in both *de novo* law-making and continuous legal change. The most sensible way to discuss these concepts is to place them on a continuum based on the web of law analogy above:

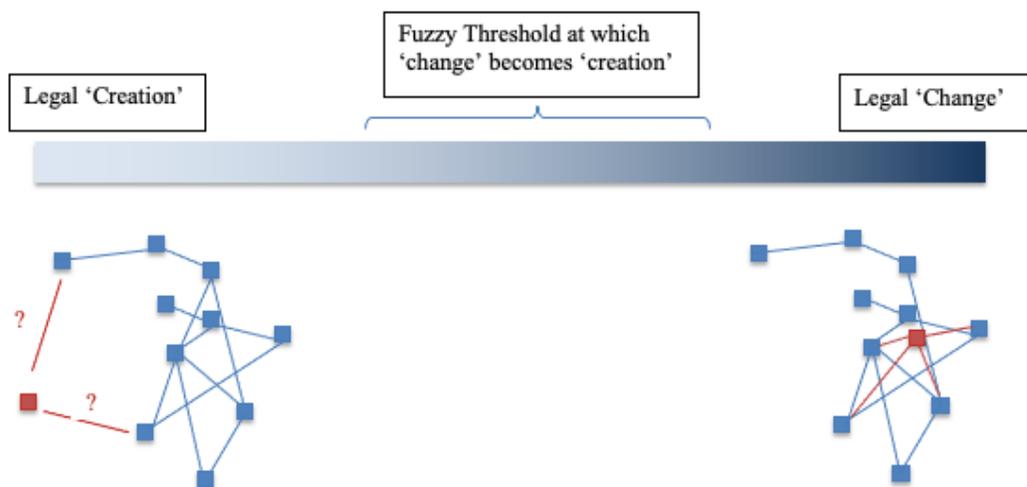


Fig 2. *Web of the Law*

According to this diagram, ‘Legal creation’ refers to legal rules governing situations which have an unclear status and are further away from space governed by other rules. It describes the expansion of law to cover a relatively new scenario, behaviour, or technology, or one which, despite being familiar, is in a state of legal uncertainty. Legal change, on the other hand, involves altering the legal status of facts which we could already assign a status with relative confidence. Perhaps the facts have been explicitly regulated before, or maybe, whilst technically novel, they have a clear legal answer based on the nearby, existing rules.

If the two concepts are on a continuum, why bother distinguishing them? The key practical difference lies in their varying path-dependency qualities. Changing the law is frequently more difficult than creating a new law: an old rule is often surrounded by other rules producing ‘intra-systemic analogy’, and thus discretion is constrained by the need to maintain consistency. Further, older rules can become bedded-in socially: groups use it for various purposes, producing natural interest groups defending or opposing it. Law ‘creation’ is therefore treated as an important future-constraining act and one of the most important acts of the legislator or judge. Many of the issues coming before judges in the early 19th century were not governed by existing precedents and, for that reason, were debated carefully.⁵³ As with all human creations, law-making can work in an unpredictable way. A standard common law strategy for extending the law was to use existing rules as a vehicle of law-making by analogy. In some cases, however, the structure of existing law forced judges to expand the law, even if they would have preferred not to.

⁵³ In the context of commercial law, (Oldham 2004), (Ibbetson 2024)

Further, and most subtly, *not* creating law remains a contestable legal position. There are always vast swathes of society law-makers simply have not considered regulating, and those that they never would consider: new technologies; the intimate space of the family home; uncontrollable aspects of the natural world. But as the legal web increases in scope, these parts of society become narrower and more temporary. It was not through the non-regulation of bargains that judges made a decision about freedom of contract, but through the selective enforcement of some agreements and not others. When legal regulation gets more ambitious and expansive, so too does the shadow of what could be, but is not yet, regulated.

2.2 Legal Components

Unlike nature, law does not move independently from its human master. What are the social forces which cause law to change, develop, grow, and explode? The feedback model provides an answer using a mixture of ‘legal components.’ I have broken these up into three parts: (a) the legal parts, covering ‘the law’; (b) the framework of legal institutions, responsible for sustaining and reproducing the law; and (c) ‘everything else’, covering the surrounding social environment of the legal system. Together they produce a complex interplay of social pressure and legal inertia, the outcome of which, in some confounding cases, is a result no-one involved would have chosen freely.

2.2a The Legal Parts: Doctrine, Culture, and Outcomes

In our model, the key variable is ‘the law’ – it is a study of *legal* development after all. Although tempting, it is not possible to study ‘the law’ as a monolithic entity distilled from the black-letter sources. Instead, it is best approached piecemeal, as: legal doctrine, legal culture and legal outcomes. We can begin with the last as it is the easiest to explain: ‘legal outcomes’ are a non-legal prediction of ‘what happens in court.’ When Mr. Hadley and Mr. Baxendale get into a dispute, who wins and what remedy is the winner likely to get? This prediction typically ignores how the winner got to their victory, reflecting the practical interest of most litigants. They want to know the result rather than the circuitous legal route leading to it. We can contrast this ‘outcome’ focus to the ‘process’ oriented nature of legal doctrine and legal culture. These govern the process of justification, reasoning, and argumentation leading to the legal outcome, and are often what lawyers and jurists care most about. How doctrine and culture interrelate is complex. It is important to properly define ‘legal culture’, for there are at least two kinds:

(1) First, *doctrinal culture*. This is any legal doctrine which exists in the form of oral, tacit, and behavioural consensus; it is all the legal information *not* contained in written text.⁵⁴ I consider this in detail in parts 2.2a(ii).

(2) Second, *institutional culture*. These are the beliefs, practices, and norms which enable different legal institutions to function. I consider these in section 2.2b.

Following this division, there are three further points about legal doctrine which need clarification. (i) a philosophical account of legal doctrine; (ii) the interaction of textual and non-textual sources; and (iii) the place of legal doctrine in the causal-chain leading to case outcomes.

(i) Philosophical Definition of ‘Legal Doctrine’

Following the first type of legal culture, legal doctrine goes far beyond ‘law in the books.’ Instead, I would describe legal doctrine as the intellectual construct constituting the distinctively legal norms of a legal system and the methods for ascertaining their application. These norms can exist in a variety of informational formats, such as text in law reports, statutes, and academic books, as well as non-textual formats such as collective consensus.⁵⁵ The main conceptual difficulty lies in working out what makes something ‘legal doctrine.’ This is a matter of legal philosophy and is unavoidable in a study of legal change. Without committing too strongly to a particular jurisprudential theory, a lawyer in the mid-late 19th Century England had a roughly positivistic model of law.⁵⁶ Legal actors behaved as if there were distinctly legal norms, separate and occasionally divergent, from those of common sense, religion, morality. A more concrete way of expressing this is through four indicators of *positivisation*.⁵⁷ First, the great transformation of informal consensus, requiring extensive contextual and social knowledge, to autonomous recorded text. Second, the emergence of meta-rules demarcating the precise effect and conditions for this recorded text to be authoritative, thereby creating a set of ‘formal’ sources. Third, the increasing prevalence and dominance of the citation of this text in the reasoning of the judiciary. Fourth, and finally, the greater influence on the actual outcomes of cases, rather than merely their reasoning. As

⁵⁴ Legal culture, in this sense, refers to the changes to legal rules which do not appear in precedents and statutes, as discussed Ibbetson and Bell *supra* (n29) 7.

⁵⁵ Hence, this captures both the ‘formants’ in Ibbetson and Bell’s Law in the Books, and ‘legal culture/institutions’, which includes the ‘formal canons of reasoning’ and ‘legal process.’ *ibid*, 45.

⁵⁶ See Lobban *supra* (n17), 3; (Cornish, Lobban, and Smith 2010b), 63. I use ‘legal positivism’ here as a descriptive, sociological shorthand to describe the beliefs of actual historical people. It is not intended to be an exercise in conceptual analysis. For discussion of this approach: (Leiter 2007; 2008; Dickson 2001; F. Schauer 2005); (Del Mar 2016), 5.

⁵⁷ For a similar metric of ‘positivisation’, see (Schauer and Wise 1997)

outlined in Chapter 2, many of these followed from the post 1760 growth of case-law. Nonetheless, though radical, these trends were never total; I explain their limits in the following sections.

(ii) Text as a Socially-Embedded Phenomenon

Whilst the law underwent a great textualization in the 19th century, it was, and remains, an incomplete process. Legal doctrine continued to live as non-textual sources. The form of this extra-textual doctrine ('doctrinal culture') varied. It could be a collective legal understanding of a term in a formal source,⁵⁸ oral consensus about the soundness of a precedent or statutory provision,⁵⁹ or the underlying principles justifying and tying rules together.⁶⁰ This consensus was not necessarily unwritten: lawyers might record their consensus in letters, articles in professional journals, educational materials, or academic treatises. Nonetheless, it was *informal* in the sense it did not derive authority for its status as a formal source, and *oral* in the sense described above in a system of 'common learning.' As judges were members of these communities, their informal consensus could take priority over the conventional meaning of the text.⁶¹ The result is that what looks like highly autonomous text could, in fact, be the opposite.⁶² For this reason, formal textual law must always be treated with caution as an embedded phenomenon in an informal social context.

The philosophy of formalism, where the text is the beginning and end of the law, would make legal history very easy. Unfortunately, it is a picture destroyed by the frequent extra-textual glossing indulged by lawyers.⁶³ For example, the English legal system made extensive use of 'legal fictions' substantially altering otherwise clear formal written documents. Even with extensive, unaltered written records, there was always the potential of a supplementary, super-textual uncodified consensus.⁶⁴ In the context of contract law, for example, it is possible a vast quantity of legal doctrine percolated outside the sources. The acceptability of different terms; the plausibility of corporate structures; the likely effects of liquidated damages clauses: all could have existed in the oral consensus of the bench and bar. In extreme cases, like that of the legal fiction, this cloud of extra-textual lore could contradict the formal sources, a possibility captured by the Scottish phrase *communis error facit ius*, or "a common error makes law." Whilst rendering textual sources less reliable, extra and super-textual consensus can deepen our knowledge of the

⁵⁸ These collective intuitions can be shared with the broader public, or they can be idiosyncratic to lawyers. For the varieties of such 'anchoring schemas', see (Epstein 2014).

⁵⁹ A 'hierarchical' rule about the status of a legal source; these often involve the relative weight of precedent, statute, and academic formants.

⁶⁰ There is always an interplay between lower-level rules and upper-level principles. See Ibbetson and Bell, *supra* (n29), 20.

⁶¹ Thus enabling the 'conversational' aspect of law, Ibbetson and Bell, *ibid*. In essence, judges are in conversation between autonomous, formal text, and extra-textual sources. This conversation differs between systems: in England, for example, academic writers had relatively little authority (165) and less room to move from formal text.

⁶² A good example is the weight of construction cases which – whilst formally binding – were often ignored by the judiciary.

⁶³ Baker, *supra* (n16)

⁶⁴ Baker, *ibid*.

deeper mechanics of the legal system. Unlike autonomous text, uncodified consensus is prone to drift over time, especially with the circulation of group members,⁶⁵ and is more receptive to non-legal influences.⁶⁶ It is also more difficult to communicate over distance, harder to duplicate information, and more difficult to verify without access to the community. To the extent this communication is necessary, we should expect to see workarounds to the limitations of orality.⁶⁷

(iii) The Role of Legal Doctrine in Shaping Legal Outcomes

A judge in the 19th century looks at the legal sources and finds he is bound by a legal precedent. How does this alter the legal outcome of the case? The answer is complicated. We must distinguish two problems.⁶⁸ First, the extent to which legal sources, and the norms they contain, actually provide a decisive answer to the case.⁶⁹ In many instances the text of the law, and nearby rules, will not indicate a single, or perhaps any, outcome; in others, the lack of information follows from too many sources, uncertainty following from clashes between sources textual and non-textual. In this space,⁷⁰ creative doctrinal work to manipulate and massage legal rules is possible and can provide extensive discretion.⁷¹ That said, it is unusual for discretion to be total, especially outside the appellate courts. There is typically a limited selection of possible legal outcomes from the textual sources and surrounding doctrinal culture.⁷² In the remaining space of barely marginally-superior options, the judge must partially select on the basis of non-legal factors, such as morality, public policy, economic efficiency, religious propriety, and political affiliation.⁷³ As the law on a particular policy-space becomes increasingly textualized and autonomous, and the fixed points in the legal web get sharper and less flexible, the room for this kind of reasoning is diminished.

Second, the extent to which this actually affects judicial decisions: even if the legal answer is uncontroversial, this does not mean the judge will actually follow it or that the relevant remedy will be efficacious.⁷⁴ It is judges, not legal rules, who decide cases, and these judges work in a complex social

⁶⁵ The internal operation and structure of legal culture/custom is contested. (Watson 1983), for example, regards legal officials as having a highly insular culture; for a more balanced view, see Sugarman (1993). There is agreement that legal custom is hierarchical, with some members having stronger voices than others, see (Cocks 1983).

⁶⁶ For example, the various formants discussed in Ibbetson and Bell, *supra* (n29), 5.

⁶⁷ See (Gordon 2021) on the role of solicitor journals as a tool for disseminating collective beliefs about different speculative claims.

⁶⁸ Respectively, 'determinism' and the 'law-practice gap.' Ibbetson and Bell, *supra* (n29) 47.

⁶⁹ Considered in legal theory under the rubric of 'determinism' and 'formalism.' The modern positivist position is that the vast majority of law is determinate, though areas of indeterminism do nonetheless exist. (Kramer 2003; Leiter 1995; 2009)

⁷⁰ The suggestion of Sacco, *supra* (n24), that all law is uncertain is misleading insofar as it suggests that all law is equally uncertain. The free interplay of legal formants can only play a role when there is legal uncertainty.

⁷¹ Ibbetson and Bell, *supra* (n29), 3-4. Some of these will have an authoritative voice, such as the provisions of a Code. Nonetheless, the textual meaning of formal sources is often ambiguous, giving space for other 'non-formal' voices, and in some cases – such as fictions – can be substantially ignored.

⁷² Ibbetson and Bell, *ibid*, p. 48.

⁷³ (Gardner 1992)

⁷⁴ (Rubin and Sugarman 1984), 14ff

context. Although controversial, a compelling recent view of legal norms is that they are primarily designed to define the conditions for applying legal concepts, concepts which in turn are merely thin, technical categories. Their influence on judges come not from some logical structure producing commands, orders, or directions, but in their role as attractors for social attitudes.⁷⁵ Depending on the type of litigation and perceived needs for consistency, a judge who fails to apply the relevant legal concepts ‘correctly’ will come under criticism.⁷⁶ The degree of confidence in the correct application of the norm he applies determines how easy it is for other judges (appeal), the profession (legal challenges), and academics (critique), to coordinate their criticism. If the criticism is sufficiently strong, and comes from the right places, this can seriously hamper the judge’s ability to succeed professionally. In addition to their coordination function,⁷⁷ the clarity of the rule also determines how sharp the line between ‘application’ and ‘reform’ is: extensively reforming the law, even when legally permitted – such as by the House of Lords – can also attract criticism. Importantly, none of the tension above is part of the doctrinal system of law. Instead, it acts as one part of the judge’s overall thought process; to the extent they respect such criticism, apply it themselves, and generally endorse the technical system of law, their decisions will be legally structured. The overall strength of legal doctrine as an ‘attractor’ of criticism is ultimately a social phenomenon, and depends on the cultural and institutional arrangement of the legal system.

2.2b The Framework of Legal Institutions

The possible forms of legal doctrine, and the social pressures to obey its directions, depend on the legal institutions and their culture. The 19th century saw fundamental changes to this basic legal infrastructure. It brought the development of the court hierarchy; regularised reporting; procedural and evidential reform; the disappearance of the jury; and changes to the enforcement of legal remedies. These changes did not directly alter legal doctrine; nonetheless, they strongly affected its development. We can consider two changes. First, in the vast increase of legal information. The production of substantive law followed from changes to pleading and post-verdict review; the textualization of the law from reporting and court hierarchy reforms, and its autonomisation from the introduction of expert language following evidential reform. Second, there are the psycho-social reactions, attitudes, and criticisms which attach to legal doctrine. Changes to legal culture and legal institutions can alter the (non-doctrinal) psychological factors which control the persuasive strength of a legal rule. A good example is the removal of the jury and

⁷⁵ This position is that argued by (Ward, 2024), many thanks to Dan for sharing earlier drafts. Note, this renders questions of the meaning and nature of ‘legal duties’ senseless.

⁷⁶ Or appeal, see (Hedley 1995); (Hedley 1989), 179-180.

⁷⁷ (Hadfield and Weingast 2012)

changes to legal procedure. Traditionally, the jury made an inscrutable decision, obscuring whether they were applying the legal rules to the facts in an acceptable way. This could reduce the tension to follow unworkable rules.⁷⁸ Similarly, in the 18th century, legal reasoning could be hidden behind the use of legal procedure - for instance, when every cases involving apparent ‘contractual mistakes’ could be quickly resolved on technical pleading grounds.⁷⁹ When these obfuscations were removed, and judicial decisions were reported accurately and consistently, scrutiny became higher, and the psychological tension to follow doctrine increased.⁸⁰

Importantly, this impetus acts in a cultural background: it only existed insofar as there were social norms to reach legally correct decisions. If there were, and these were properly supported by conducive legal institutions, there would be constant tension constraining judges to follow the legal doctrinal position. The psychological dynamics of this tension can produce different responses. They can lead to a deterrent force against reaching legally incorrect results, a feeling of being helplessly ‘bound’ or ‘constrained. This is likely where the law-applier has no ability to change the law or wider legal culture, and no ability to mask the legal invalidity of their decisions. Judges in trial courts and lower appellate courts bound by the precedents of upper-tier courts, and which have their decisions clearly reported, must either follow the legal rules or do their best to skirt around them.⁸¹ Failure in either would inevitably involve a ‘legally wrong’ decision, and thus criticism. High tension could also lead to an impetus to modify the textual law, whether as an Act of Parliament or superior court judgment. Conversely, for legal rules composed partially of oral consensus, a cultural change is necessary. These could involve producing glosses on a statute; reading down the meaning of a case; or supplementing the law with new rules. The resistance here is not the formal system of changing the law, but purely cultural and sociological – the inherent conservatism of the profession or the difficulty of organising changes to social understandings.

2.2c Outside the Courtroom: The Extra-Legal Environment

Acting as the fundamental background is the wider environment the law operates in. Virtually all of the processes above are contingent on the background conditions of the legal system. The environment contains two essential features of legal change: first, extra-legal pressure to change the law; and second, extra-legal methods of dispute resolution.

⁷⁸ Parliamentary Debates, third series, vol.131, cols.1257– 1258 (1854), cited in (Hanly 2005), suggesting the jury could deflect embarrassing questions away from the judge. See also (Ibbetson 2012; 2013; Lobban 1997)

⁷⁹ (Hamburger 1989), referring to the role of ‘variances’ in obfuscating the law of mistake.

⁸⁰ Ibbetson and Bell *supra* (n29), 9, 46, 50. For the role of local press and solicitor communities in controlling county court judges, (Polden 1997), 245-6.

⁸¹ (Goodhart 1934), 61 describes this sentiment, quoting Salmon that the judges were ‘engaged in forging the fetters of their own feet’ by moving issues away from the jury.

(i) Extra-Legal Pressure

Pressure refers to inconsistency between the demands perceived by a judge to reach a particular case outcome and those indicated by the legal norms. For example, judges might believe political and religious interests require outcomes which are legally unsustainable. These could include perceptions that outcomes must remain popularly acceptable, linked to press coverage; sensitivity to the needs of government; and fear of ‘commercial unworkability’ connected, in the modern period, to conceptions of economic theory. Whatever these were, if they conflict with the outcome indicated by the legal norms, and corresponding psychological tension to obey the law, then pressure builds up. Special emphasis is required on perceived demands because the judges are, in a sense, the vectors by which any extra-legal pressure must work. Commercial interest cannot alter the law directly: it must first alter the perceived pressures on a judge deciding cases, which then might change a precedential outcome. Another key part of perceived demands is the potential bias and isolation of judges. Not all criticism of the legal system becomes pressure, regardless of its legitimacy or strength: it is entirely contingent on the social background to the system. This background determined what is seen as a social issue by the judiciary: the voices which matter and need to be taken into account.

(ii) The Path to Court

England’s system of precedent introduces another important source of environmental contingency: getting to a court judgment. We can break this into an ‘external’ and ‘internal’ pathway. The formal, external pathway, involves the litigant’s perspective of progressing through court. It includes numerous component stages.

- (1) First, we can take the total possible behaviour which could theoretically be litigated. This hypothetical ‘litigable activity’ is our base rate. Note, that what is even theoretically ‘litigable’ may not be estimable from the written sources alone: as before, professional consensus can intervene to modify what is a ‘possible case.’
- (2) Second, we can consider the various factors which prevent this activity from going to trial. These are numerous, including: (a) The potential litigant(s) not perceiving the activity as a dispute at all;⁸² (b) Litigant(s) not perceiving it as a *legal* dispute, perhaps because they are family

⁸² (Felstiner, Abel, and Sarat 1980); (Mather and Yngvesson 1980); (Kritzer 2011)

members or stock traders; (c) The case not going to trial because of social and structural factors preventing litigation, such as:

- (i) the litigant(s) lacking the financial means or incentive to go to court;⁸³
- (ii) the defendant being the plaintiff's employer,⁸⁴ or the social standing of the litigant (or their opponent) deterring lawyers from representing them;⁸⁵ and
- (iii) the availability of out of effective non-legal methods of dispute resolution, such as arbitration, settlement, trade associations, and insurance;⁸⁶

(d) the plethora of contingencies, such as delay, bankruptcy, settlement, and death, which interrupt a case even once a writ of summons has been issued; and, finally, (e) the case producing a court resolution which does not produce a reportable judgment.

There are significant obstacles thrown up by the extra-legal environment which can prevent cases setting precedents.⁸⁷ These obstacles can also remove pressure to reach certain outcomes. For example, a rule might be commercially unworkable, but all the parties who might care to challenge it routinely and contentedly use arbitration in its place. This can produce strange pockets of legal doctrine which, though technically 'on the books', and which heavily constrain judges, have no practical weight placed on them. They therefore remain as a kind of harmless absurdity which judges, and Parliament, lack the incentive to alter. On the other hand, some of these rules might suddenly become 'load-bearing' if other environmental factors alter: for example, poorly advised litigants, or alterations in arbitration practices, causing the rules to be raised in litigation. These environmental factors, in combination with the information-management functions of the legal system, demonstrate the massive contingency in the legal system. Consider *Fig (II)* as an example of the filtration process of *Potential Claim to Reported Precedent*.

⁸³ Simpson argued 19th century private law emerged from the litigation of the 'affluent', (Simpson 2003) 619. By the late-19th century, limited companies came to make up almost half of all litigants - the *Judicial Statistics 1898*, 27, found 43% involved in QB litigation were limited companies. (Ferguson 1980), 142 notes litigation beyond the County Court level was typically seen as economically infeasible.

⁸⁴ As found in the (Martín-Casals 2010), 12-13.

⁸⁵ (Rubin 1984b).

⁸⁶ Ibbetson and Bell, *supra* (n29), 10; for examples relating to evading the rules of privity, see (Ibbetson and Swain 2008)

⁸⁷ Several historians suggest that, overall, the law played a small role in the activities of merchants. see (Hedley 1997; MacNeil 2009; Arthurs 1985). The seminal study is (Macaulay 2011)

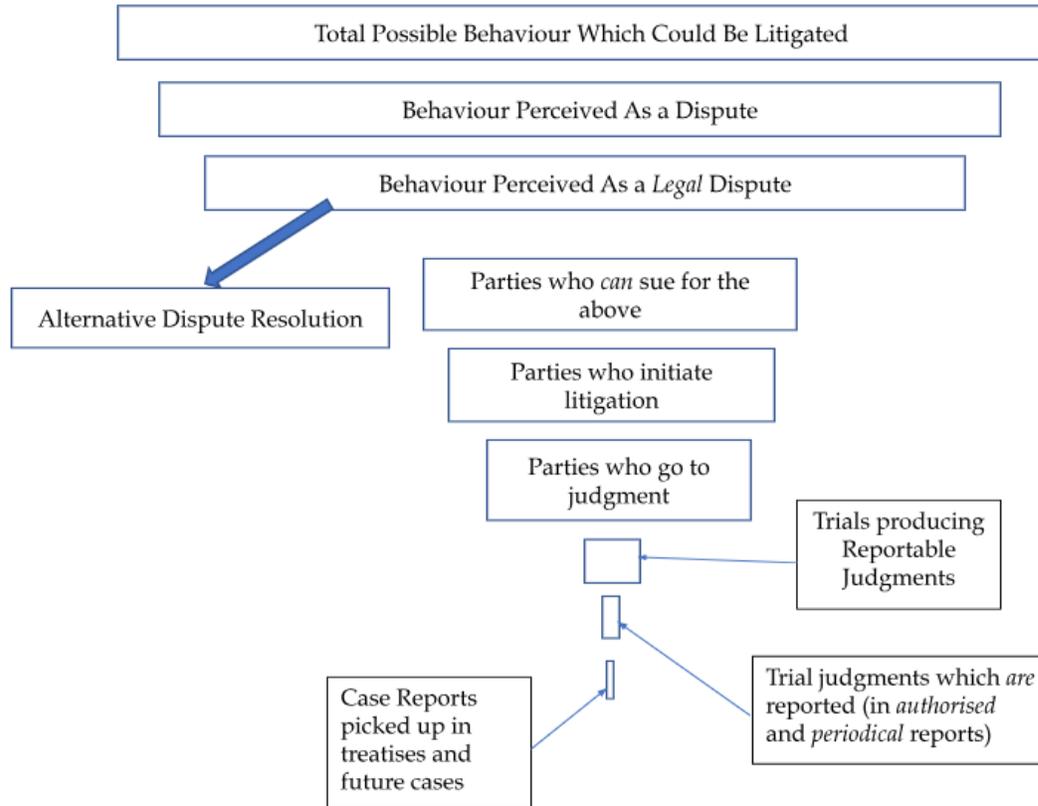


Fig 3. Litigation Funnel

The crucial point for the feedback model is that only parties who make it to the *judgment* stage ever reach a point where their case can produce a legal change. Though it is also to keep in mind that, even if parties are not bringing cases, this does not mean there is no pressure: indeed, pressure for many years often proceeds a ‘test case’ threading the needle and getting the rule changed.

There is a mirror to this in the form of the internal system of case filtration, occurring between the external stages (d) and (e). Not all cases progress up the court hierarchy, especially as we get into the mid-19th century. Unfortunately, the actual process by which cases are selected as ‘significant’ or ‘appellate-grade’ remains somewhat nebulous. Nevertheless, no account of the feedback model can avoid this process. In particular, for a study of private law, the link between *County Court* (local) and *High Court* (central) is critical. The former, strategically named, ‘county courts’ were established in 1846 to replace the older and more informal Courts of Requests.⁸⁸ They were limited to small claims⁸⁹ and dealt

⁸⁸ (Winder 1936); (Polden 1999), 12; Arthurs, *ibid.*, 140.

⁸⁹ Initially under £20, this was extended to £50 in 1850. The jurisdiction was steadily widened until covering a wide range of possible actions in 1870.

overwhelmingly with debt-related actions.⁹⁰ Unlike their predecessors - which seemed to apply a species of local justice - each county court was staffed by a legally trained officer responsible for applying the common law rules as determined by the central courts. These local courts are of great significance - in Rubin's words they were where "the majority of contracts were struggled over."⁹¹

The central question is to what extent, and in what ways, the County Courts were 'connected up'⁹² with the central courts. We want to know: **(a)** whether they obeyed the central courts, **(b)** whether they fed up cases; and **(c)** if they generated pressure for rule changes. For **(a)**, it is difficult to uncover the extent of county court rebellion short of a detailed survey of the reported cases.⁹³ Nonetheless, a basic trend does emerge: the county courts were increasingly integrated into the common law system from their establishment onwards.⁹⁴ Top-down control took various forms: increased local reporting of county court decisions;⁹⁵ the professionalisation of county court practice;⁹⁶ the growth of national periodicals emanating from the centre; greater appellate jurisdiction; and the increasing quality of county court judges. Hence why Gordon dismisses the notion that the County Courts independently applied their own rules when dealing with torts involving dangerous property. Regarding **(b)**, the county courts barely fed into the central courts following the top-down connection.⁹⁷ An average of 200 cases a year were appealed to the King's bench⁹⁸ and around 60 were appealed to the Court of Appeal. Overall, a tiny fraction of the total caseload of the County Courts.⁹⁹

Nonetheless, it is difficult from these statistics alone to determine point **(c)** - the doctrinal influence of the County Courts. From contemporary sources, the link between County Court and High Court was clearly distinct from that of the High Court and Court of Appeal. The 1856 Judicial Statistics Report suggested the County Court cases were primarily the 'trifling' cases, leaving more 'important and intricate' cases for the superior courts.¹⁰⁰ Of course, as noted in the Second Report of the Judicature Commission,¹⁰¹ cases which are 'complex' and 'of serious importance to the parties interests' are not necessarily those which are financially feasible to take to the central courts. Low-value claims can also contain legally significant

⁹⁰ Polden *supra* (n88), 35 describes them as glorified 'debt collection agencies.'

⁹¹ (Rubin 1984a), 243

⁹² (Leader 2020) 280ff on the informational and formal connection of the two.

⁹³ E.g. (Cox, Macrae, and Hertslet 1852); (Pitt-Lewis and De Colyar); and (De Colyar 1883)

⁹⁴ Polden (1996b), 161-2 describes a trend from informal control by the press, local community, and bar, to a formal control by the Lord Chancellor's Department by the early 20th Century.

⁹⁵ Polden *supra* (n88), 67; (Polden 1997), 248. See (Polden 2010), 899ff.

⁹⁶ Polden, *ibid* n88, 67, Leader, *supra* (n92), 280 suggests the 1850s onwards saw an increasing standardisation of County Court practice. In addition, a shift to a self-conscious 'legal professional outlook' in the Chronicle.

⁹⁷ Initially the plan was to *prevent* this kind of connection to avoid increasing expenses; Polden, *supra* (n88), 14

⁹⁸ See County Courts Act 1875 s6 on the divisional courts' appellate jurisdiction. Also The County Court Statutes from 1846-1875, p. 230. (Danzig 1975), 271, fn 94.

⁹⁹ In addition, remitted cases from the County Courts were tiny.

¹⁰⁰ *Judicial Statistics 1856*, x

¹⁰¹ At p.10, cited in Polden *supra* (n88), 76 fn 218.

fact patterns. In the context of personal injury claims involving defective products, County Court cases which were both low-value and posed potentially significant challenges to the existing tort paradigm. We can approach this dynamic from two angles. First, there may have been actual features of high-value contract cases (falling outside of county court jurisdiction) which meant they were qualitatively different from routine cases and more likely to be of precedential value.¹⁰² For instance, increases in contract drafting sophistication, combined with a casuistic approach to contract interpretation, producing divergence between routine low-level cases and high-level precedents. Second, it appears that ‘legal significance’ was increasingly defined in terms of a case’s value.¹⁰³ Under such a paradigm, the assumed function of the County Courts to extract low-value¹⁰⁴ makes definitionally less legally relevant, regardless of the kinds of contracts being litigated.

Overall, to conclude, the feedback system is rendered significantly more difficult by both the *internal* and *external* factors disrupting an otherwise steady stream of cases. It means, fundamentally, that any link between change and external criticism is contingent. The feedback model will not produce reliable hypotheses without auxiliary models of how the extra-legal environment is linked up to the court system. Challenging what is typically taken as automatic, the internal process of appeal is also surprisingly complex and cannot be reduced to ‘legally significant cases head upwards.’ In the late 18th and early 19th century, the court hierarchy was messy, informal, and by no means ‘scientific.’ From the mid-19th century onwards it became more formal, but, as seen with the County Court cases, what constituted ‘significance’ was intertwined with financial value.

2.3 Legal Change and Feedback

Given these factors, how does legal change occur? First consider the ‘steady state’ position in the legal system. This is where legal doctrine (1) allows judges to reach outcomes which they feel are acceptable; or (2) whilst theoretically constraining judges to undesirable outcomes, can be avoided with institutional or procedural dodges and fictions; or (3) is both unavoidable and publicly undesirable, but cases never arise implicating it. Legal change starts to occur when these three conditions are disrupted. These might be because (1), previously acceptable outcomes become unacceptable, e.g. due to social change or the disputes rising in monetary value; (2) procedural reform removes a judge’s ability to avoid unacceptable outcomes; or (3) parties suddenly start going to law where they previously had not, putting weight on law

¹⁰² Polden, *supra* (n88), 92. See note *supra* (n83).

¹⁰³ Leader, (n92), 269. This philosophy was criticised by Bentham, (Bentham 1818), 34–36.

¹⁰⁴ Polden *supra* (n94), 135 notes that in 1865 the vast majority of suits were still under £20; Danzig, *supra* (n98), 271

which was previously untested. It is important to emphasise here that these newly unacceptable outcomes may, in fact, be outcomes which the judiciary had previously tolerated quietly, and the steady-state was simply a lack of regulation.

When judges begin to feel conflicted as the tension to follow the law conflicts with the perceived pressure to reach different outcomes, the steady state is disrupted. If this conflict continues over time, and, if there is no way to release or avoid it, judges will be incentivised to change the law. Some of this change may occur outside the books in the rules and understandings contained in legal culture. Once the limit of this extra-textual massaging is reached, law reform must occur formally – for example, by parliamentary intervention and reform, or through overruling or creation of precedents. Ibbetson and Bell refer to this as a ‘tipping point’: the moment when the pressure is sufficiently strong that the formal procedures for law-alteration are deployed, producing a change in the law.¹⁰⁵ Ibbetson emphasises, however, that many changes can occur before this point to defuse the process of legal change outside court: private parties can create their own solutions, such as arbitration or financial instruments; lawyers can come up with inventive ways to reconcile doctrine with a particular outcome; legal culture can change to allow avoidance strategies previously impossible; or the groups rallying for change can lose their momentum. Thus, many points of contingency are baked into the feedback model.

Part 3: A Case Study: Contract Law

The feedback model was initially developed using tort law, a legal paradigm which operates primarily *ex post facto*. Tortfeasors and their victims rarely plan their litigation ahead of time, the most important modern exception being insurance companies. Conversely, contract law is far more prospective: parties make and plan their contracts ahead of their performance, anticipating how different terms will be interpreted if a dispute arises. Two important consequences flow from this basic difference. The first is that contracts have a greater potential for complexity than torts: the variety of terms across clients and sectors provides a huge cache of potential material to legally order. As such, intuitively we should expect contract law to constitute a larger and more detailed body of doctrinal law tracking the complexity of the wider economy. The second is that the prospectiveness of contracting allows parties much greater scope for ‘private coding strategies.’¹⁰⁶ These strategies required a mixture of environmental, doctrinal, and

¹⁰⁵ Ibbetson and Bell *supra* (n29), 18

¹⁰⁶ Discussed in MacNeil *supra* (n87); (Cranston 2021); (Pistor 2020); Ferguson *supra* (n83); Hedley *supra* (n87), 87-8.

institutional conditions, such as: the availability of out-of-court dispute resolution mechanisms like arbitration and negotiation; doctrinal rules which prioritise party autonomy and flexibility in drafting, and law-makers which understand and accommodate commercial practice. Here, I consider three aspects of this enabling feature of contract law. First, I give a more detailed analysis of the conditions required for private coding to be possible; second, I explain how this can produce different tempos of law creation using the distinction between mandatory and default rules as an example; and third, I look at the unique social and political features of creating, rather than merely changing, legal rules.

3.1 Private Coding Strategies

Professor Pistor gives a detailed account of the conditions for extensive private coding.¹⁰⁷ First, there must be a sufficient ‘basic module’ of contract law which provides parties the ability to draft contract terms creatively. These are ground rules – legal rules governing, for example, the formation, termination, interpretation, remedies, and vitiating factors of contracts. This ‘basic module’ is covered in English law by a combination of the general part and some of the specific contract rules. In turn, this module fits in with other modules, such as bankruptcy and property law.¹⁰⁸ Second, there must be a relatively small volume of rules which cannot be contracted out of. These are referred to in private law theory as ‘mandatory rules,’ contrasted with default rules which can be avoided with careful drafting. Mandatory rules are an unavoidable litigation generator, and therefore doctrine-producer; the scale of production then depends, in turn, on the nature and subject of the regulation.¹⁰⁹ Third, there must be a shared acceptance of flexible drafting between commercial parties, lawyers, and the judiciary. Parties have to be confident that judges will accept their contractual innovations should they come before court.¹¹⁰ When all these factors come together, Pistor argues, a culture of ‘private coding strategies’ develops - one which involves a close imbrication of law with the needs of business.¹¹¹

Such a culture has a direct effect on the generation of contract law. The influence is felt primarily at the level of Environment in the Feedback Model. As noted above, inconvenient, unworkable, or simply unpopular rules ordinarily generate pressure. In a culture of private coding, however, sophisticated contract parties can either draft around any inconvenient rules where those rules are merely default rules,

¹⁰⁷ Pistor, *ibid*, Chapter 7, 243ff

¹⁰⁸ *ibid* 9, 20

¹⁰⁹ *ibid* 271-3, emphasising the role of ‘dislocation’ and global forum-shopping as a means to avoid mandatory rules

¹¹⁰ *ibid* 255-263, Cranston, *supra* (n106), 31-2

¹¹¹ *ibid*, Pistor, 242-247

or avoid those rules which are not defaults ('mandatory rules') by resorting to arbitration.¹¹² In the case of the latter, a process known as 'dislocation' can occur whereby commercial parties create and use contracts which, as a matter of black letter law, look increasingly dubious.¹¹³ The confidence under which parties will tolerate dislocation relates, in turn, to their belief in the disposition of law-makers towards business. The greater the confidence in judicial or legislative accommodation – perhaps in a super-textual consensus - the more predictable litigation will be, thereby preventing cases from reaching trial. The result of these evasive techniques is that sophisticated litigants rarely feel the unworkability of legal rules - they can either draft, arbitrate, or negotiate, around them.¹¹⁴ Environmentally, this reduces the pressure to alter such rules: although apparently 'on the books', they are in fact barely used and thus subject to little pressure for change.¹¹⁵ Private coding has the effect of slowing down – even freezing – the development of substantive law.

The primary benefit of using the feedback model in this way is that it allows us to generate hypotheses about legal change. For example, under the model we should expect a difference between legally advised litigants and those who are not. The expense of litigation, especially at the higher levels, ensured it was rare for poorer litigants to set important precedents.¹¹⁶ Instead, the parties who typically litigated were 'repeat players' – companies and individuals who made contracts of sufficient value to justify the expense of litigation.¹¹⁷ Nonetheless, it is an open question whether, if these conditions are relaxed, it will introduce parties unwilling or unable to draft around inconvenient rules, thereby generating pressure and stimulating legal change. Another question relates to the storage of information. Whilst it is tempting to imagine parties relied heavily on the courts for predicting the outcomes of their contracts, this was simply not the case. As suggested above, contract precedents could develop in a direction far away from the ordinary contractual rules, disputes over which then being resolved primarily in arbitration. If we assume commercial parties need to predict what the effect of their contract terms will be, it raises the following questions: when dislocation occurred, how was knowledge about acceptable contract terms produced, stored, and communicated? Finally, the model suggests that the most generative contract doctrines should be, first, those relating to mandatory rather than default rules, and, second, in those sectors in which settling lawsuits was particularly difficult.

¹¹² The extent of dislocation is also conditioned by the freedom of arbitrators to avoid formal rules; this is an open question, although there are signs arbitration became increasingly 'legalised' as the 19th century progressed.

¹¹³ MacNeil *supra* (n87); 70; Pistor, *supra* (n106), 240ff; (Howarth 2013), 190-191. Described by Sugarman and Rubin *supra* (n74) in terms of 'semi-autonomous realms', 10.

¹¹⁴ Hedley, *supra* (n87) 90-91, arguing the reason for contract law's apparent stability is its practical irrelevance; Cranston *supra* (n106) 59-60.

¹¹⁵ *ibid*; (Ferguson 1984), 197 (Stock-brokers), 205 (Statute of Frauds); notes that for there to be virtual indifference to the market, there must be strong collective cohesion or other internal forms of policing. Cf Rubin *supra* (n85), 326, on the necessity for tallymen to enter the county court system.

¹¹⁶ Although certainly not unheard of – for example, the numerous precedents involving 'milk sops', Ch 6.

¹¹⁷ (Galanter 1974)

3.2 Lexi-generative Factors and Default Rules

The feedback model explains why a rule might be created or changed at a high level of abstraction, whilst the micro-history methodology of ‘legal archaeology’¹¹⁸ explains it at a low level. I have developed several mid-range theories, focusing on the role of legal grammar¹¹⁹ on the development of doctrine. I call these ‘lexi-generative’ factors and use them to explain the rhythms, tempos, and generative potential of different doctrinal rules. For example: rules which operate temporally, changing the legal status of a set of facts based on ongoing events, produce extensive law because of their greater span of reference.¹²⁰ Similarly, ‘escape-valve’ rules reduce the total amount of law by designating matters as ‘fact’, denying them binding effect, and thus depriving them of any legal-informational content.¹²¹ These lexi-generative factors had a direct influence on the volume of law formed, and, in turn, the complexity of the law. A good test case for the concept of ‘lexi-generativity’ are mandatory and default rules.¹²² The former had a much greater generative potential because, as noted above, they prevented the usual operation of private coding.¹²³ Within the feedback model, this meant there were fewer ways to release environmental pressure, and thus mandatory rules generated law in immense volumes.¹²⁴ The latter, default rules, applied in the absence of party intention. For example, in the latter 19th century, if parties did not explicitly warrant their title in a sale of goods, the courts would assume, as a matter of default, that such a term was included. Nonetheless, if the parties chose, they could exclude the term by including an explicit term.

The growth of default terms in the 19th century is complex and indicates the possible relevance of path-dependency to the process of law generation. Default rules could be created in two ways: first, through the semi-organic process of precedent; and second, through the proactive efforts of the legislature. In the 19th century, there are very few examples of the latter. The legislature instead preferred - if it was to create default terms at all - to simply codify the existing common law.¹²⁵ The production of default-terms law via the former depended not merely on the availability of litigants, but also legal procedure and the particular policies of the judiciary. In the late 18th century, the ascertainment of default terms was hidden behind the jury’s discretion, typically applying local trade custom.¹²⁶ The essential question is why judges believed it was necessary to extract these matters as law. We can produce two answers which trace general theses on the intrinsic complexity of contract law: an organic and path-dependent thesis.

¹¹⁸ (Simpson 1996), 12.

¹¹⁹ Thanks go to Dan Ward for this useful term.

¹²⁰ Chapter 4.2.1b

¹²¹ Chapter 5.3.2

¹²² (Goetz and Scott 1985); (Ayres and Gertner 1989)

¹²³ Chapter 4.2

¹²⁴ For the interplay between regulatory effectiveness and certainty, see Macneil *supra* (n113); and (McBarnet and Whelan 1991)

¹²⁵ Chapter 6.2.1b

¹²⁶ Chapter 5.3.2

The organic thesis is that default terms, whether on the sale of goods, insurance, or as general doctrines, emerge essentially organically from party needs. The existing menu at any one time reflects a combination of ‘dead’ default rules - those widely contracted around and no longer used - and ‘active’ default rules - those used by parties to fill gaps, thus still regularly coming before courts.¹²⁷ On this model, the formation of default rules is a product of consistent party need combined with judicial perceptions that it is commercially useful for these rules to exist as positive law rather than unstructured findings of fact.¹²⁸ This dynamic eventually reaches an equilibrium whereby all useful default rules have been formulated and law-making slows down (the law is ‘solved’); this equilibrium may change, altering which defaults are useful.¹²⁹ The degree of specificity in default rules (‘rule-ness’)¹³⁰ is a function of the courts’ willingness to concretise specific applications of the defaults for different types of contract. In general, it would seem they rarely wished to do so unless the term was extremely common, and instead preferred to leave their findings as a matter of ‘fact’ (e.g., as part of the trial judge’s interpretation of the terms of the contract).¹³¹ Due to the nature of this equilibrium, if the body of defaults was hypothetically removed for some reason, it would re-form in the same shape if the environmental conditions remained constant.

The other possibility is that the production of default rules is closely connected, and therefore contingent upon, the policies of the judiciary. Such policies could include distrust of the jury’s use of default terms to reach particular outcomes, or perhaps a belief they were inconsistent and unable to handle complex contracts.¹³² They could also have related to distributive outcomes the judges were trying to fulfil: the creation of defaults, for example, to adjust the relative merits of the parties,¹³³ or an attempt to shift contract-culture towards a greater reliance on default rules.¹³⁴ This explanation is compatible with the first insofar as it is merely used to explain the particular content of the defaults once they have emerged. It diverges when we consider that judicial default-activism might, beyond stimulating a larger body of ‘dead’ defaults, lead to the stimulation of more litigation, and therefore more active defaults. Under this view, the judiciary played an active role in the eventual shape of default rules in the 19th century. The most powerful thesis in favour of this possibility is that party reliance on law (‘commercial needs’) is in a

¹²⁷ (Schwartz and Scott 2016), 1551

¹²⁸ (De ruysscher 2012), 12, 15 shows a similar process of mercantile usage being converted into rules of positive law in 16th Century Antwerp, made necessary because of an influx of new foreign trade practices, 19-20.

¹²⁹ The nature of the process ensures the older defaults cannot be overruled (no cases being brought), and they remain as ‘dead’ defaults.

¹³⁰ (Schauer 2020)

¹³¹ *infra* Chapter 5.3.2

¹³² For a clear case of judicial preference for fact over law, see (Hemming 1885): “Of late years judges have happily set their faces against the citation of cases. . . .” (289); “it has become every year possible to reject a larger proportion of construction cases. . . .” (290)

¹³³ *infra* Chapter 5.3.2

¹³⁴ (Guinnane, Harris, and Lamoreaux 2014); see Cranston *supra* (106), 56-7 on tensions between drafting culture and legal expectations.

feedback loop with the legal system.¹³⁵ We could consider two countries in an initial state, say England and Germany,¹³⁶ where parties draft meagre, short contracts, relying primarily on local custom to fill in the gaps.¹³⁷ As this custom became less workable,¹³⁸ they would have a choice: to fill in the gaps themselves with explicit terms,¹³⁹ the eventual evolutionary end-point being the Trade Association,¹⁴⁰ or to allow law-makers to do so, the eventual end-point being the Legal Code. If drafting custom is fluid, then the post-custom moment gave the common law courts the following option: produce law using its new procedures, thereby supplying commercial parties with terms and the freedom to leave contracts gappy;¹⁴¹ or continue sending the law to the jury, allowing - and forcing - parties to resolve the problem of gaps themselves.¹⁴² I return to these questions in Chapters 5 and 6, though ultimately they cannot be answered without a detailed comparison of doctrine to actual contract drafting throughout the 19th century.¹⁴³

3.3 Logistics, Politics, and Legal Complexity

The list of ‘environmental factors’ in 2.3 included, *inter alia*, political and social pressure. In the thesis, I focus primarily on the quantity of contract law, rather than its particular content, except insofar as the latter had lexi-generative relevance. Yet no serious analysis can entirely ignore these environmental factors. Legal complexity tracks the creation of law, which in turn involves the regulation of the public: it is an inherently political concept. Law-creation in the 19th century implicated a range of values which could also, to the extent the content of law was relevant to how much law was later produced, become relevant in the decision-making process. I cover three here in brief. First, the underappreciated relevance of logistics to the development of law.¹⁴⁴ The key characteristic of English law in the 18th and 19th centuries is the extreme centralisation of the judiciary, both numerically and geographically.¹⁴⁵ This sharply limited the quantity of business that they could manage and contributed to various strategies

¹³⁵ See Chalmers’s view on legal contingency (Chalmers 1890), v-vi on the ‘fortuitous’ nature of English authority, suggesting the production of law can stimulate more law in a process partially independent from the mere functional needs of market actors.

¹³⁶ Modern German contract drafting is, apparently, far shorter than that in America. See (Hill and King 2004), 889.

¹³⁷ (Charles 2020), 201. For an indication of the continued workability of custom into the 20th century, see (Aske 1909), 142-144 noting commercial men draft very short contracts in reliance on custom. The canonical statement on this theme Lord Campbell’s judgment in *Humfrey v Dale* (1857) 7 E & B at 278.

¹³⁸ (Mitchell 2020), 213, describing the process by which parties assumed a custom of trade would be shared, so omitted it; it led to a dispute which reached the court; judges inserted the custom into the contract; parties started opting out of the term; and judges responded to these new terms.

¹³⁹ *ibid*

¹⁴⁰ Though note Hill and King, *supra* (n139), that in modern Germany there is a combination of trade associations and statutory standard forms.

¹⁴¹ Mitchell *supra* (n138) argues the increasing implication of warranties in sale of goods cases stimulated more detailed drafting, 205-6

¹⁴² (Langbein 1987) suggests that the length of US contracts (and, to a lesser-degree, English contracts) is due to the shoddiness of the court system, noting costs and the presence of the jury, incentivising parties to avoid litigation with extensive contractual planning.

¹⁴³ For an initial survey, see Mitchell, *supra*, (n138)

¹⁴⁴ See Danzig *supra* (n98), fn105 for illuminating quotes regarding constitutional law and the relatively small number of English judges compared to France and Germany.

¹⁴⁵ (Duman 1982), 6; (Francis 1983), 872; (Sugarman 1993), 264.

designed to reduce their workload, including the formulation of legal doctrine.¹⁴⁶ The judiciary attempted to channel as many issues to the lexi-generatively sterile jury as possible,¹⁴⁷ and restricted, to a degree, the total business of the court.¹⁴⁸ Concerns over juridical overload are represented in treatises and collections of reports written at the time, which often express a concern their works might increase litigation. In parliamentary inquiries into judicial business, the overwhelming concern was with managing costs and keeping the total number of judges low.¹⁴⁹ One judge, in a somewhat extreme comment, suggested that the complexity of the pleading system was necessary to dissuade insufficiently motivated litigants.¹⁵⁰ These attitudes, if muted, continued into the 19th, 20th, and indeed 21st century - in the form of concerns over 'floodgates'¹⁵¹ - and were supported by the passive aspects of making law by legal precedent. These *logistical* and *structural* factors are essential to understanding why judges ruled the way they did.

Second, even after the mid-19th century, when the profound rise in litigation, post-trial review, court reporting, and treatises, were mostly accepted as the new reality, judges maintained a reticence towards making contract law.¹⁵² In part, this was a persistence of 18th century attitudes,¹⁵³ but it also matched broader ideas of the time. The early 19th century saw the emergence and increasing popularisation of a new liberal political economy based on the work of Adam Smith.¹⁵⁴ That these ideas made their way into the legal system is undeniable.¹⁵⁵ They lurk behind the numerous statutes clearing away older paternalistic market regulations,¹⁵⁶ can be found cited in argument and in the views of the judiciary,¹⁵⁷ and were extensively discussed,¹⁵⁸ with approval and practical application, by the leading contract law treatise writers.¹⁵⁹ Whilst the extent, uniformity, and influence of these views requires further detailed study, the judiciary clearly did follow a largely hands-off approach to the economy,¹⁶⁰ satisfied to merely police what they saw as discrete instances of moral wrongdoing instead of wide-scale, general planning or

¹⁴⁶ Francis *ibid* 41-51 describing the 'controlled delegation strategy' of the 16th century judiciary and providing a detailed analysis of their motivations for controlling litigation. This included the formulation of contract rules, such as the rule of conditions being replaced with a rule on material breach.

¹⁴⁷ *ibid*

¹⁴⁸ (Atiyah 1985), 99;

¹⁴⁹ 1856, *Judicial Statistics* ix, xi, on the question of whether the judiciary could be reduced in number; see also the RC *First Report 1829*.

¹⁵⁰ RC *Second Report* (1830), Sir William Draper Best CJCP, 46.

¹⁵¹ The classic example being LJ Atkin's judgment in *Balfour v Balfour* [1919] 2 KB 571.

¹⁵² Cf (Klerman 2004), 1182, who argues judges were less incentivised in the 19th century, following the instantiation of judicial salaries, to hear cases

¹⁵³ *infra* Chapter 5, *introduction*.

¹⁵⁴ For an important qualification on the nature of this influence, (Lieberman 1998), 89. Whilst judges and treatise writers seem to have been aware of Adam Smith, his writing itself is ambiguous regarding 'freedom of contract.' 96-100, 104.

¹⁵⁵ For a survey of secondary literature, (Cornish and Clark 1989) 66-72; Sugarman and Rubin *supra* (n74), 12-13. For specific examples: (Tofaris 2011), Ch 5 arguing the Indian Contract Act draft, and the 19th century judiciary, were influenced by the principle of 'freedom of contract'; (Kostal 1997), 263-5, 270-3, 315-321, in the context of railways, noting both the importance of liberal ideology and its inconsistent application; Rubin *supra* (n85), 346-8 noting the complex role of market principles in the county court; Cranston *supra* (n106), 208, 210 on the liberal politics of Abinger and Parke. cf (Lobban 2010c 298-300) who ascribes a more minor role to economic theory; and (Sugarman 1992), 295-7 for some qualifications.

¹⁵⁶ For a detailed survey, see Chapter 6.

¹⁵⁷ Duman, *supra* (n145) 102, 138-140 on the employer-bias of the judiciary and their increasing ownership of shares; likewise, see the analysis of judicial cohorts in Atiyah *supra* (n148), Chapter 13. cf (Lobban 2012a; 2012b). For statements as to the naturally 'free' state of trade and the market, see *Maxim Nordenfelt Guns & Ammunition Co Ltd v Nordenfelt* [1893] 1 Ch 630, 640-641; *Leather Cloth v Lorsant* (1869) LR 9 Eq 345, 353; *Allsopp v Wheatcroft* (1872) L.R. 15 Eq 59, 64

¹⁵⁸ For instance, the debate on regrating, *infra* fn (695)

¹⁵⁹ Chapter 4, s3.2 discussing the 'Mercantile Treatises.'

¹⁶⁰ Cranston, *supra*, (n106), 30-31, 34-41 describes freedom of contract as the 'basal principle' of English commercial law; Sugarman and Rubin, *supra* (n74), 12, as the 'pre-eminent' policy, characterising the judiciary's approach as 'abstentionism.'

regulation.¹⁶¹ In this way, the logistical challenges of the common law courts brought an affinity to a liberal political economy, whether the latter was deliberately adopted or otherwise.¹⁶² The presence of liberal economic thought continued into the late-19th century¹⁶³ and it formed one of the justifications behind the later commercial codifications.¹⁶⁴ In the words of Chalmers:

“the man of business, in effect, says to the lawyers, ‘Leave me free to make my own contracts, but tell me plainly beforehand what you are going to do if I don’t make a contract; or if I fail to express it intelligibly.’”¹⁶⁵

This quote brings together all the crucial elements: *legal certainty* gives private parties the *freedom* to structure their own affairs, thus *meeting the needs of commerce* and *reducing the burden* on the legal system.¹⁶⁶

Finally, there was a clear constitutional dimension to the creation and management of legal complexity. The early-mid 19th century can be seen as a special historical window in which the previous, 18th century scepticism towards parliamentary intervention was combined with a judicial willingness to make new law. This opened up a field for judicial experimentation, although the extent to which it was used depended in part on the previous two factors. From the mid-19th century onwards, several important changes occurred in the relationship between the courts and parliament. Parliament was becoming increasingly proactive, informed, and democratically legitimate; these factors led to increasing deference by the judiciary towards its activity.¹⁶⁷ New legislation occurred across virtually all fields of contract law, and new administrative tribunals were created to move faster and with more specialism than the slower central courts. These deflected and managed much of the regulatory burden which otherwise would have crushed, been totally avoided by, or forced a reform in, the traditional legal system. It also took on a much more dominant role in reforming areas of legal doctrine, such as the law of married women and bills of lading. By the late-19th century legislation had become the dominant driver behind legal growth. Importantly, the codifying statutes of the 1880s-90s also served to shift the power of free legal organisation from the judiciary, and supporting treatise writers, to fixed statutory text. These constitutional changes framed the negotiation of the courts with their potential role as regulators,

¹⁶¹ Chapter 5, Part 2; Lobban (2012b), 116-7, 137 on the limited interventions of the court. (Lobban 2012a), 412 describing the multitude of judicial policies, including freedom of contract, commitment to status relationships, and aspects of the moral economy.

¹⁶² (Francis 1895) 134-5

¹⁶³ Tofaris, *supra* (n155), provides *Parkin v Thorold* (1851), 242; *Archer v James* (1859), 1006; *Manchester, Sheffield and Lincolnshire Railway Co v Brown* (1883), 716, 718-9 as clear later examples of freedom of contract appearing in legal judgment.

¹⁶⁴ (Ferguson 1977), 23 for a survey of Chalmers’s ‘codification ideology.’

¹⁶⁵ cited, *ibid*

¹⁶⁶ See Cranston, *supra* (n106), 41

¹⁶⁷ Atiyah *supra* (n148), 96, 384-7

increasingly leading to them taking a passive approach, and thus stunting the creation of law where Parliament failed to act. Alongside logistics, the court's constitutional position therefore ran in the same direction as their overall commitment to liberty and 'free trade.' All three of these factors were caught up in the same churning historical process: the Age of Complexity beginning in the late-18th century.

Chapter 2: The Age of Complexity

Like the frog unaware he is being boiled alive in water, the Age of Complexity has no precise starting point. All we can say is that an acceleration began in England sometime between 1750 and 1780 and that by 1860 it had reached a speed sufficient to transform virtually every aspect of the legal system. Contemporary lawyers were aware their legal system was accelerating. The signs were obvious: the ever more rapidly-expanding volume case reports; the steady increase in court sitting-time; the growing backlogs of ongoing lawsuits; and the vast sums of money moving through the justice system. All this was carefully observed in parliamentary inquiries and the prefaces to the burgeoning legal literature. Yet few, if any, realised just how deep or pervasive the changes would be. This chapter explores the nature and causes of this acceleration, concluding with the eventual responses, planned or otherwise, to the Age of Complexity. It is broken into two parts:

Part 1 begins with a period of **growth** from 1750-1850. I track the rise in litigation and case reports, explaining the growth using procedural changes and a new relationship between court and commercial litigant.

Part 2 then tracks a period of **stagnation** from 1850-1914, characterised by steady, if not falling, rates of case reports and litigation. The explanation for this fall is more difficult, not least because of the plethora of reports formed in the early-mid 19th century complicates the 'official report' data. I suggest several possible theses, ranging from economic slowdown and the completion of contract law to the maturation of legal literature and formalisation of precedent.

Part 1: I Remember When Wheelbarrows Were Enough

“For when he was a Student, he could carry a compleat Library of Books in a Wheelbarrow; but that they were so wonderfully increased in a few Years, that they could not then be drawn in a Waggon.”¹⁶⁸

This quote aptly captures the homely, individual-scale nature of law in the 17th and 18th centuries. By the 19th century, however, not even waggons would do as the body of law began to exceed the size of private libraries. How we got from there to here is not particularly mysterious and the story can be traced straightforwardly using court records. It is a tale of changes in business, followed by changes in the rates of litigation, followed by changes in the volume of law. These different wheels are not directly connected: the law can spin independently on a lower gear whilst society accelerates. Nonetheless, once the gear was changed, law began to accelerate rapidly, linked to a society undergoing an uncontrolled industrial expansion.

1.1 Showing the Rise (1750-1850)

No-one can sensibly deny the years from 1750-1850 brought a rapid rise in legal activity. The eruption appears in every possible metric, from litigation, to judgments, to judicial hours worked, to reported cases. Take a basic example – the number of initial summons issued (measured in writs of summons). As Brooks notes, initial summonses, such as writs of summons, are used for a variety of purposes.¹⁶⁹ In many cases they are equivalent merely to a letter of ‘final notice’, and likely act as a strategic step before negotiation or arbitration.¹⁷⁰ Fluctuations in writ of summons issued may therefore reflect changes in the cost-benefit of using a writ as a threat, rather than settled intentions to litigate.¹⁷¹ Nonetheless, they do represent contact with the legal system and thus give a rough idea of total legal activity. C.W. Francis produced pre-1823 figures for said writs by extrapolating backwards from later data.¹⁷² The rough pattern he found is as follows:¹⁷³

¹⁶⁸ Cited in (Fox 1913) 7, from a report from the early 18th century (Modern Report Volume 5 (1720), *preface*, p. xi)

¹⁶⁹ (C. Brooks 1998), 64-65; see also (C. W. Brooks 1986) and (Prest, Anleu, and Brooks 2004)

¹⁷⁰ Brooks 1998, *ibid*

¹⁷¹ Brooks, *ibid.* cf 1856 *Judicial Statistics*, x-xi for discussions of various strategies and procedural alterations which might have affected the rate of writ of summons.

¹⁷² Francis *supra* (n162). There are no reliable statistic prior to 1823 for writs of summons. Francis created a general ratio between entry books case data – which does go back to the 18th century – and writs of summons using later data. He was then able to extrapolate backwards using this ratio and earlier entry books figures.

¹⁷³ *ibid.*, Appendix 3 gives a longer breakdown, although I am not sure if he used the same ‘index’ method to produce them.

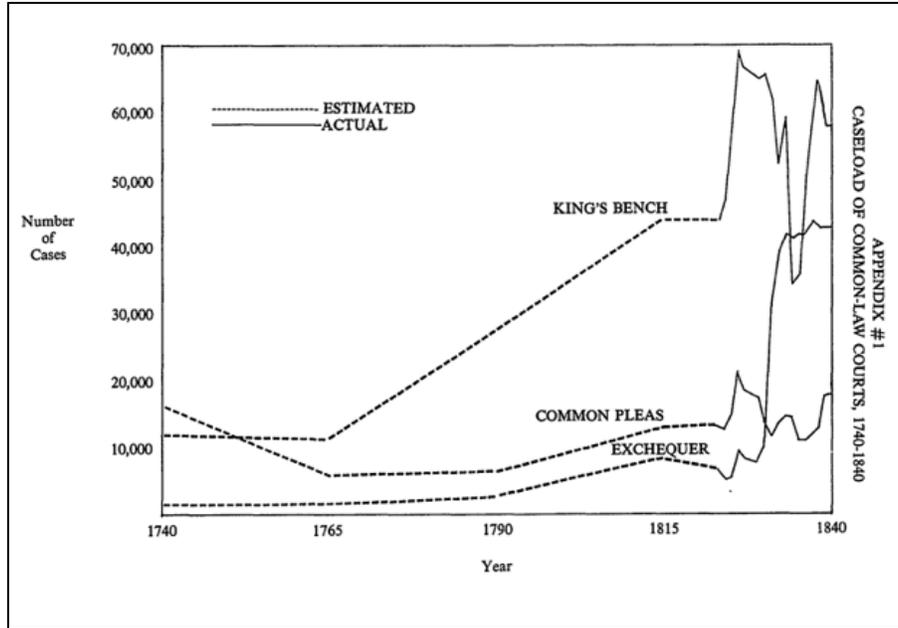


Fig 4. Extrapolated 18th Writ of Summons Figures

These imply a vast increase in the total amount of litigation, beginning sometime between 1765 and 1770. A more precise measure is to look directly at ‘cases in advanced stages.’ This is a measurement devised by Christopher Brooks to track cases which have progressed past the initial stage of issuing a writ of summons. The best source for ‘advanced cases’ are the docket books and entry books of judgment. The docket books served as an index for the plea rolls, used by court officers to organise court proceedings and entry in them is used by Brooks as a rough indicator for the ‘advancement’ of the case.¹⁷⁴ As Brooks notes, in the King’s Bench an entry would only be made by the officers once the parties had appeared and the case run its course, concluding either in “a trial at nisi prius, a settlement out of court, or a judgment entered through the failure of the defendant to enter any plea.”¹⁷⁵ The entry books on the other hand recorded final judgments, the lawyers, and the amount awarded where relevant. I gathered both on a decade-decade basis. They show a relentless rise from the late-18th century onwards:

¹⁷⁴ See Brooks 1998, *supra* (n169), 10, fn 3; (Brooks, 1986) 50.

¹⁷⁵ *ibid* 1986, 50.

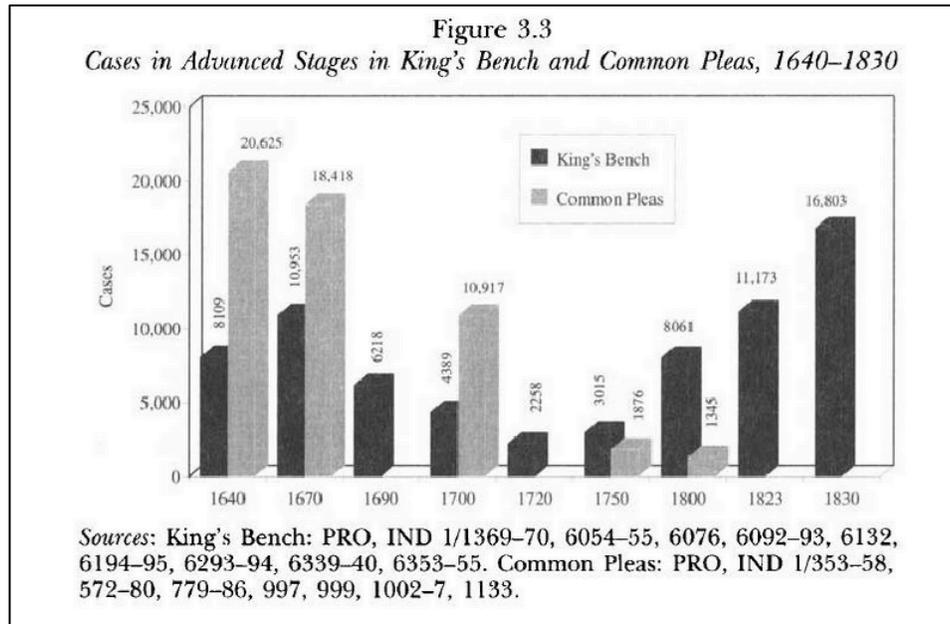


Fig 5. Cases in Advanced Stage (Brooks Estimate)

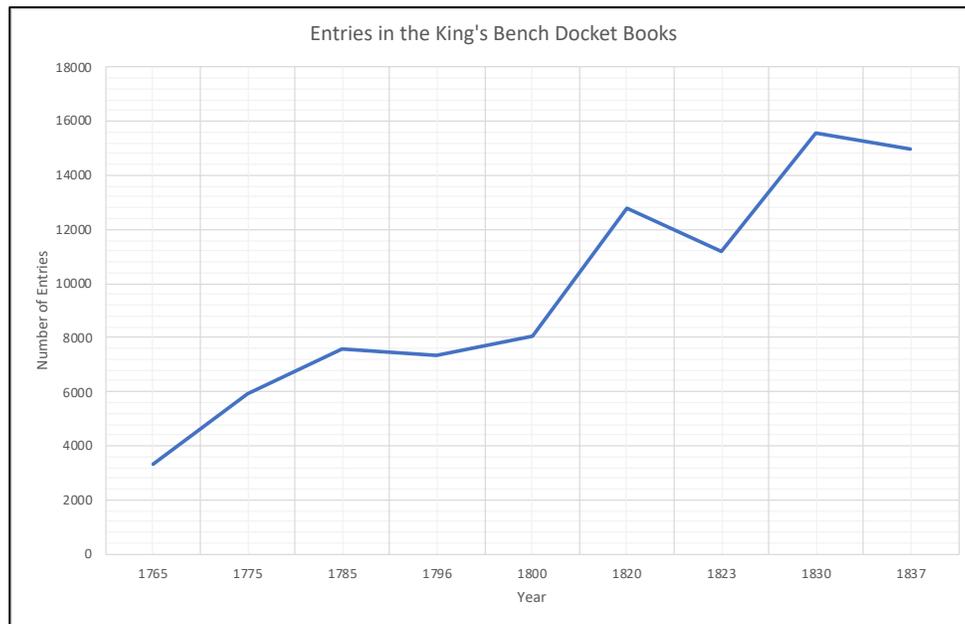


Fig 6. Docket Book Figures (KB)

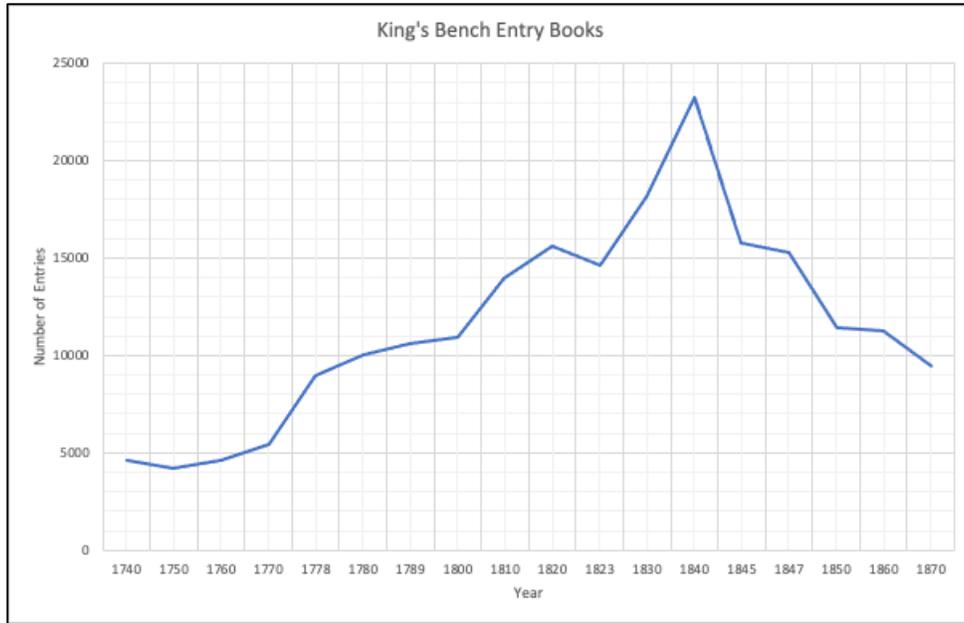


Fig 7. Entry Book Figures (KB)

These graphs suggest there was a sharp rise from around 1750-80, culminating in a total increase of between 4 and 5-fold the entry book figures by 1840 (from 3-5000 to 16,000-25,000). Following 1840, there then appears to be a sustained and continuous fall. There was an equally rapid expansion of reported judgments beginning around 1780. I have compiled a complete dataset from 1750-1914, although they are merely a broad-brush portrait of the legal system. From 1750-1865 they include the reports collected in the complete English Reports collection; from 1865-1914 they track the Incorporated Council for Law Reporting (ICLR) reports. The graph does not include duplicate reports, nor the numerous periodical reports which spun up in the early-mid 19th century:

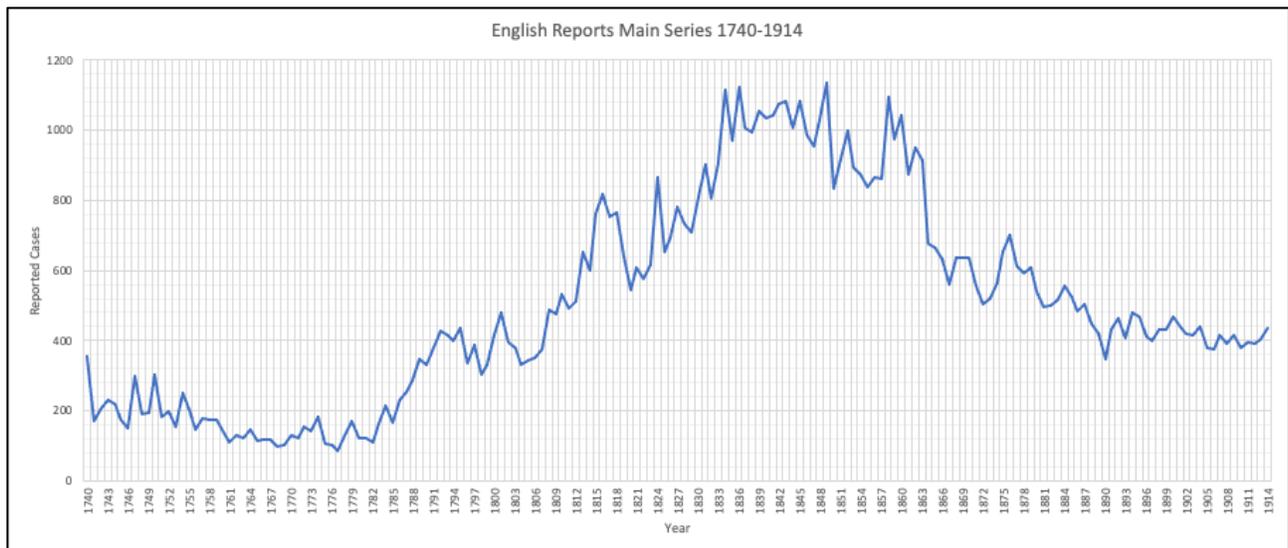


Fig 8. Main Series Reports

The rise, starting sometime between 1780-1790, culminated in a tenfold increase by 1840, sustained until the 1860s. As with the ‘cases in advanced stages’, the 1840s represent the apogee of legal activity, precipitating a drop which continued up to and beyond 1914. The rise between 1770-1840 is even more dramatic when the figures are traced in terms of *cumulative* reports (setting 1740 at 0), given that cases remained legally relevant for several years, even decades, after being reported:

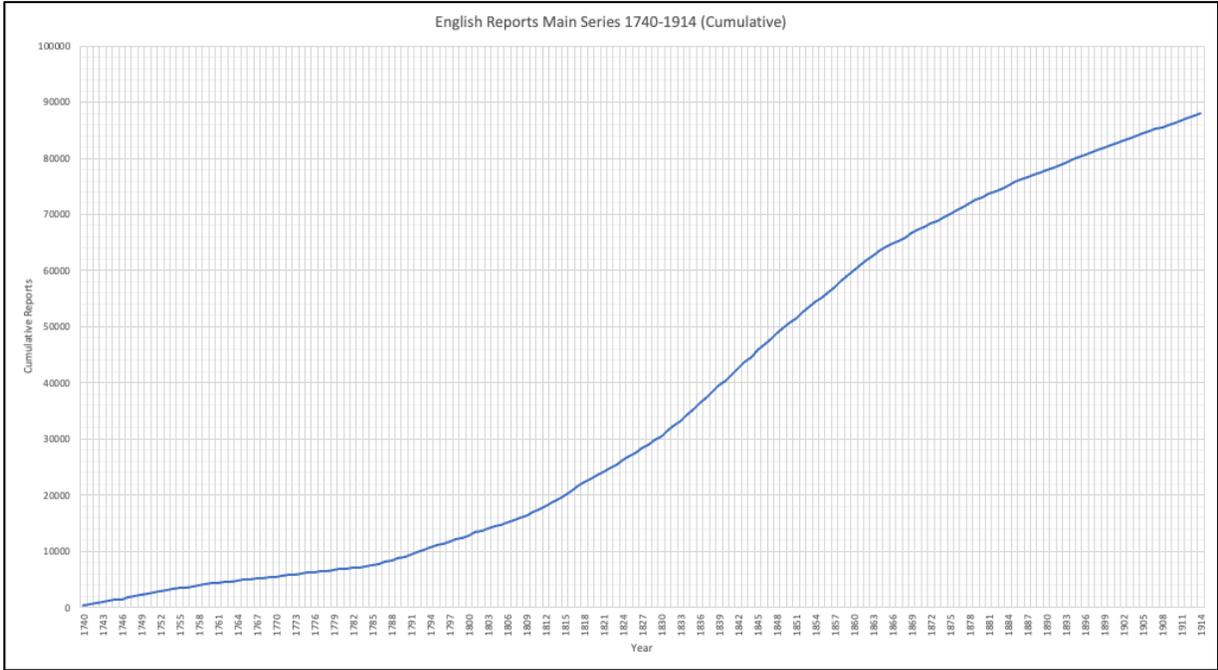


Fig 9. Main Series Cumulative Reports

This conveys neatly just how many additional cases were being added year on year between 1770-1860. By 1914, the total volume of reported cases in the ER and ICLR series alone was approaching 90,000. Of course, not all 90,000 of these reports would all be legally relevant – in fact, only a fraction of the total ‘relevant cases.’ The age of relevant cases was getting younger and younger, and therefore more and more voluminous. Martin Schmidt, in an unpublished thesis,¹⁷⁶ tracked the citation rates of the ER series, producing the following trends:

¹⁷⁶ (Schmidt, 2016), 223, fig 22, 226, fig 26.

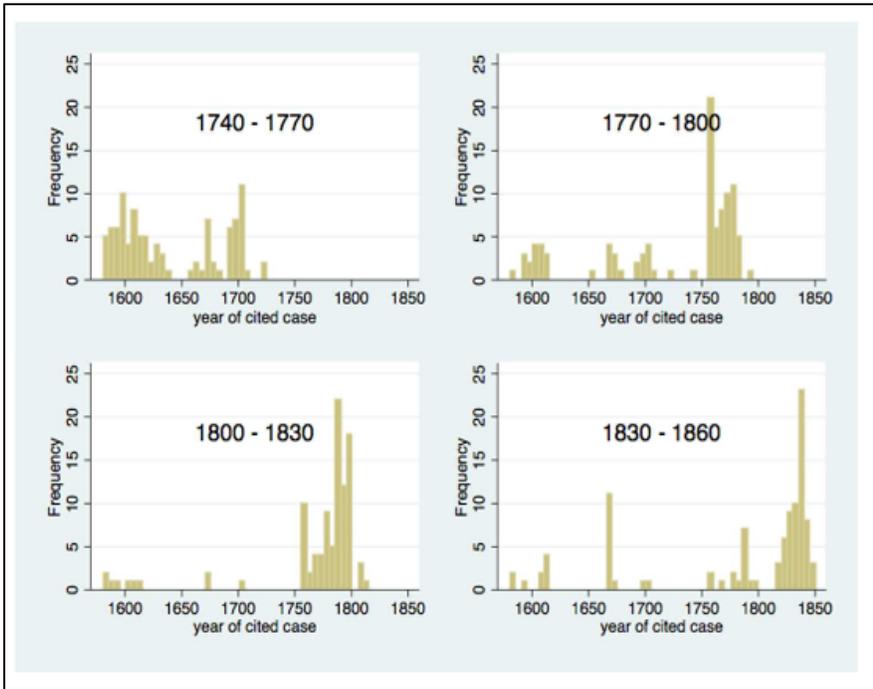


Fig 10. Annual Temporal Composition of top 100-cited authorities in tri-decade slices

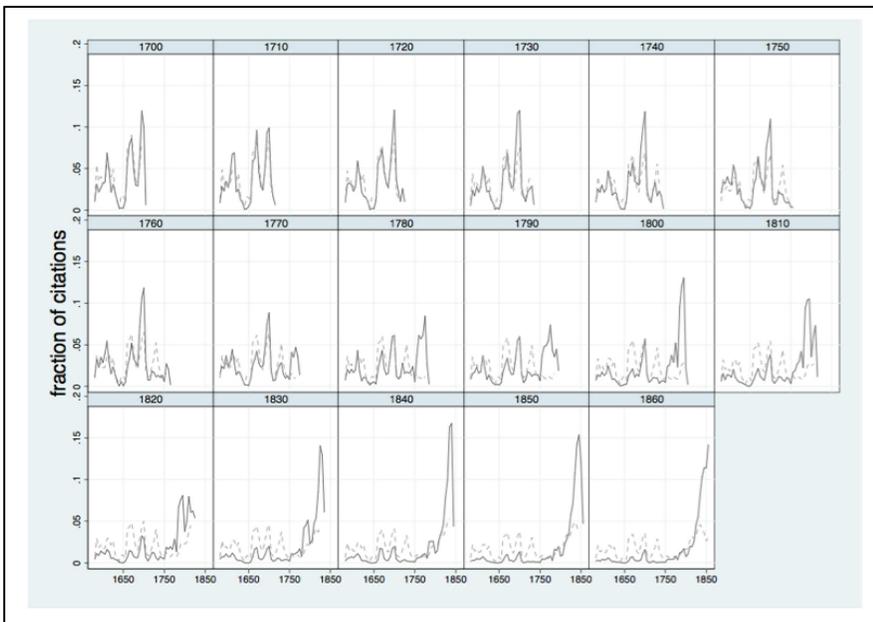


Fig 11. Time profiles of fraction of cited cases by decade

In Schmidt's words: "within a few decades a legal innovation process with low depreciation rates (1 to 2 percent) and strong past-persistence transitioned to a present-focused innovation process with significantly higher depreciation rates (4 to 6 percent) and weak past-persistence."¹⁷⁷ This transformation unfolded in a similar manner in both England and the United States, with a newly created body of law developing 'in a self-referential manner.'¹⁷⁸ As Schmidt notes, this marks a paradigm shift towards a system where cases are generated in great numbers; cite comparatively more recent cases (less past-persistence); and receive fewer subsequent citations the older they get at a faster rate (higher depreciation). In short, old cases were becoming irrelevant more quickly; by 1900 the majority of cited precedents originated in the 19th century.¹⁷⁹

A basic cause is that the information in them was depreciating in value more rapidly, reflecting accelerating changes in social and economic conditions.¹⁸⁰ This study is also supported by citation-patterns of the 18th century treatises. Lobban notes that Gilbert drew the "vast majority" of his cases from reports published before the Glorious Revolution (1689),¹⁸¹ with most coming from Croke's reports of cases from the time of Elizabeth and James I.¹⁸² Given Gilbert likely drafted the majority of his treatise in the first decade of the 18th century, this suggests he was relying predominantly on authorities around a century old. Baloch tracked a similar trend for Powell's *Essay Upon the Law of Contracts and Agreements* (1790), finding that of the 507 cited cases, 192 were from the 17th century or earlier, and only 63 from after 1750.¹⁸³ In contrast, the age of cases in the later contract treatises was far younger, with the vast majority dating to between 1800-1840. The metabolism of the law was speeding up: new cases were being produced, re-inputted and cited, and giving birth to new cases ever more quickly.

These new cases were not merely more voluminous, they were also *longer*. Schmidt estimated the total length of English Report Series cases by total words and found the following:¹⁸⁴

¹⁷⁷ *ibid.*, 1.

¹⁷⁸ *ibid.*, 12.

¹⁷⁹ *ibid.*, 118, 165, 173 described by Schmidt in terms of 'innovation value' decaying.

¹⁸⁰ *ibid.*, 174

¹⁸¹ (Lobban, 2017), cxxii

¹⁸² *ibid.*, cxxiii

¹⁸³ (Baloch, 2007), 416.

¹⁸⁴ Schmidt, *supra* (n176), 233

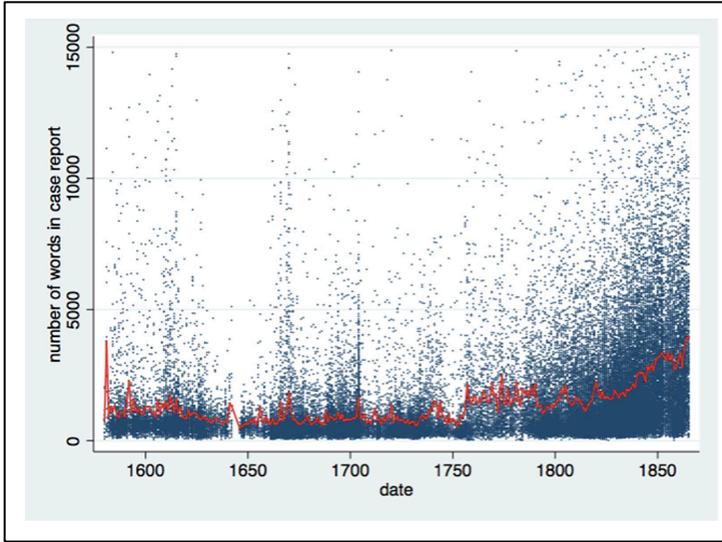


Fig 12. Number of Words in Case Reports

A more selective survey of contract cases in the King’s Bench estimating the total number of *pages* per case shows a similar trend continuing into the early 20th century:

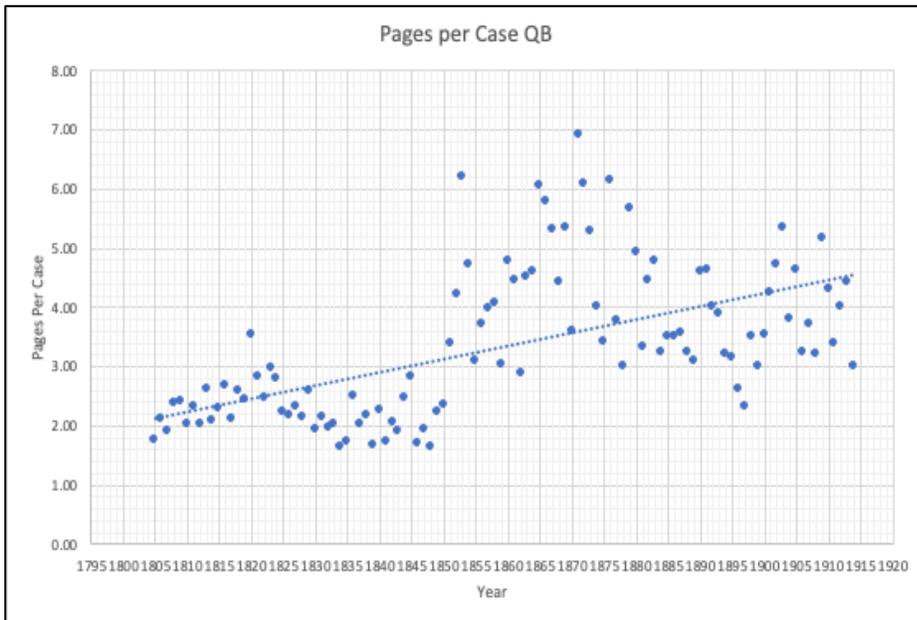


Fig 13. Pages per contract case (QB/KB)

Contemporaries were aware of these changes. Lawyers frequently complained about the engorged size of reports, pining for the good old days of cases routinely a paragraph long. A commission report in 1826 warned of the growing mass, suggesting “the length indeed of Modern reports is a serious evil; and a

great obstruction to the dispatch of business” counselling that “redundancy is the vice of the age.”¹⁸⁵ Of course, such concerns were not always realistic. Vesey, a Chancery reporter, replied that it would be impossible to reduce his reports to the size of those given by Peere Williams (1740). Instead, he attributed the prolixity to “the various and complicated affairs, resulting from the great increase of wealth, an excessive spirit of commercial enterprise, and a state of society, that has attained the highest point of cultivation and refinement.”¹⁸⁶ What was clear, at least by the middle of the century, was that court times were increasing and judges were being overloaded by the mass of business. Such concerns are peppered throughout 1856 Commission report into the legal system, with many of those giving evidence complaining that the number of common law judges (12) was far too low to deal with the enlarged course of business. It also emerges in the recorded figures for the Chancery. There appears to have been a persistent increase in the number of days it took to resolve a single case:¹⁸⁷

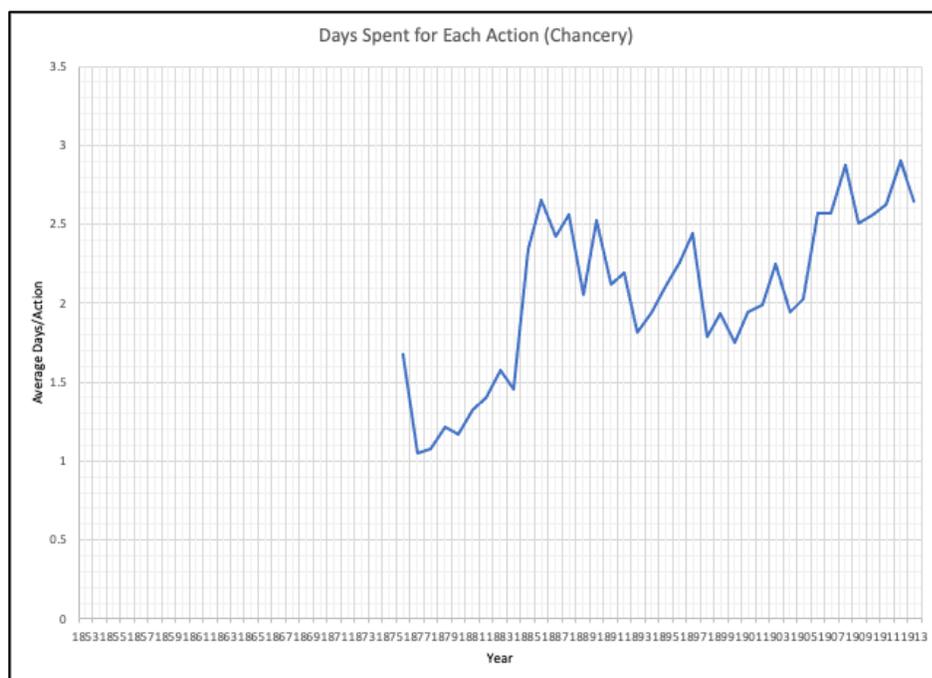


Fig 14. Days Spent Sitting per Action, Chancery

¹⁸⁵ (Commission 1826)

¹⁸⁶ Vesey Jr, *Chancery Reports 1789-1817*, 2nd Edition (1827)

¹⁸⁷ N.b. (PC Scarlett, 1877), 62 who noted that the average number of contested cases which could be resolved per day had dropped to about 6 in 1840 from 20-25 in 1800.

By far the most radical change, however, came with the creation of the County Courts. All the figures above are in the long shadow of the county courts' mountain of litigation.¹⁸⁸ Taking the total number of complaints and causes determined shows a staggeringly enormous caseload:

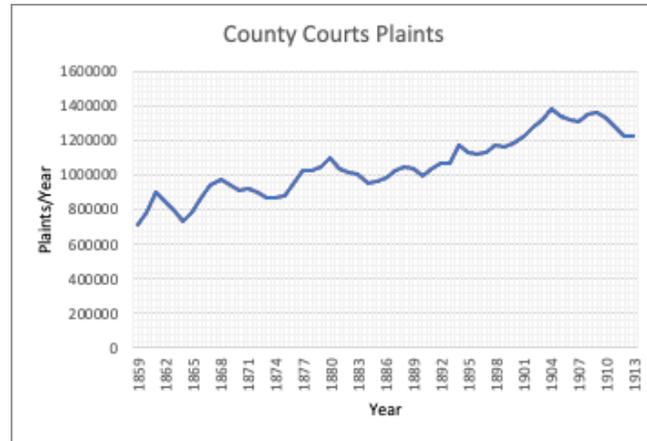


Fig 15. Total Number of County Court Plaints

As can be seen, the county courts reliably reached six, and even seven, figure sums in their complaint numbers by the late 19th century. Importantly, unlike their predecessors, the Court of Requests, the County Courts followed – more or less – the law promulgated from the central courts. Their expansion therefore reflects a widening of the common law system. Altogether, these, and the preceding figures, show a legal system going through a remarkable growth spurt.

1.2 Explaining the Rise

It is impossible to explain all aspects of the 18-19th century transition to complexity here. The growth in litigation, for example, is highly intricate and will be comprised of both *supply-side* and *demand-side* explanations.¹⁸⁹ Some of the statistics are explicable according to the former, relating to how many litigants the legal system can process and the cost of doing so.¹⁹⁰ Demand-side explanations, on the other hand, relate to the potential need in society to go to court. This is the favoured explanation of MacDonnell and Johnson, who suggest economic conditions are the dominant factor in explaining the rise and fall of civil litigation.¹⁹¹ Strong evidence in favour of this explanation would be significant changes, whether spikes or slow falls, unrelated to changes in judicial-capacity, or ‘supply.’¹⁹²

¹⁸⁸ As Brooks 1998, *supra* (n169), notes, 68, the large expansion of litigation in 1880 was primarily due to the County Court system being created.

¹⁸⁹ For analysis in the context of other forms of dispute resolution, Francis *supra* (n145), 887-8

¹⁹⁰ E.g. Reforms like the District Registries; Commercial Court; and County Court, suggest supply, rather than demand, was a core limiting factor. See, *1856 Judicial Statistics* p. x for the ability of County Court business to rapidly continue increasing without a serious collapse in KB numbers.

¹⁹¹ MacDonnell, *1895-1914 Judicial Statistics*; (Johnson, 1993).

¹⁹² Brooks 1998, *supra* (n169) 108, suggested reporting rates plummeted in times of War, before radically increasing in 1991.

Evaluating this theory would require an investigation of economic history outside the scope of this thesis. Instead, I focus on another measure of court activity slightly closer to the production of doctrine: case reports. My explanation for why more cases were reported is straightforward: cases were reported privately to sell to lawyers and, over time, lawyers demanded more reports, stimulating more reporting. Lawyers wanted cases if they could be of use in court and more cases were being decided in a manner considered useful, or ‘reportable.’ The rise in useful cases arose from two places. First, judges were deciding more cases and those cases were increasingly substantively reasoned,¹⁹³ making them effective for predicting and arguing future disputes. Second, these cases became, partially because of said reasoning, more persuasive in legal argument.¹⁹⁴ Whilst neither of these trends were novel to the 18th century, both accelerated from 1770 onwards. I argue the deeper cause behind this acceleration was a turn by commercial men increasingly towards law, and judges, in turn, increasingly accommodating them. It is here that my causal narrative becomes a sketch: why there was a turn to law is only briefly explored and I treat it largely as a fixed background factor. In sum, the set of causes appears fairly trivial:

Commerce turns to law -> Courts decide more cases substantively and follow past cases more consistently -> Lawyers demand these reports -> Reporters produce more reports to sell to lawyers.

Nonetheless, it was this seemingly mundane sequence of events which triggered an explosion in case reports, one sufficiently powerful to force deep and lasting reforms across the English legal system.

1.2a The Basic Dynamics of Case Reports

The first step in explaining increasing case reports starts with the system of case reporting. In the 1800-1914 period there were two distinct phases: the nominate reports (1800-1865), and the Incorporated Council for Law Reporting (ICLR) reports (1865-1914).¹⁹⁵ The basic motive, due to the commercial nature of law-reporting, was to make the reports appealing to their main customers, practising lawyers, of whom barristers were particularly important. Nonetheless, this incentive varied substantially depending on the structural organisation of reporters. In both periods, the reporter assumed barristers wanted reports of cases which would be relevant and useful in court – such as cases which created or revised legal rules

¹⁹³ Substantive reasoning is best understood in contrast to procedural reasoning. The latter relates to when different actions can be brought, focusing on the steps needed to achieve different procedural outcomes (such as getting one’s case before a jury). The former involves a direct consideration of which facts lead to which legal outcomes. See (J. Baker 2019), 60.

¹⁹⁴ (Reid and Zimmermann 2000), *A Note on Law Reporting*, lvi provides similar causes behind the growth in organised law reporting in Scotland. He also notes a similar trend, at lviii, of law reporting periodicals.

¹⁹⁵ Much has been written on law-reporting in the 19th century. See (Holdsworth 1938), XII; XIII; XV; (Daniel 1884); Wallace *supra* (n7), (Polden 2010c) (Hanly 2005); (Dawson 1968); (Oldham 2000, 2004, 2018); (D. Ibbetson 2006)

dealing with common situations. ‘Usefulness and relevance’ in court are, however, extremely difficult to define,¹⁹⁶ and a reporter’s idea of ‘usefulness’ or ‘value’ could sometimes diverge from the profession’s and judiciary’s.¹⁹⁷ As we will see, in some instances reporters deliberately suppressed precedents¹⁹⁸ or attempted to progressively develop the law through proactive reporting.¹⁹⁹ Closely tied up with ‘usefulness’ is the strength of precedent²⁰⁰ and the growth of substantive law; resistance to the former often manifested as a criticism of overreporting.

We can also identify numerous motivations unrelated to the needs of lawyers. These are pathologies produced by the organisation of reporters. Several minor incentives²⁰¹ include reporting cases (1) for personal gain because a reporter is paid by the page,²⁰² or rewarded for case numbers;²⁰³ (2) following requests by a judge to report them;²⁰⁴ (3) to ensure volumes of case reports are of a consistent size to meet subscriber expectations;²⁰⁵ and (4) to promote the practice of a reporter and their friends by reporting cases involving themselves.²⁰⁶ The most important, by far, was (5) the incentive to report a case because a rival reporter had reported it.²⁰⁷ As we will see, the competitive structure of reporting, combined with uncertainty over what made a case ‘useful’, induced reporters to consistently err on the side of reporting a case whose utility might have appeared dubious.²⁰⁸ These pathological causes potentially confound my Complexity thesis, implying that a proportion of the great rise in case reports had nothing to do with practical necessity. I will consider both periods here, attempting to determine the extent to which overreporting was present.

The Nominate Reports

The rise in reporting begins with, and continued throughout, the nominate report period. The ‘nominate reports’ were designated such because each set of these reports was named after the reporter compiling

¹⁹⁶ (Anon 1848b), 4 expressly states it is impossible to come up with a definition of whether a case ought to be reported at length.

¹⁹⁷ See (Mews 1893), 184, criticising barristers for preference for modern reports; Daniel, *supra* (n195), 290 notes that barristers over-cite and thus cases they would cite for this purpose alone ought to be excluded. Nonetheless they never omit a case which ‘the court would seriously consider if it was before them.’

¹⁹⁸ Interestingly, (Anon, 1939), 33 suggested at that any attempt to suppress a case was pointless because, if it was of precedential value, it would emerge via manuscript reports.

¹⁹⁹ Mews, *supra* (n197), 180 is critical of this approach. For example, attempts to ‘fetter the exercise of the judge’s discretion’ by reporting cases.

²⁰⁰ Mews, *ibid*, 184 for example, took the view that old cases retained perfectly their character as precedents. Thus, barrister preferences for newer cases were frivolous. Cf Daniel, *supra* (n195), 289 who suggested reportability can change over time as judges become more – or less – obedient to their previous decisions.

²⁰¹ Provided by Mews, *ibid*,

²⁰² *ibid*, 183

²⁰³ *ibid*, 183

²⁰⁴ *ibid*, 183; though he notes this is a minor cause

²⁰⁵ *ibid*, 183.

²⁰⁶ *ibid*, 185

²⁰⁷ *ibid*, 184, which still apparently continued post ICLR.

²⁰⁸ Anon (1848b), *supra* (n196), 13 suggests that it is difficult to tell whether a case ought to be reported and that it is was therefore safer to err on the side of caution. This is repeated post-ICLR in (Lindley 1885), 287.

them. These were private individuals,²⁰⁹ typically barristers early in their careers, who wrote them with a view to profit.²¹⁰ Reporters covered all the courts of law by 1820, including the Chancery and nisi prius cases,²¹¹ using the reporting style established earlier in the 18th century by Burrow, Douglas, and Cowper.²¹² According to later 19th century sources, these reports were known as the ‘authorised’ reports and were carried out with the consent of the judges in the court they covered.²¹³ It was also suggested the nominate reports received a right of exclusive citation²¹⁴ and privileged access to the judge’s draft materials in the early 19th century.²¹⁵ Nonetheless, their history is quite murky and it is difficult to trace any special right they may have possessed.²¹⁶ At most, it can be said they form a distinct, particularly comprehensive and extensive set of reports aside from the periodical and duplicate reports.²¹⁷

There appears to have been an important shift in the late 1820s. Due to perceived shortcomings in the nominate reports,²¹⁸ numerous private competitors began to publish their own reports. These were sometimes by other individual barristers (the ‘duplicate reports’) or legal periodicals attempting to acquire readership (the ‘periodical reports’).²¹⁹ Initially, these competitors qualified their work, regretting the building volume of reports and danger of competition between reporters leading to case repetition, but emphasised how they were only reporting *original* cases. Nonetheless, over time, these informal reports radically reduced the circulation numbers of the nominate reports.²²⁰ Contemporary accounts, including the prefaces to the reports themselves, suggested the main driving commercial incentive behind the private reporters was to catch cases of interest of the bar which the nominate reports missed or were too slow in reporting.²²¹ I explore the structural factors behind this growth below; for present purposes, what matters is that the number of potentially useful cases started to exceed the capacity of the nominate reporters alone. We can see this clearly in the numerous unauthorised competitors springing up in this period. By the 1840s numerous criticisms were being levelled at these reports, such as delay, expense,

²⁰⁹ An exception is the House of Lords, which appointed official reporters. (Holdsworth 1934), XII, 104. The nominate reports grew out of the reports of private lawyers for their own use (Veeder 1907), 5.

²¹⁰ The earnings of court reporters was substantial, (Polden 2010b), 1213-5; Polden notes criticism of the system of regular, private reporting as too commercial and of poor quality; there were also indications a monopoly run by the Associated Law Booksellers.

²¹¹ Polden, *ibid*, 1212.

²¹² (Holdsworth 1934) XIII, 425

²¹³ Daniel *supra* (n195), 265; they were also carried out linearly, preventing competitive incentives, see Price’s *Reports of Cases Argued and Determined in the Court of Exchequer* (1816), and Merivale’s *Reports of Cases Argued and Determined in the High Court of Chancery* (1817).

²¹⁴ *ibid*, Daniel, 266. Said to have been dispensed with by the King’s Bench in 1832.

²¹⁵ *Ibid*, Daniel; (Anon 1841) 26.

²¹⁶ As noted in the Polden *supra* (n210), 1212. The term ‘authorisation’ was often interchanged with ‘regular’, ‘orthodox’, ‘standard’, and ‘nominate.’

²¹⁷ (Anon 1841), 27.

²¹⁸ *ibid*

²¹⁹ (Ibbetson 2006), 175-6 provides a useful table suggesting the majority of new periodicals were published between 1820-1869, with a clear peak between 1840-9. Many thanks also to Ann Hale for sharing her timeline of legal periodicals between 1727-1942.

²²⁰ Daniel, *supra* (n195), 128, 425, There was circulation of 4000 for QB reports, and 2000 or more for the Chancery between 1824-1830. By 1863 the circulation of the nominate Chancery reports was 450, compared to 4000 for the law journal.

²²¹ Delay was one of the most common criticisms of the nominate reports, alongside expense and irregularity. (Holdsworth 1934) XIII, 425. For numerous criticisms, see Daniel, *supra* (n195), *first part*.

irregularity, inaccuracy, prolixity, and, most importantly for our purposes, inclusion of useless or irrelevant cases.²²²

The main cause behind this over-reportage, as diagnosed by Daniels, was dysfunction in the competitive market for reports.²²³ The dynamic of overreporting is simple: whether a case was ‘useful’ was often unclear and the criteria were sufficiently open-textured to admit many possible options.²²⁴ Second, missing a report which was subsequently used and cited many times in court from another rival’s report was perceived to be far worse than including one or two useless duds.²²⁵ As a consequence, Daniel argues, reporters consistently erred on the side of including cases with little to no precedential value, and reporters would attempt to include more cases than their opponents.²²⁶ Unfortunately, as noted above, this has the effect of confounding our causal explanations for the growth of cases. As suggested above, the intuitive hypothesis is that there were simply more cases of interest to lawyers and as a result more cases got reported. Whilst this remains plausible, the problem is that it is difficult to determine to what extent the rise is attributable overreporting. Usefully, in 1865 there was a substantial reform to the reporting system which appears to have precipitated the decline.

The Incorporated Council for Law Reporting (ICLR) Reports

The ICLR was founded in 1865 largely in response to the criticisms of overreporting, and delayed or prolix reporting. Such criticism became sharper as the law of precedent grew more formal and reports took on a greater precedential weight;²²⁷ in turn, the regularisation of reporting strengthened the precedent-system.²²⁸ Interestingly, Daniels, the main proponent of the reform, suggested by remedying the overreporting pathologies, could reduce the total number of volumes by a half or a third.²²⁹ From the statistics above, it appears by 1865-1866 the reported cases had in fact dropped by two thirds. A possible explanation is that the introduction of stricter editorial processes in the ICLR reporting process culminated in a removal of the overreporting incentives described above.²³⁰ Accepting this thesis in full is slightly startling: it implies that – for possibly 30 years – two thirds of all nominate reports were reported

²²² (Anon 1848b), 2 describes it as a ‘mass of undigested material’; (Anon 1848a), 238 states “often, very often, unimportant [cases] are recorded.” Fox *supra* (n7), 6. Cf Bligh *New Reports* (1827), iv who was confident in publishing his reports despite the ‘evils’ of competition because he believed overreporting was an illusion.

²²³ Daniel, *supra* (n195), 138. For other contemporary comments: (Holdsworth 1934) XV 250, for subsequent comments Lindley *supra* (n208), 138.

²²⁴ See (Anon 1848b). A tangential, though important, debate is *who* ought to decide what made a case important. (Anon 1848a), 239, suggested reporters should be given the power to suppress precedents.

²²⁵ Also noted in (Fox 1913), 6.

²²⁶ Daniel, and the views of others, *supra* (n195), 7-9; 11; 47-52, 111; nb (Polden 2010c) 1215.

²²⁷ (Anon 1848a) *Reporting System*, 236, gave an early indication of this concern when he noted an ‘anonymous manuscript’ could bind the profession. See Daniel *ibid* 16-18, 91 referring also to the diffusion of reports across the Empire.

²²⁸ (Pollock 1898)

²²⁹ Daniel *supra* (n195), 130, cf Hemming, therein, who regarded the ‘pith’ as merely 1/10 (107).

²³⁰ (Holdsworth 1934) XV, 250.

for reasons outside of legal utility. Further, that the earlier rise in reports was primarily instigated by overreporting pathologies, and that the subsequent fall was in their correction.

It is difficult to believe this thesis and there are numerous points which suggest this cannot be the whole story. First, and most importantly, the rise in case reports begins around 1760; most accounts of overreporting do not suggest it was a problem earlier than 1820.²³¹ As such, at least this portion of the rise in cases is likely independent from overreporting pathologies. Second, the ICLR was not, in fact, a watershed moment at which overreporting ended. The reform did not remove the competitive incentives in reporting, nor did the ICLR receive an exclusive right of citation²³² and, consequently, the Law Journal and Law Times continued to exist as competitors with high circulation. As a result, it appears overreporting continued post-1865.²³³ Persuasive evidence of this is provided by Mews who spotted the number of ICLR reports was constant year by year, regardless of actual judicial output.²³⁴ The stabilisation in the reporting graph at around 200 cases per year is therefore misleading: the true figure could in fact be a continued decrease into the 20th century.²³⁵ A similar indicator that causal processes beyond pathology were at play is the continued increase in page length despite the creation of the ICLR.²³⁶ Third, the decline set in around 1840-50, rather than 1866, the first establishment of reports, and indeed the decline is not instantaneous but occurs over several years in varying extents between courts. Fourth, and finally, reading the cases before and after 1865 does not seem to suggest there are proportionally far more pointless or useless cases in the earlier period. This is not surprising: the majority of ICLR reporters were previously nominate reporters, and it would appear there was little oversight exercised by the editors.²³⁷

Moving forward with the assumption overreporting is merely one part of the rise and decline of case reports, what other causal forces could be behind this? In part 1.2b, I will consider the possibility there were, simply, *more reportable cases* in all areas of law.²³⁸

²³¹ Bligh, *supra* (n222) noted in the preface to his reports that persons feared ‘the evils’ of ‘accumulating reports.’ Nb (Rogers 1897). Cf Fox *supra* (n7), 2 referencing the consistently anti-accumulationist *Watkins’ Principles of Conveyancing*, 2, arguing the evils had set in by 1820; likewise Daniel *supra* (n195), 6, fn2. Conversely, Mews, *supra* (n197) 181-2, found the reports from 1813-1823 short and efficient.

²³² Daniel, *ibid*, 256

²³³ Mews, *supra* (n197), 179, 184. Mews pointed to the fact commercial competitive incentives continued to operate, and that adverts could be found stating a report’s value because it was larger than any other. See Polden *supra* (n210), 1221-2.

²³⁴ Mews, *ibid* 179

²³⁵ Mews, *ibid*; (Anon 1939) who suggests there is still possibly excess reporting; and the views in (Pollock 1891, 1892)

²³⁶ As noted in Anon *ibid*, 29. Nonetheless, there were fewer overreporting criticisms in this period. 32.

²³⁷ (Pollock 1903) for an excellent overview, (Duxbury 2004), 6, 296-306.

²³⁸ (Rogers 1897), 251

1.2b Moving the Legal System Up a Gear

Reporters, on the whole, reported cases that lawyers wanted to use. The fact more cases were reported simply reflects the fact there were more in-demand cases. We can consider two factors behind a rise in such cases. The first is that judges decided large numbers of cases substantively, producing valuable general principles and rules governing a range of possible facts. These are exceptionally useful in planning for future potential cases and thus were considered ‘reportable.’ Second, judges followed the reported cases more consistently. This made all cases more effective tools in argument and therefore of greater value. Both of these trends were stimulated by a mutual turn from business to law and law to business: substantively reasoned cases which were followed consistently were taken as essential for the needs of business.

(i) The Radical Technique of Deciding Cases Substantively

The first factor was the movement by judges towards substantive decision-making. A tempting argument is that substantive judgments were more useful than their procedural predecessors, and thus were more in demand. For example, one could suggest they are intrinsically more useful (e.g., for predicting future cases), or because they would be more persuasive to judges in a climate of substantive legal argument. Interestingly, however, such a step is unnecessary. Instead, I assume they are of equal utility but that substantive law, by its nature, can produce a greater volume of information than law tied to the procedures of pleading. The reason is that such procedures like the forms of action and the jury restrict - possibly by design -²³⁹ the extent and complexity of legal doctrine. They leave the majority of complex and idiosyncratic facts to the jury, a body incapable of producing legal rules from them.²⁴⁰ Once these limits are removed, legal rules can more directly trace the factual density and complexity of commercial activity. Thus, reports would rise because a greater volume of report-worthy cases emerged – these cases theoretically could have been procedural, but weren’t – they were substantive. In this section, I will show (1) judges rapidly increased substantive decision-making from 1760 onwards using procedures to review jury verdicts. Further, (2) I suggest this was designed to facilitate the needs of modern commercial litigants. As a result, this greater volume of legal rules, breaking beyond the cognitive limits of the jury,²⁴¹ could sustain a much greater body of reportable cases, and thus case reports.

²³⁹ Francis *supra* (n145) calls this the ‘controlled-delegation’ strategy.

²⁴⁰ (Milsom 1967)

²⁴¹ (Milsom 1981b), 10, “the consequence [of the judge replacing the jury]... was that the common law broke, without noticing, through a natural boundary between law and fact, and began that descent into ever lower levels of detail.”

Just as with the rise in reports, there is little doubt the late-18th to early 19th century brought the creation of many new substantive legal rules. Contemporaries, both commentators and the judges themselves, were aware of the rapid production of novel legal principles and rules using new procedures. Burrow, in the preface to the first volume of his reports (1766), noted:

“There are *more* Opinions of the *Court*, during this Period, upon *important* Points, than ever were given during the like Number of Years: And I do not remember a single Instance where the Determination did not give general Satisfaction.”²⁴²

Indications as to the rapid synthesis of case law in contemporary commentary are common. Treatise writers in frontrunner doctrinal areas, such as maritime insurance and bills of exchange, remarked on the great generation of case-law during the term of Lord Mansfield and its usefulness for their work.²⁴³ James Allen Park, for example, noted in 1787 that “much has been done [in erecting a complete system of jurisprudence] within the last thirty years.”²⁴⁴ Likewise, Chitty in the preface to the first edition of his *Practical Treatise on the Law of Contract*, observed “Perhaps no branch of the jurisprudence of the country has of late years been more the subject of judicial inquiry and decision than the law of Contracts.”²⁴⁵ It is also possible to find judicial recognition of the immense generation of substantive rules. A particularly direct account is in *Lickbarrow v Mason*, where Buller J notes that the previous 30 years represented a turning point for the commercial law of England representing the creation of new ‘guiding rules’ under the caselaw of Lord Mansfield.²⁴⁶

In addition to contemporary comment, we can also draw from wider legal literature. The majority of new legal treatises emerged in the years following Lord Mansfield’s generative activity. This is mirrored in Schmidt’s citation network research, suggesting most significant cases were decided in the period after 1760. We can connect the King’s Bench’s role in making substantive law to the general increase in reported cases using the docket rolls and entry book figures. Not only do these place the take-off period around 1750, but they suggest the King’s Bench was primarily responsible for this drive.²⁴⁷ The timing of

²⁴² Burrow *Reports* (1771), vol 1, v

²⁴³ (Bayley 1789), piii; (Story 1843), 15n; (Millar, 1787), p. vii, 17. For general commentaries suggesting the same, (Bell 1826). ix-x; (WD Evans, 1810), iii. 89

²⁴⁴ (Park 1787), xliv. Cited in (Lieberman 1989), 100.; likewise, comments from Wooddeson in *Elements of Jurisprudence*, p. 159.

²⁴⁵ Chitty, 1st edition, v citing as causes ‘The rapid extension of commerce, and the variety and increase of the transactions of mankind’

²⁴⁶ *Lickbarrow v Mason* (1787) 2 Term Reports 63, 73. 81. See also Daniel *supra* (n195), 28.

²⁴⁷ The disparity of business in favour of the King’s Bench is confirmed by the RC *First* (1829), 17; *Second*, 211, A.3; 213; 220; 222; for a procedural analysis, see Cross’s answers, 238.

many of the new reports also confirms this: the King’s Bench reports were the first to be published, likely due to the growing volume of reportable material and demand from the profession.²⁴⁸ These were followed successively by the other ‘nominate reports’ in the other common law courts. As the 19th century progressed, it appears the common law courts, alongside their nisi prius trials, were responsible for the vast majority of contractual caselaw. I carried out a survey of all case reports in the main report series above between 1800-1914. Of these 25,000 + cases, I produced the following pattern:

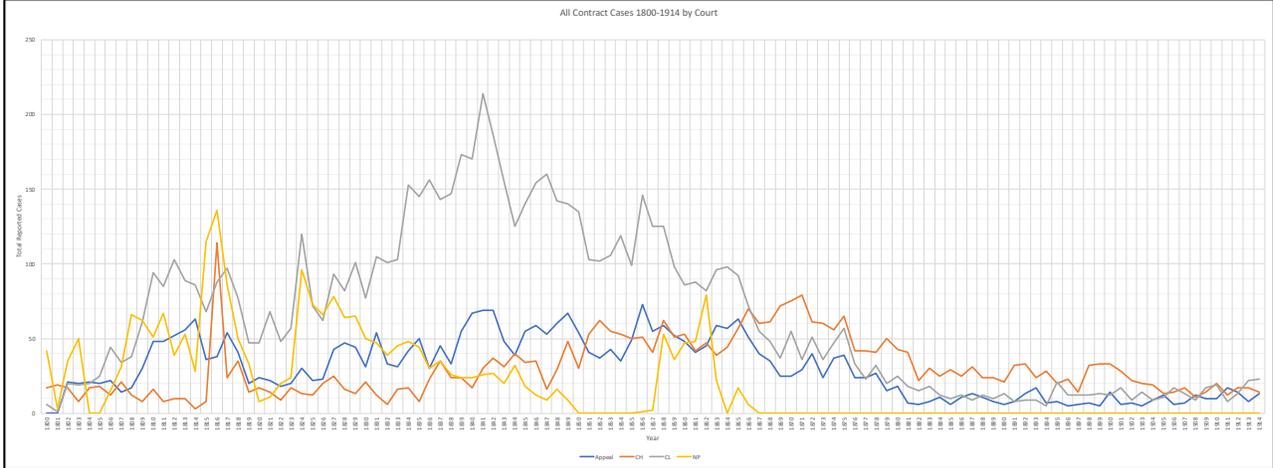


Fig 16. Total Number of Contract Reports, by Court

Together, they show the early growth was produced by the CL and nisi prius reports predominantly, which continued overwhelmingly in the CL courts to produce the 1832-1862 peak. As contract law made up around 50-60% of all cases going to trial, and 20-30% of all reported cases in this period, this contribution was a significant force behind the rise in cases.

The procedures used to create this new wave of substantive law are also well-known.²⁴⁹ Up until the mid-18th century, many of the later subjects of contract law were left to the jury and thus could produce little ‘law.’²⁵⁰ Historically, there have been two major variants of procedures capable of removing issues from the Jury.²⁵¹ First, before trial at the pleading stage, when the issue can be more tightly defined to circumscribe the discretion of the jury. Second, after the trial via procedures allowing judges to review the jury’s finding of facts and analyse its legal consequences. These changes had already begun in the 16th century with an increased judicial “willingness to make authoritative decisions, and a corresponding

²⁴⁸ Burrow, *supra* (n242) notes in his second volume that the legal profession complained there were insufficient cases in his first volume, *preface*. .
²⁴⁹ Baker, *supra* (n193) 93; (Hanly 2005); (W. R. Cornish and Clark 1989); (J.H. Baker 1979), 20; Francis (n145), 115, fn(382); For a more detailed analysis of these procedures, see (Pritchard 1960); for contemporary analysis of the rise of judge-only adjudication, (Cababé and Ellis, 1885), iii.
²⁵⁰ (Baker 1980), 469
²⁵¹ (Baker 2003), 385 implicitly provides these as ‘pre’ and ‘post’ trial review procedures.

desire in the legal profession and its clientele to have the law clearly stated upon known or admitted facts.”²⁵² There was an increased openness to deciding formal demurrers and to reviewing jury decisions after trial. These reasoned decisions were then increasingly captured in a new legal medium - the printed word²⁵³ - and organized using devices like the alphabetical abridgment.²⁵⁴ Accompanying these changes was a shift in the mode of common law reasoning: a growing turn to ‘positivism’, sharpening of the notion of an ‘authority’,²⁵⁵ and accompanying increase in the weight of precedent.²⁵⁶ These trends continued and accelerated in the 18th century, although with several major differences.

The most significant was the collapse of pleading as an engine of legal development. The immediate cause behind this collapse was the extensive use of broad pleadings by the litigants.²⁵⁷ A plaintiff could plead multiple counts, including the extremely broad *indebitatus* counts.²⁵⁸ Conversely, defendants could respond with the blank general issue.²⁵⁹ By uniformly denying all the plaintiff’s allegations, defendants prevented the opportunity for special pleading and, in turn, restricted much of the space for formal demurrers.²⁶⁰ There were several structural reasons behind this practice. The primary inconvenience seemed to be that special pleading required the lawyer to precisely anticipate what would emerge at proof during trial. As disputes became more intricate, lawyers became increasingly unwilling to stake their case on ‘one, or to any definite number of counts.’²⁶¹ The abandonment of special pleading left a gap in jury-control. In its place, the judiciary took it upon themselves to control the jury at the trial stage, producing enough significant substantive law for nisi prius reports to become viable.²⁶² If the parties were dissatisfied with this decision they could always rely on one of the post-trial review procedures. There were many options available: the motion in arrest of judgment; motion for judgment *non obstante veredicto*; demurrers as to evidence,²⁶³ taking special verdicts;²⁶⁴ special cases;²⁶⁵ motion for a new trial,²⁶⁶ and reserving points of law during trial for consideration.²⁶⁷ Of these, the last four were the easiest procedurally, and were deliberately used by judges to create new law.²⁶⁸ Contemporary authors explicitly

²⁵² Baker, *supra* (n193), 90; Baker, *ibid.*, 48, 385, Ch 21. Assisted by the rise of the ‘case’ form of action, see Ch 2.

²⁵³ See Baker, 2003, *ibid.* 506-7, for the effect of printing on the law; and (D. Ibbetson 2000), 345, 346-7; (Williams 2010, 2020)

²⁵⁴ (Macnair 2019), 191, 193, who dates the first alphabetized printed text in the common law to 1490; see Fitzherbert’s Abridgment (1514-5), Brooke’s Abridgment (1573), and Shephard’s Grande Abridgment (1675).

²⁵⁵ (D. Ibbetson 2016), 60 describing a trend towards treating precedents as authorities, albeit non-binding ones, from the 16th century onwards.

²⁵⁶ (D. J. Ibbetson 1995), 88; Baker, *supra* (n251), 51, 486-489.

²⁵⁷ See Baker, *supra* (n193), 94-96.

²⁵⁸ (Stephen 1824) suggested this practice was of ‘very ancient date’, 285. Baker dates it to the 17th century, (Baker 2010), 511–14. For an overview, see *Second Report on the law of Pleading* (1830), 34.

²⁵⁹ Blackstone also discusses this trend, at Comm, iii, 305-306. Holdsworth (1934) XV, 267-268.

²⁶⁰ Stephen *supra* (n258) remarks at 175-176 that the general issue narrows the scope of the ‘greater and more subtle part of the science.’

²⁶¹ See *Minutes to Second Report* (1830), 18, Long, A.3; and Bayley, 126. A.3.

²⁶² See the Nisi Prius Reports of Campbell; Espinasse; Buller’s Nisi Prius Digest; Selwyn’s *Nisi Prius*, and the later Archbold, which contains extensive substantive law. For earlier reports, see (Newman 2024b), Part 3.

²⁶³ Baker, *supra* (n251)

²⁶⁴ *ibid.*

²⁶⁵ Stephen, *supra* (n258), 111

²⁶⁶ For sources on the new trial procedure, see Hanly, *supra* (n249), fn 8.

²⁶⁷ See Baker, *supra* (n193); Baker, *supra* (n251), 385-408; Pritchard, *supra* (n249), 92ff for a useful list.

²⁶⁸ For a later commentary, see Evans, *Pothier* (1806), 71 on the increased use of the new trial procedure.

linked them with the growing expansion of case-law. Douglas (1786), in the preface to his King's Bench reports, recorded:

“According to the modern usage, by far the greater number of the important questions agitated in the courts of law come before them upon motions for new trials, cases reserved, or summary applications of different sorts.”

Writing later, David Graham, in his ‘Essay on New Trials’ (1834), referred to ‘the subject of new trials, so intimately connected with the progress of the great mass of causes.’²⁶⁹ There was a general concern over the administrative burden of these new procedures: the Parliamentary Commissions in 1829-1830 into procedure frequently expressed concern over the number of post-trial review procedures;²⁷⁰ there were special inquiries in 1814-21 into Special cases and Rules to show cause for New Trials;²⁷¹; and the Parliamentary inquiries from 1834 also recorded new trials, special verdicts, and demurrers in detail as particularly significant figures relating to judicial business.²⁷² It is also possible to find judicial remarks on the novel use of the new trial procedure to create new substantive law.²⁷³ Finally, early 19th century treatise literature, where it records the procedural history of the rules involved, also suggests a predominance of new trials and special verdicts behind the new substantive law.²⁷⁴

These new procedures were linked at a higher level to changes in the doctrinal boundary between ‘fact’ and ‘law.’²⁷⁵ This distinction was the Common Law’s traditional method for distinguishing the proper role for the jury and the judge. In theory, matters of fact were left to the jury’s discretion whilst judges were responsible for the legal rules. In practice, the boundary was negotiable and judges attempted to restrict the jury by controlling evidence at trial and redefining issues of fact into issues of law.²⁷⁶ The place of ‘questions of mixed law and fact’²⁷⁷ is particularly illustrative of this process. Concepts involving a ‘mix of law and fact,’ such as ‘probable cause’ and ‘reasonable time’, were divided into those more suitable for the judge or the jury to decide. If they involved a few clear-cut facts, then judges regarded

²⁶⁹ (Graham (Jr.) 1834), v

²⁷⁰ RC *Third Report* (1831), 27, ffff, A.24; *Second Report*, 46-48; Art V, Special Pleading, at 331; Stephen, *supra* (n258), 462. For earlier concern over the repeated review of jury verdicts, see *Bright v Eynon* 1 Burrows 396, 393.

²⁷¹ For concern over the number of new trials, see Return of Numbers of Civil Cases (1821).

²⁷² See RC *Practice and Proceedings*, (1829, 1830, 1831).

²⁷³ *Saunderson v Rowles* (1767) 4 Burrow 2064, 2067

²⁷⁴ Evans, *supra* (n268).

²⁷⁵ The division dates to the 13th century, but the meanings of both ‘law’ and ‘fact’ have changed over time. For mediaeval history, see (Arnold 1974); for the early modern period, (Shapiro 1969) ff 229. For an early theoretical discussion, see Evans, *ibid*, 307 “Of the Distinctions Between Law and Fact, and the Effect of Usage upon the Law”.

²⁷⁶ Judges sometimes had to struggle against the jury; Lieberman *supra* (n244), (Ibbetson, 2001) and minutes to the Jury act demonstrate the often unruliness of the jury. (Howlin 2014), 161, fn 137.

²⁷⁷ The term appears to have originated from its use in *Johnstone v Sutton* (1786) 1 T.R. 545, see (Anon 1845)

them as suitable for reformulation into substantive law.²⁷⁸ Conversely, if they involved unpredictable, varied, and chaotically interrelated facts, then they were seen as appropriate for the jury.²⁷⁹ The standards for ‘reformulation’ appear to have shifted over time. For example, Lord Mansfield, commenting on his predecessor’s judgment, noted:

[W]ith great respect to Lord Chief Justice Lee's memory, I think the jury asked him a very proper question whether this drawing and redrawing [of notes] was, in point of law, a trading in merchandise within the statutes concerning bankrupts...the report says "He told them it was a question of fact and not law." With all deference to his opinion, it was a question of law upon the fact...²⁸⁰

Where possible, judges were encouraged to identify and extract ‘leading facts’ out of otherwise amorphous standards, thereby producing new cases and restricting the jury.²⁸¹ These trends were accelerated by the fabrication of ‘judicial rulings’ by precedent-hungry law reporters and the extension of those precedents by analogical reasoning.²⁸² Nonetheless, the process of converting fact into law never completely eliminated the jury’s freedom. Whilst there is no conceptual limit on how detailed the law can get, there are practical limits on what is useful to formalise in legal rules. As we will see in Part 2, it is likely that the legal system began to approach this limit in the latter half of the 19th century.

New Dynamics in Law and Business

The procedures behind the generation of new substantive law are straightforward, yet they were already in use from the 16th and 17th centuries onwards. The real puzzle is why their use accelerated in the mid-late 18th century. I break my answer into two parts: first, the strategic appeal of these procedures to commercial litigants; and second, the willingness of judges to allow and develop them. The former reflects a wider trend by which business ‘turned to law’ in the mid 18th century.²⁸³ Prior to this point,

²⁷⁸ Starkie (1844), 42; at 55, and 57 he notes that in some areas the facts are too diffuse to lay down a legal rule. Anon, (1834), seems to also regard the source of expertise, such as customary common sense, as relevant as to who applied the standard. nb Anon (1845) *ibid*.

²⁷⁹ *ibid*, Evans, *supra* (n268), 308.

²⁸⁰ p. 115, cited in Liebermann *supra* (n244); another similar point can be found in *Tindal v Brown* (1786) 1 T.R 167, where Lord Mansfield noted the boundary between law and fact, and jury discretion and legal rule, ought to be moved.

²⁸¹ Anon (1845), 34; the reasoning appears to have been taken substantially from *Panton v Williams* (1841) 2 Q.B. 169. For a similar indication of this process, see the *Morning Chronicle* 6th December, 1777 noting Lord Mansfield’s ability to discern ‘leading circumstances’ from the facts, cited in (Oldham, 1992), 93.

²⁸² There was an opposing group arguing the progressive approach would have deleterious consequences when combined with the rules of precedent, causing the proliferation of precedents and ever more specific rules. Starkie *supra* (n278), 58.

²⁸³ (Bursset 2023; 2016; 2020); (Lemmings 2000), 79-86 for the partial role of commercial litigants in increasing litigation rates post-1750, particularly in the King’s Bench. Unfortunately, I do not have space to interrogate this important causal story in the depth it deserves. For a critical survey Rubin and Sugarman, *supra* (n74), 4-7, 10.

private parties typically resolved their disputes with informal arbitration which was “extrajudicial, lawyer-free, and focused on preserving the parties’ relationship.”²⁸⁴

Resolving disputes out of court was more efficient: it was faster,²⁸⁵ cheaper,²⁸⁶ and had significant procedural advantages compared to the common law.²⁸⁷ It was also more compatible with a mode of business focused on long-lasting, personal relationships.²⁸⁸ It is plausible that, in this low-litigation environment, parties had little incentive to use post-verdict review procedures, just as judges had little incentive - or opportunity - to make substantive commercial law. Bursset suggests this balance of advantages started to shift around 1750 due to structural changes in the market, the most important being the growing impersonal nature of credit agreements.²⁸⁹ Informal arbitration became less effective and parties were forced to turn either to court or ‘legalized’ arbitration proceedings. The law could no longer be escaped, reflected in increased litigation rates,²⁹⁰ consequently, businesses from some, though certainly not all, sectors of the economy started to have a stronger interest in the legal system. This interest manifested in a variety of ways: mercantile commentary on judicial decisions,²⁹¹ active collaboration as special jurors,²⁹² and, in some cases, strategic precedent creation. The last of these could range from the business community collectively seeking rules to plan behaviour, to ‘repeat players’ deliberately trying to set favourable precedents using test cases.²⁹³ The emergence of ‘repeat litigation’ also set up structural incentives to challenge jury verdicts. Given the degree of randomness inherent in the jury a losing party would virtually always have an incentive to get a retrial.²⁹⁴ Consequently, areas where jury discretion produced randomness would be challenged repeatedly until they were replaced with substantive rules ‘establishing certainty.’²⁹⁵ For some procedures, such as reserving points at law, the consent of both parties was required alongside leave from the trial judge. Yet this did not prevent ‘the vast majority of nisi prius cases’²⁹⁶ coming to court this way, likely because review by the judge was generally

²⁸⁴ Bursset 2020, *ibid.*, 6. See also, (Churches 2000).

²⁸⁵ Churches *ibid.* 929, 952 quoting contemporary letters, suggests one of the reasons for the fall in litigation in the 17th and 18th centuries was the greater delays in court.

²⁸⁶ Brooks 1998, *supra* (n169), suggested the cost of litigation doubled p.47; this is also the explanation of Bursset, *supra* (n283)

²⁸⁷ Bursset, *ibid.*, 17ff. The common law was typically regarded as ill-suited to commerce, see (Postlethwayt 1751-5), (Child 1693), (Cary 1695).

²⁸⁸ Bursset, *ibid.*, 13-17. (Muldrew 1996)

²⁸⁹ Bursset, *ibid.* 32ff; see also Hedley *supra* (n87), 88 for an argument extended networks of *strangers* is an essential trigger for turning to law.

²⁹⁰ Bursset, *ibid.* 46

²⁹¹ *Medcalf v Hall*; *London Chronicle* 4 July 1782, cited in MM, Oldham, *supra* (n281), 158. Cf (Lobban 2010), 387; (2012b), 122-3. For a particularly extreme, albeit later, example, see Duxbury, *supra* (n237), 306, citing an instance of a case being privately-printed.

²⁹² Oldham, *ibid.*

²⁹³ Galanter, *supra* (n117); Polden *supra* (n88), 91; (Howe 2012), 399, by the later 19th century, the concept of a strategic ‘test case’ had emerged, see (Ramsey 2024), fn 96.

²⁹⁴ *Wymer v. Page* (1814) 1 Stark. 9; (Chitty 1838), sol. 4, p. 91 notes the new trial was the quickest way to review a verdict. See also, *Third Report* 1831, 40 noting that new trials were often just pretexts to get a second trial upon the ‘general merits of the action.’ Evans, *supra* (n268), 71, suggests judges typically allowed reconsideration of the facts provided counsel agreed.

²⁹⁵ Burrow, *supra* (n242), (iv)

²⁹⁶ Pritchard, *supra* (n249) p 95, fn 44

preferred.²⁹⁷ The new pressure of commercial litigation is therefore a key causal component in the new procedural paradigm.

The other half of the equation is the bench's willingness to create law.²⁹⁸ Previous histories of contract imply the judiciary altered its ideology around the turn of the century to become more business friendly. Atiyah's *Rise and Fall of Freedom of Contract*, for example, suggests the judiciary adopted new liberal economic and philosophical ideas when fashioning the commercial law of England.²⁹⁹ A more balanced interpretation is that the 18th and 19th century judiciary continued an older attitude of commercial facilitation.³⁰⁰ The change in rules reflected new commercial needs - and thus new modes of facilitation - rather than an entirely novel relationship.³⁰¹ Plenty of pre-1750 examples can be found of judges expressing the importance of deciding cases in a way which conformed with the needs of business.³⁰² Their minimalist approach likely reflected an environment in which businesses relied far less on legal dispute resolution rather than a scepticism of business itself. In a period of historically low litigation, judges were happy to act as umpires rather than active participants in shaping the commercial field.³⁰³

The important, post-1750 change was not a new affiliation with business, but a new concept of the judicial role whereby the legal system served the market using substantive legal rules.³⁰⁴ Such a response is unsurprising: many of these younger judges had worked for and advised businesses as barristers,³⁰⁵ and the growing tide of litigation pressing on the courts was primarily commercial in nature. The newly proactive judiciary surveyed the 18th century common law structure and perceived two things. First, the commercial unworkability of the jury. Whilst judges had, and continued, to make use of special juries consisting of merchants,³⁰⁶ there was a trend towards a more general scepticism towards the role of the jury in complex disputes.³⁰⁷ This foreshadowed the later, general reduction in jury discretion across all

²⁹⁷ Pritchard, *ibid* p. 92 on the requirement of party consent for a new trial.

²⁹⁸ (J. H. Baker 1985), 58; Francis *supra* (n145), 120-122; nb Oldham, *supra* (n281), 197.

²⁹⁹ Atiyah *supra* (n148) and (Horwitz 1979)

³⁰⁰ See, for instance, Parker C.J. *Mitchel v Reynolds*, at [189] noting the "favour and indulgence of the law to trade and industry"; and Holt CJ, Baker, *supra* (n193), 373.

³⁰¹ (Lieberman 2014), 150 notes that contemporaries were well-aware that fundamental changes in the economy were altering the structure of the legal system; (Jones 1781) pp. 2-3.

³⁰² See (Swain 2015), pg 57ff has a convincing survey of pre-18th century commercial attitudes; see also Lieberman *supra* (n154); Cornish and Clark, *supra* (n249), 217; (Lemming 2000), 85-6 dates 'consanguinity' between bench and commerce more firmly 19th century. Cf (Malament 1967) for limits going back to the 16th century.

³⁰³ Francis, *supra* (n298), 120; Francis, *supra* (n145), 95, notes whilst 17th century judges were willing to incorporate mercantile practice into the law, they generally saw themselves as umpires rather than active participants. This is reflected by their willingness to leave issues to the jury. *Hankey v Jones*, (1778) Cowper 745, 751-2. Regarding the commercial sophistication of barristers, See (Gordon 2010), 461-62. This narrative is matched generally by Duman's *supra* (n145), study of judges, and Cock's portrait of the 'traditional bar.' *Supra* (n65).

³⁰⁴ Lobban *supra* (n17)

³⁰⁵ Sugarman *supra* (n145), 257, 273; in the context of railways, Baron Martin had worked for Pickfords, and Baron Parke's brother, Major Parke, had worked as firm manager before Joseph Baxendale. (McLaren 1997), 181.

³⁰⁶ See Oldham, *supra* (n281), 92, at 243 he distinguishes the role of the ordinary and special jury in this process. For slightly later scepticism of the special jury, see Denman in the *First Report*, 1829, 215.

³⁰⁷ Howlin, *supra* (n276), 144-146 attributes general scepticism to a range of factors, including professionalisation and a turn to 'rational' modes of proof. The civil jury was still, however, taken as an essential part of the legal system. Its abolition had to wait until the mid-late 19th century. See (Jackson 1937); (Getzler 2002; Bullock 2023; Hanly 2021); Ferguson *supra* (n83) 143-5.

areas of law. A straightforward explanation, proposed by Lacey in the context of criminal law but applicable generally, is that tolerance for jury discretion relates to knowledge coordination.³⁰⁸ Rules of contract formation, for example, are unnecessary when judges believe there is a straightforward, reliable concept of ‘manifest contractual agreement’ shared between them and the jury.³⁰⁹ Difficulties arise once the judiciary comes to believe juries could not be trusted to share their values or act consistently.³¹⁰ In the 18th century, this anxiety arose primarily in the context of complex commercial litigation. Judges, corroborated by merchants, believed the layman was unpredictable,³¹¹ slow,³¹² inconsistent,³¹³ and at times either hostile towards, or incapable of understanding, the practice of commercial men.³¹⁴ Above all, judges believed reliance on the jury would prevent the future guidance commercial litigants needed in complex, specialised contractual transactions.³¹⁵

Second, the 18th century judiciary recognised a new solution for the jury problem. The bench already had several techniques for controlling juries, such as restricting pleading; tightening limits on evidence;³¹⁶ and the use of nonsuits.³¹⁷ In some contexts, these were capable of producing highly predictable jury outcomes.³¹⁸ By the 18th century, however, it was becoming increasingly clear they were insufficient. Using substantive legal rules was not a novel innovation - an extensive treatise of land law had already been written by the 15th century.³¹⁹ What was novel was the extent and scale of law-making. The mid-18th century represented the inflection point at which substantive law ceased to be an exceptional resort and instead became the standard judicial method. This went hand-in-hand with new beliefs about the ‘scientific’ benefits of doctrinal rules³²⁰ and their advantages for commercial parties. Systematised substantive law was regarded as more certain,³²¹ cognitively easier to comprehend;³²² more effectively communicated³²³ and reproduced;³²⁴ and, above all, because it was general rather than particular, a more

³⁰⁸ (Lacey 2001), 370

³⁰⁹ *ibid.*, referring to ‘manifest criminality.’ For an extended discussion on the use of mutually legible, thin formal legal concepts by Islamic jurists, produced via legal science see (Bishara 2017); (Chen et al. 2017), 273-8.

³¹⁰ Cornish and Clark, *supra* (n249), 196. For a judicial example of this view, see Denman in *RC First Report*, 215.

³¹¹ Bursset, *supra* (n283), 18. Francis, *supra* (n145), 813 found an exception when it came to debt actions. If the plaintiff possessed formal proof, actions were very predictable.

³¹² Oldham, *supra* (n281), 82-3, describing Lord Mansfield’s view on the jury.

³¹³ Lieberman *supra* (n244), (114); (Bursset 2016), 619 suggests the 18th century fall in litigation represented the difficulty of using the courts for anything other than simple debt collection. These difficulties included cost and unpredictability due to the Jury.

³¹⁴ This concern, coupled with a concern over professionalisation, is particularly clear from the mid-19th century onwards. Hanly *supra* (n249), pp. 253-278; Leader *supra* (n92), Cornish and Clark, *supra* (n249), 196; Jury Act Minutes, Channell, 1595 and Coles-Webb, 850

³¹⁵ *Valleyo and Echalia v Wheeler* (1774) Lofft 631, 643-4, and Cowper 143; *Nutt v Bourdieu* (1786) 1 Term Rpts 323. *Milks v Fletcher* (1779) 1 Douglas 231, 232.

³¹⁶ See *Jewell v Parr* (1853) 12 CB 916; also, see authorities in *Ryder v Wombell* (1868) L.R. 4 Ex 32, 32-36, 39-40

³¹⁷ Francis *supra* (n145), 817-819.

³¹⁸ *ibid.*

³¹⁹ (Milsom 1967) 15; (Milsom 1981b), 4; and Baker *supra* (n193), 78ff, both suggest complexity was one of the motives for which judges moved issues from the jury to the judge.

³²⁰ Lobban *supra* (n17), Chapter 4.

³²¹ (Anon 1839), 1089.

³²² *Hamilton v Mendes*, (1761) 2 Burrow 1198, 1214, where Lord Mansfield suggests substantive principles are more ‘easily learned and easily retained.’ For similar comments later, see (Dicey 1883)

³²³ (Park 1787), p. xl. 61.

³²⁴ (Devlin 1956), 147

powerful ‘guide for the future.’³²⁵ Further, unlike the technical rules of pleading, the content of substantive law could be tailored to suit merchants - sources like mercantile expertise,³²⁶ the knowledge of expert jurors;³²⁷ arbitration practice,³²⁸ and foreign rules³²⁹ could be fused into commercially workable law.³³⁰ The superiority of substantive law for a modern economy was so obvious that its absence was taken as an unforgivable shortcoming in an industrial power like Britain.³³¹ It is of little surprise, therefore, that the 18th century saw the massive expansion of judicial law-making and, therefore, reportable cases.

(ii) Strengthening of Precedent

The second factor ensuring more cases would be reported, and more attention paid to the process of legal reporting, is that their status as a legal source rose. If judges reliably followed past cases when deciding future cases, then reports of cases become indispensable to the practising lawyer.³³² The greater the guiding power, the more valuable they become. Naturally, this is closely intertwined with the growth of substantive legal reasoning.³³³ Cases can only guide future judges if their content specifies how the judge should treat future facts. Further, as we saw above, judges treated substantively reasoned decisions as essential tools for creating consistency and thus were inclined to follow them. Nonetheless, the two can come apart – substantively reasoned cases can be ignored or not followed – and as a matter of chronology the strengthening of precedent is not an exact fit. The rise in case reporting began around 1750, which predates the later doctrinal developments of formal rules of *stare decisis*.³³⁴ Instead, it is necessary to use other indicators to measure the *guiding capacity* of precedent.

It is crucial to distinguish the formalisation of precedent (Part 2.1a below) with a general increase in the persuasive weight of past cases. Although subject to debate in the early 20th century, it is now clear that the strict rules of *stare decisis* were yet to form by the 18th century.³³⁵ Instead, 18th Century precedent

³²⁵ *Lickbarrow v Mason* (1787) 2 Term Rpts 63, 73, 81

³²⁶ (J. H. Baker 1979), 296-9; (J. Baker 2013)

³²⁷ Special jurors provided the ‘raw material’ which the court fashioned into ‘a solution for future use.’ Oldham (n281), 94; (Rogers 1987), 165

³²⁸ Burset *supra* (n283), 20, giving Choice of Law being governed by the parties’ intentions as an example.

³²⁹ Rogers *supra* (n327), 161, 163, 168-171

³³⁰ See Cornish and Clark, *supra* (n249), 216-219. In other cases, form took precedence over content. Lord Mansfield would occasionally remark an ‘uncontroversial’ or ‘obvious’ case was worth adjudicating on so it could be converted into a ‘public’ decision. For example, *Robinson v Bland*, (1760) 2 Burrow 1077, 1085. *Peacock v Rhodes*, (1781) 2 Douglas 633, 636.

³³¹ Lord Mansfield explicitly regarded his law-making role as a response to recent industrialisation. *Jones v Randall* (1774) Lofft 383, 385 and *Cowper* 37, 39, 19. For an extreme statement, see (Campbell 1881), 402-403.

³³² This is Holdsworth’s explanation. Holdsworth (1934) XII, 105 *xii* argues there were no reports of the House of Lords until Dow because ‘the Lords took part in the decision’, and it only became ‘profitable’ when the ‘House should be guided by the reasons given by its members.’ See also Dow, (iv).

³³³ *ibid*; (Lewis 1932), 231-2 agreeing with Holdsworth’s explanation written pleading allowed for more substantive reasoning in cases. For an extensive defence of the ‘reasoning’ explanation, see (Duxbury 2008); and (Anon 1848a), 241

³³⁴ Baker *supra* (n193), 206; (T.S. Lewis 1932; 1930; 1931); (Evans 1987)

³³⁵ For a summary of this debate, see Evans, *ibid*, 42.

theory was informal, though apparently stable,³³⁶ and judicial adherence to past precedents depend on several factors. These included the degree of unanimity in the decision, the personal reputation and skills of the judges deciding them,³³⁷ the strength of the case line, and the extent they had been relied upon subsequently, all balanced against the results they produced in the present.³³⁸ Evans calls this the ‘rational’ approach to following precedent.³³⁹ Precedents were weighty because of their place in a reasoned debate in which participants respected the views of their senior and experienced interlocutors. These factors, alongside the lack of doctrinal rules, are indicative of an untaxonomized legal order. Although judges cited and referred to cases, the case text did not independently constitute law.³⁴⁰ Instead, it was the consensus of the profession – specifically, the view of senior members – which determined whether a case was ‘sound’ or not.³⁴¹ This helps explain the absence of official or even organised court reports;³⁴² the complex and informal court hierarchy;³⁴³ the declaratory view of law;³⁴⁴ and the ambiguous position on the strength of precedent.³⁴⁵ In a case in 1796, one judge noted: “Common sense is sufficient to decide this case, without having recourse to any of the legal decisions on the subject.”³⁴⁶ We can contrast this informal paradigm to the formal doctrinal rules of *stare decisis* which emerged, likely for internal logistical reasons, in the early-mid 19th Century.³⁴⁷ This dogma required judges to follow precedents automatically and absolutely if they met certain formal conditions, such as coming from a superior court and belonging to a specific reporter.

Nonetheless, although formal rules of precedent were to emerge later, the persuasive force of precedent was not static. From the mid-18th century onwards, judges emphasised the strength of precedent for the same reasons they formulated substantive law: to increase certainty in the legal system.³⁴⁸ The terms used to discuss cases changed and judges appeared to pay more deference to prior authority. These follow clearly from the law-making motivation and consensus-building methods of Lord Mansfield in particular.

³³⁶ (Grajzl and Murrell 2021a; 2021b) suggest the 18th Century followed a period of intense debate over precedent.

³³⁷ *Brown v Higgs* (1800) 5 VJ 495; *Butler v Butler* (1800) 5 VJ 534; *Hartley v Hurlle* (1800) 5 VJ 540 referring to ‘great men’; *Cooth v Jackson* (1800) 6 VJ 12 (1800), referring to the opinion of particular judges.

³³⁸ Lewis, *supra* (n333), 238; Ferguson, *supra* (n83), 34; (Oldham 2006), 137-141, similar considerations can be found in Wynne, in his *Eunomus* iii, 192, (1767)

³³⁹ Evans *supra* (n334), 37-38. For a similar notion, see Simpson, *supra* (n16), 380 on the ‘rational’ period of the common law.

³⁴⁰ Thus, judges would sometimes suggest it was unnecessary to cite a case, *Wheldale v Partridge* (1800) 5 VJ 388; would allow informal citations, *Benfield Ex Partie* (1800) 5 VJ 424 (‘Boylston’s Case’); and *Pocock v Reddington* (1801) 5 VJ 794

³⁴¹ *Brown v Pocock* (1833) 2 R&M 212; Lobban *supra* (n17), 78-9.

³⁴² Likewise, the poor or inconsistent report quality. See (Holdsworth 1934) XII, p 187-190; for examples, see *Tidmarsh v Grover* (1813) 1 M&S 735 *Philliskirk v Pluckwell* (1814) 2 M&S 391 and *Naylor v Taylor* (1829) 9 B & C 718

³⁴³ *Garland v Carlisle* (1833) 2 C&M 31

³⁴⁴ See Baker *supra* (n193), 206, 209; Lobban *supra* (n17), 2-4; Cornish and Clark, *supra* (n249), 32 Table 1.1; n.b. (Shapiro 2020), 241 for the connection between judicial law-making, legal reform, precedent, and common learning.

³⁴⁵ See the ambiguity over whether a case was binding if plainly absurd or unjust. Blackstone Comm 70; Evans denied there could be ‘general rules’, *supra* (n268), 66.

³⁴⁶ *Porter v Shephard* (1796) 6 T.R. 665, 669

³⁴⁷ Baker *supra* (n193), 206; Lewis, *supra* (n333).

³⁴⁸ A need which differed depending on the doctrinal area, see *Bolger v Mackell* (1800) 5 VJ 509; *Burdett v Spilsbury* (1843) 6 Man&G386 (Land); *Seymour v Barker* (1809) 2 Taunt 196 (Procedure); *Cockburn v Alexander* (1848) 6 C.B. 810, (Commercial Law). Many thanks to Elizaveta Stetsenko for her assistance on this topic.

As noted by Lieberman, Mansfield sought complete unanimity between the judges in the King's Bench when deciding cases.³⁴⁹ The stated motivation was that unanimity would bring with it stability, which in turn would serve the needs of commercial litigants. He emphasised, alongside the other judges, the need for 'open and clear' communication,³⁵⁰ and frequently used judicial conferences to settle points decisively.³⁵¹ Burrows also remarks on this process and its effects on fixing precedents:

All [the King's Bench] decisions are *unanimous*... [which] reveals uncommon knowledge, capacity, and temper in all of them, meaning when a case is decided it sets it as a "Rule" forever, establishing "*Certainty*."

We can find a similar theme in Douglas's reports several years later. Douglas suggested judges considered themselves bound by case reports "no less strictly than to the express dictates of the legislature."³⁵² Yet Douglas was still operating in the 'rational' period of precedent: a case would have no force if it was decided without sufficient argument between the bar or bench.³⁵³ When a case did possess significant weight - such as being decided by a particularly learned judge³⁵⁴ - this would justify a report of it. Dow, in his preface, suggested:

"It may probably likewise be considered as particularly desirable that the grounds of these determinations should be rendered public at this moment, when to the high authority of the noble and learned Lord who presides in the House of Lords is added the no less distinguished authority of the Late Lord Chancellor of Ireland...."³⁵⁵

This philosophy of precedent was still based on *consensus* and *reasoning*.³⁵⁶ Lord Mansfield summarised the position succinctly: "[t]he reason and spirit of cases make law; not the letter of particular precedents."³⁵⁷ Nonetheless, it appears the needs of certainty came to weigh more heavily in the minds of judges on the 'balance of reason.'³⁵⁸ One cause was a general perception the law needed to be made prospectively certain so that merchants could use it as a guide.³⁵⁹ Another closely connected factor was that a traditional argument for adhering to precedent - repeated reliance upon it by litigants - was

³⁴⁹ Lieberman, *supra* (n244), 136.

³⁵⁰ *Millar v Taylor* (1769) 4 Burrow 2303, 2395.

³⁵¹ *Belither v Gibbs*, (1767) 4 Burrow 2117 and *Bidleson v Whytel*, (1764) 3 Burrow 1545.

³⁵² Douglas (viii)

³⁵³ *ibid*, ix

³⁵⁴ For cases in which the personal authority of the judge determined the weight of the case, see *Dyer v Dyer* (1788) 30 Eng. Rep. 42, 45; *Ex Parte Young* (1813) 35 Eng. Rep. 311, 311

³⁵⁵ Douglas, (iv)

³⁵⁶ For statements of the rational location of the law, see *Ashby v White* (1704) 92 Eng. Rep 126.

³⁵⁷ *Jones v Randall* (1774) Lofft 383,

³⁵⁸ Evans, *supra* (n268), 67, suggests this trend had been 'carried too far' and that 'the admitted presumption is too often rested upon as an absolute conclusion.'

³⁵⁹ *ibid*, noting a case may be fixed solely for 'certainty's' sake; *Morecock v Dickens* (1768) 27. Eng. Rep. 440, 441.

becoming increasingly persuasive as merchants fell into the orbit of the common law courts.³⁶⁰ As a result, judges would typically follow precedents even if they disagreed with their content,³⁶¹ on the basis it would produce uncertainty.³⁶² The only justification for departing from this approach was if the case was ‘clearly erroneous.’³⁶³ This allegiance, alongside the new substantive richness of judgments, made them useful to the profession. Indeed, by the peak of the ‘generative period’ - the late 1840s and 1850s - reports had acquired such persuasive force they were not merely useful to the judge and lawyer - they were indispensable.

1.3 Summary: Things Get Complicated

By all accounts and indications, the English legal system went through an immense, historically aberrant growth spurt between 1750-1840/50. As with many changes in the Common Law, this appears to have been litigant initiated. Businesses increasingly went to law, indicated by the rising cases in advanced stages and writ of summons, generating more cases. Judges, particularly in the King’s Bench, reflexively altered legal methods to meet this demand. To produce consistency and predictability, more cases were decided substantively and these cases were followed loyally by the judiciary. One effect was to thereby generate far more case notes, reported privately and distributed widely across the legal profession. As we will find in Part 2, this growth was not sustainable and the new mass of cases was beginning to overwhelm the legal profession. The burgeoning legal library triggered several fundamental changes to the legal system still with us today: the formal system of precedent; hyper-selective case reporting; and substantively organised ‘legal treatises’ designed to manage the new mass.

Part 2: Late-Century Malaise

All classical eras must come to an end. Although the total cumulative cases continued to grow well into the late 19th and early 20th centuries, the yearly rate of growth fell steadily from 1850 onwards. This fall was matched by similar drops in cases at advanced stages, litigation rates, and other metrics of litigant activity (but not days spent sitting). Explaining this apparent drop is far more difficult than the more unequivocal rise in cases, not least because by 1850 a far greater variety of different reports had emerged. A graph tracking solely the ICLR reports is therefore woefully incomplete. Nonetheless, through

³⁶⁰ For example, Lord Hardwicke’s judgement in *Ellis v. Smith* (1754) 1 Ves. Jnr. At p.17

³⁶¹ A similar ‘hardening of precedent’ can be observed in the Chancery around this time as well under Lord Hardwicke. Lieberman, *supra* (n244), 81.

³⁶² *Sheddon v Goodrich* (1803) 8 Ves. 497, Lord Eldon; *Selby v Bardons* (1832) 3 B. & Ad. 17, Lord Tenterden.

³⁶³ *ibid*, Shelby.

comparisons with litigation rate and the periodical reports, it is difficult to avoid the conclusion the legal system was faltering.

2.1 Showing the Fall (1850-1914)

The Victorians, having meticulously tracked litigation rates from 1859 onwards, believed their legal system was slowing down. Such a conclusion was perplexing: Britain was richer, more populous, more sophisticated than ever before, yet its courts were emptying out. Why? To answer this conundrum, I begin with the metrics showing the fall. First, litigation rates, measured by writs of summons issued. The statistics, generated from the *Judicial Statistics* series, show a consistent drop in the total quantity of writs issued. We can see this in the following graphs for the King’s Bench, Common Pleas, Exchequer. They also include, from 1876 onwards, the writs issued by the District Registries.

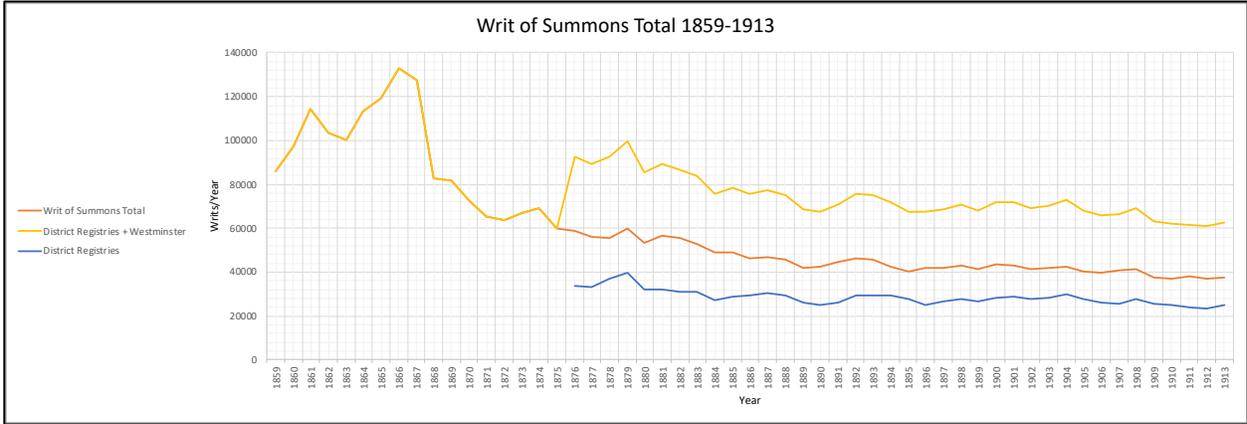


Fig 17. Writ of Summons, 1859-1913

The trend is a consistent decrease from 1868, mediated only by the establishment of the District Registries.³⁶⁴ The source of these statistics, the Parliamentary Papers are limited, both in their accuracy and their chronology. As such, I have gathered figures from earlier enquiries into the general structure of the legal system in 1830 and 1840.³⁶⁵ I have inserted these separately as I am not confident the figures they provide are exactly equivalent to those from the 1856 period. Assuming they are not off by orders of magnitude, the following graph can be produced:

³⁶⁴ Snagg “Fifty years of the English County Courts”, 569, 573-5, cited in Brooks, *supra* (n169), 106, fn 202. suggests the high court saw a decline in activity due to the County Courts.
³⁶⁵ See under 4.1.

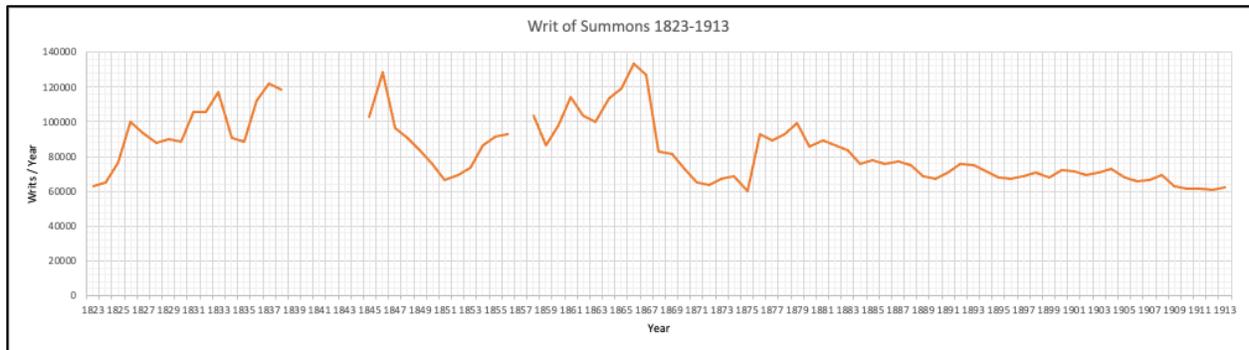


Fig 18. Writ of Summons, 1823-1913

There are several interesting aspects to these patterns of decline. First, the peak in 1866, and general high yearly average of writs pre-1868, appears to be the apogee of an increase which began in the mid-18th century.³⁶⁶ Brooks, in his study of cases at advanced stages, found that the trough of litigation in the 18th century began to ease in the 1760s, increasing through to 1830³⁶⁷ and beyond. From the earlier enquiries it seems that by 1829, the number of writ of summons in the common law courts had already reached a level comparable to the later 1859-1869³⁶⁸ period, and indeed exceeded the last quarter of the century. Second, this decrease is even more pronounced when measured as a percentage of the total population, which was increasing yearly at a rapid pace.³⁶⁹ Third, the issuance of writ of summons broadly matches patterns in the number of orders for default of service and court appearances (see Fig 19, 20). These figures possibly give a more accurate representation of litigation activity as they require more involvement from the parties and the court.³⁷⁰

³⁶⁶ These are supported by anecdotes in the (First Report), Jervis, 211, A.3; Denman, 213; Gurney, 218; Comyn, 220; Lawes, 222; Graham, 235. For a chronology going back to Lord Mansfield, Raine, 233, A.3.

³⁶⁷ First Report, p. 11, suggests there was a notable increase from 1825.

³⁶⁸ The 1851 dip was accompanied by Barrister perceptions of a slowdown, see Cocks *supra* (n65)

³⁶⁹ The decrease in litigation is mirrored in Germany and Paris in the 18th century. Brooks, *supra* (n169), 91. Although in 1910 litigation was double that in Scotland (per head), but significantly below France and less than half Germany's: *1894 Judicial Statistics*, 16.

³⁷⁰ J Macdonell, *Judicial Statistics* 1902, 23 noting that some believe appearances reveal the proportion of *bona fide* disputes. Macdonell himself is sceptical: "Whether that test be even approximately correct is open to doubt."

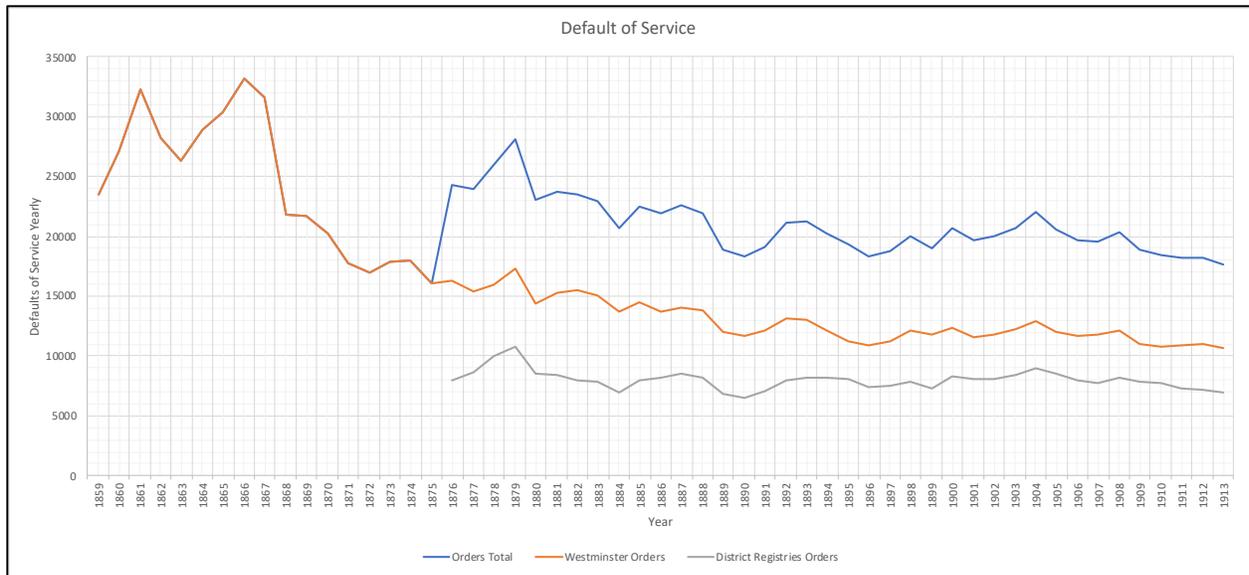


Fig 19. Default of Service 1859-1913

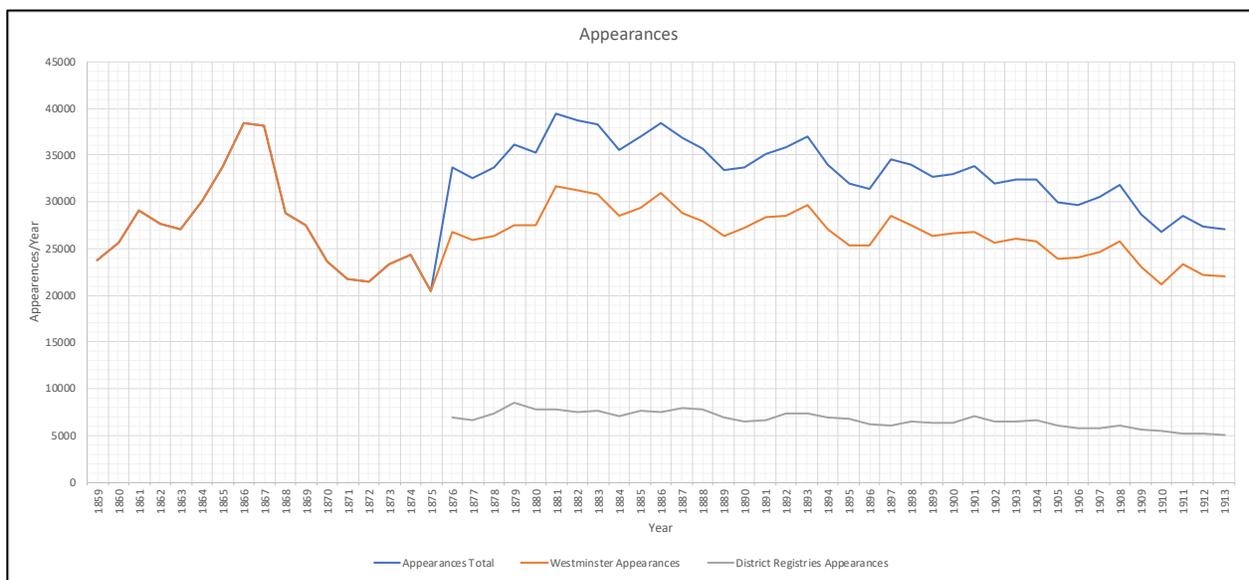


Fig 20. Appearances 1859-1913

Both graphs indicate a slow decline moving into the late 19th century and early 20th century beginning between 1870-1885. Despite the ‘modernised’ legal system, there was no way to avoid the conclusion: English litigation rates were falling.³⁷¹ This decline is not drastic, although compared to the 1823-1860 period it is sizable and consistent. This slowdown can also be seen in the metric of ‘cases in advanced stages’ and for the figures for the County Courts. The figures for the Entry Books of Judgment are

³⁷¹ Noted in 1894 *Judicial Statistics*, *ibid*.

particularly important for explaining the causes behind this fall. Unfortunately, the figures gathered from the books themselves conclude in 1875 (and must be extrapolated for the latter half of the period). We can compare these to the complete series taken from the 1857+ *Judicial Statistics* series which diverge, producing a more moderate, slower decline:

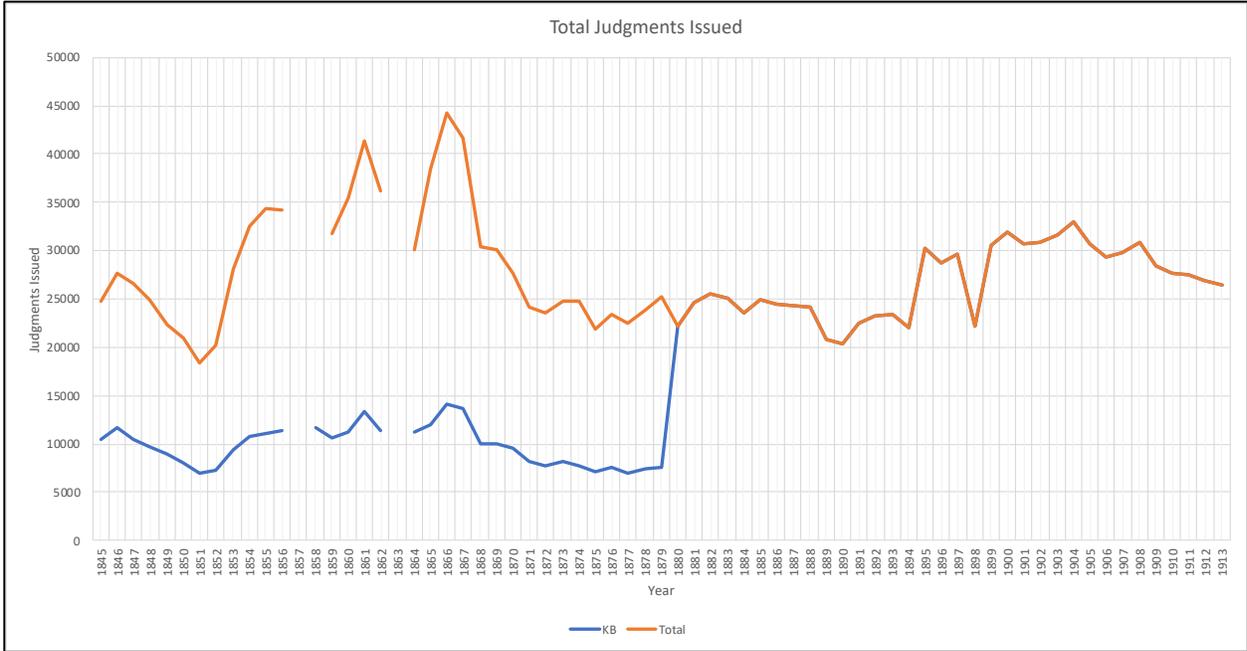


Fig 21: Judgments Issued 1845-1913

The only exception to this otherwise torpid parade of figures is in the caseloads of the *superior courts*. For the House of Lords we can track the Total Proceedings and the Total Number of Judgments Given. The following graph shows a slow increase in both, with a particularly sharp jump in 1908 (Fig 22). Conversely, the Court of Appeal, shows a relatively stable pattern for number of cases Heard and Determined (Fig 23), the outcome capable of being reported. The year after its establishment saw a dip, but this quickly picked up and by 1882 it averaged around 600 cases a year.

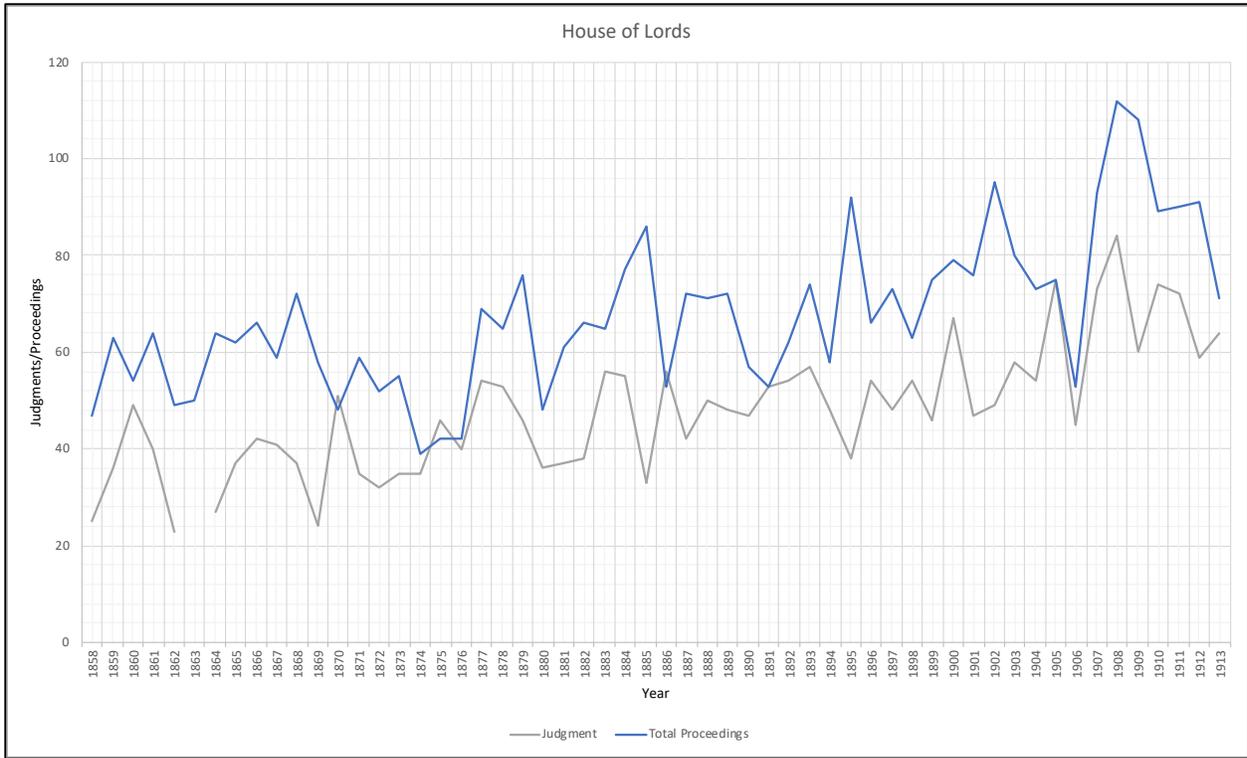


Fig 22. Total Proceedings House of Lords

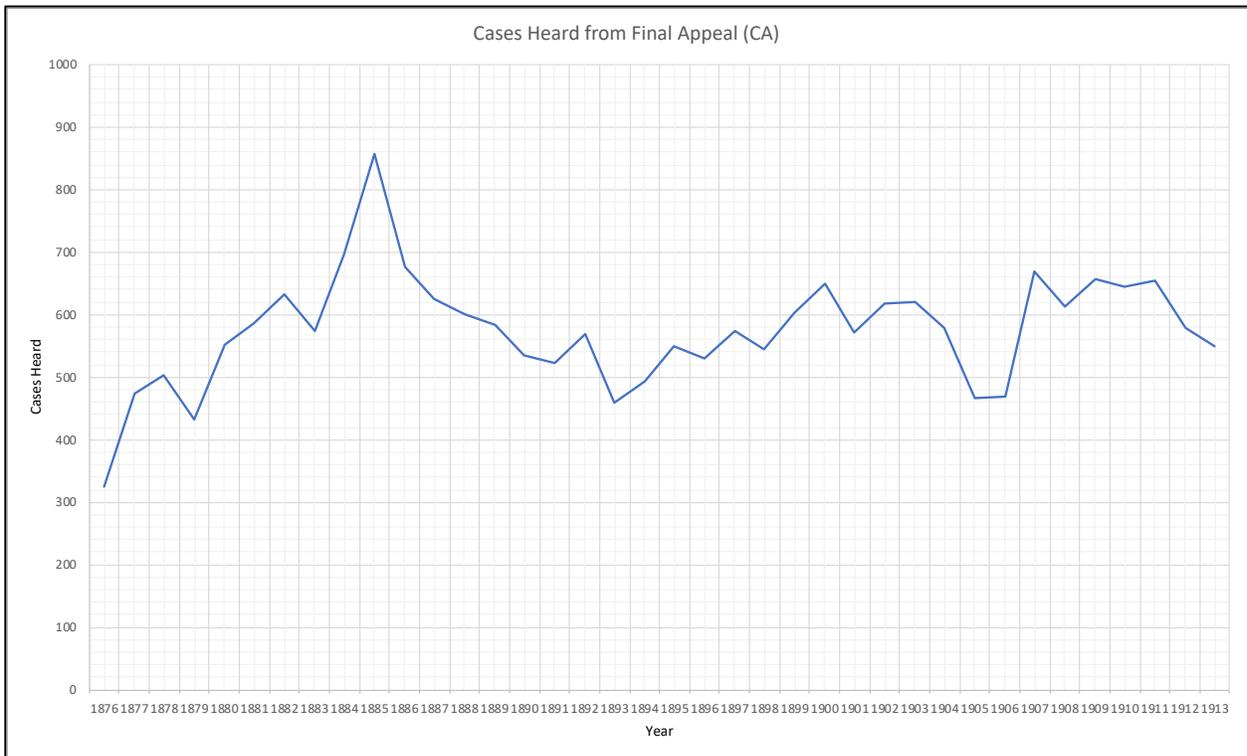


Fig 23. Cases Heard in the Court of Appeal

There are multiple explanations for this vitality, but it is compatible with the thesis – described below – that the English legal system was transitioning towards a more centralised, *top-down model*. Important cases could be funnelled to a concentrated group of elite judges at the top of the judicial hierarchy, thereby easing pressure on the lower-tiers. If we move beyond litigation rates, the slowdown also appears in figures for the total number of case reports. On the complete aggregate account, we get a fall beginning sharply around 1860:

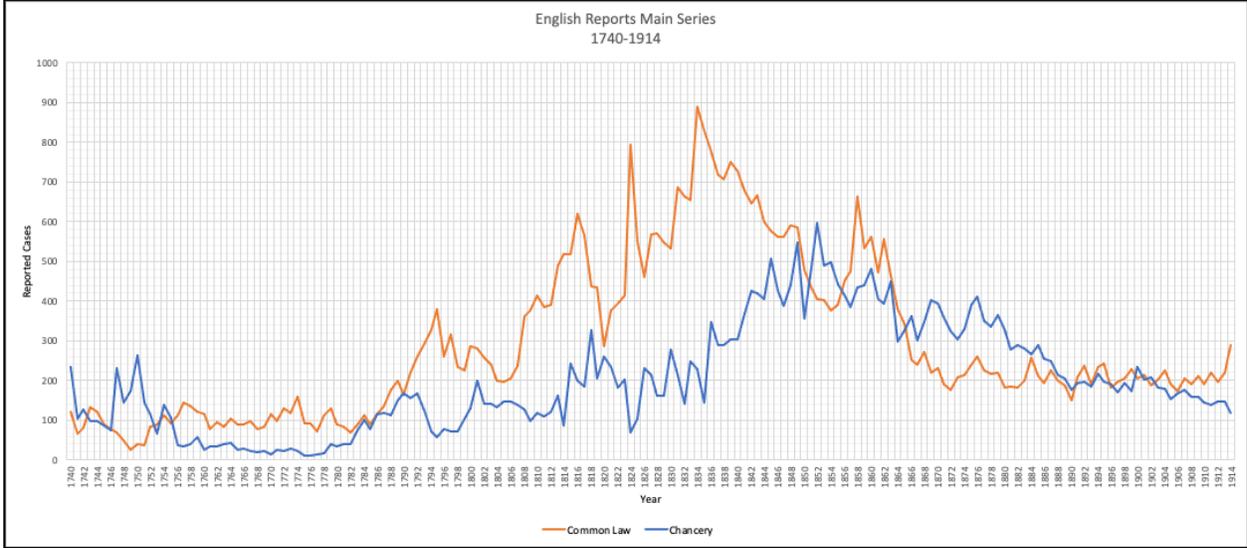


Fig 24. English Report Main Series 1740-1914, court disaggregated

This court-differentiated graph shows important divergences between different courts. The complete *Common Law* series (including common law appeals) begins falling from 1840 onwards. These match, broadly, the pattern of cases in advanced stages in the King’s Bench. The exception – the 1860 peak and sharp fall – is attributable to one final set of *nisi prius* reports being produced before disappearing altogether in 1865. We can contrast the Common Law pattern to the pattern for the *Chancery* reports: here, the fall in cases is slower, more delayed, and does not track neatly onto the establishment of the ICLR in 1865. Interestingly, this fall is also mirrored in a slower, more delayed fall in Chancery litigation patterns:

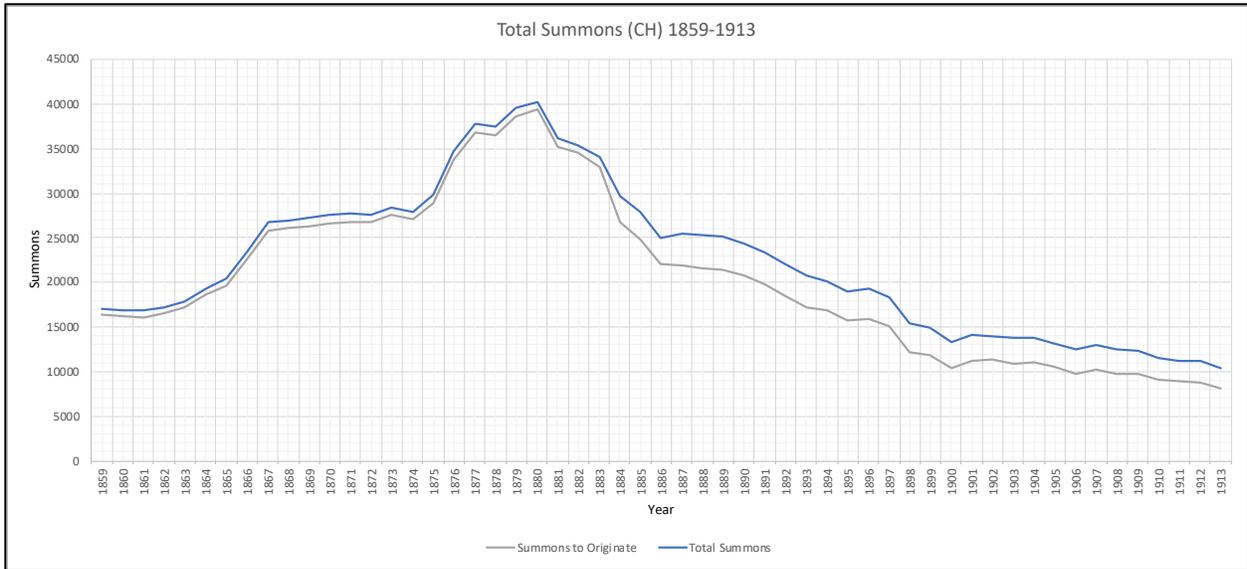


Fig 25. Total Summons (CH) 1859-1913

There is a flaw with the graphs above. The great danger with looking exclusively at the ICLR reports is that they are only a small piece of the complete reporting activity in the latter half of the 19th century. We can get a more balanced picture by looking at some of the periodical reports. Due to time constraints, I was only able to gather data on the Law Times Reports and the Law Journal Reports. Nonetheless, they show similar, somewhat drastic declines:

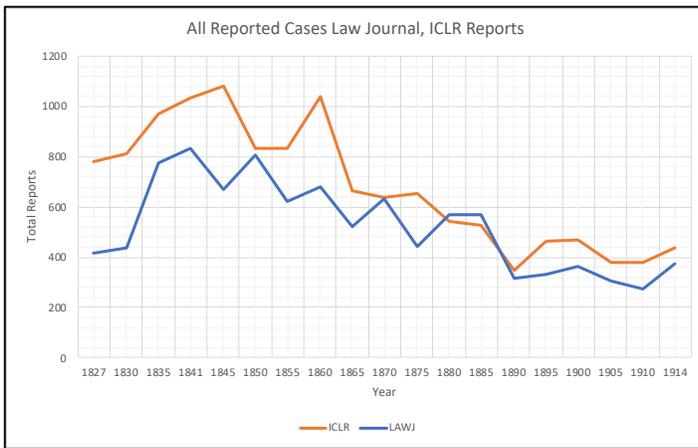


Fig 26. Reported Cases Law Journal 1827-1914

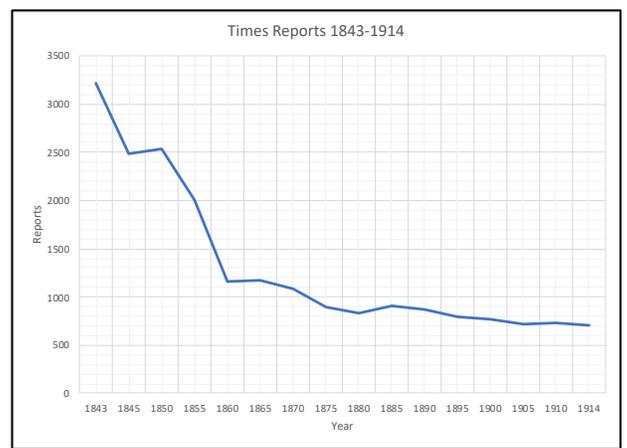


Fig 27. Reported Cases Law Times 1843-1914

The similarity of fall even extends to the trends in different courts. As a result of the formatting of the *Law Journal Reports*, it was also possible to disaggregate the data:

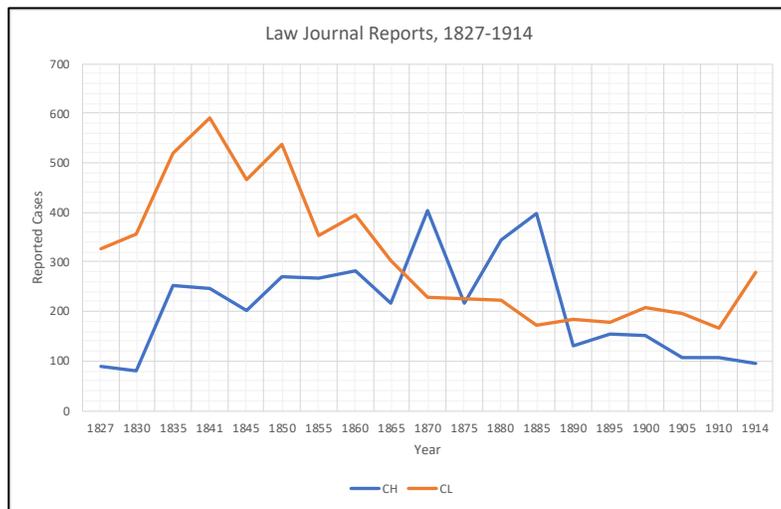


Fig 28. Reported Cases Law Journal, by Court 1827-1914

We see the same falling off of common law cases from around 1840 onwards, and a slower decline of Chancery reports, surging again in the 1880s, before dropping as well. One metric did not fall, however: the total number of pages per case. We can estimate pages/case for the *Law Journal Reports* and find a familiar pattern of *hyper-lexis*:

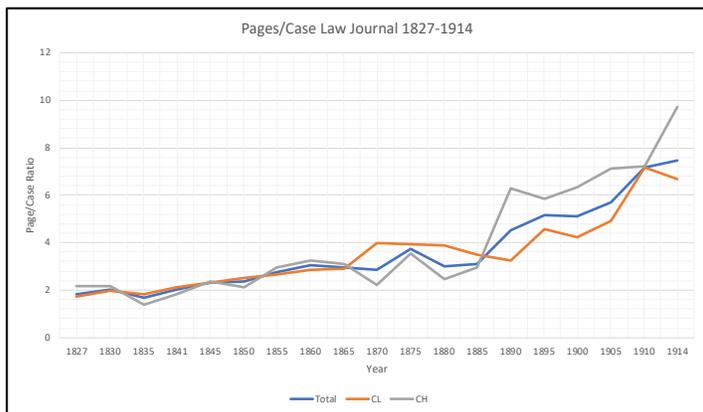


Fig 29. Page/Case Ratio Law Journal 1827-1914

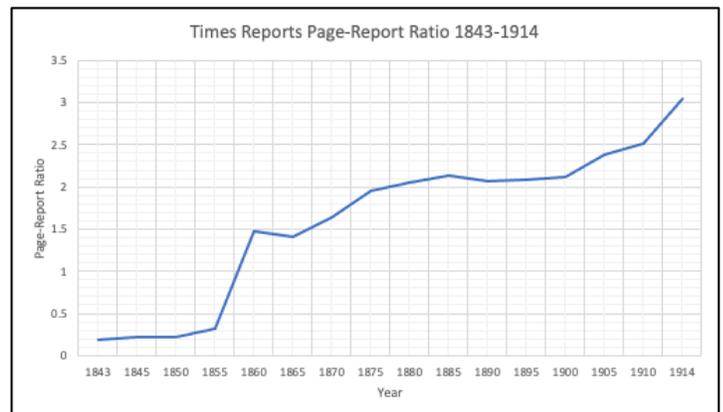


Fig 30. Page/Case Ratio Law Times 1843-1914

In summary, around 1841 something deep occurred in the English legal system. Writ of summons dropped from a century-high; cases at advanced stages fell off; and reports in the ICLR, *Law Times Reports*, and *Law Journal Reports* all plummeted. The only signs of continued growth were in the activity of the appellate courts and the ever-growing number of pages per case. What could explain this strange shift in the legal system?

2.2 Explaining the Fall

I have two possible hypotheses behind the reporting figures in part 2.1. The first I call the ‘Gear Shift’ hypothesis. It suggests that the primary cause was a combination of formalised precedent and more selective case-reporting. As cases became formally binding, only those from the superior courts were considered ‘reportable’, regardless of the content of cases lower down the hierarchy. This shift to an artificially-constrained pool of potentially reportable cases was accompanied by a more stringent ‘selective’ approach to reporting. Together, they reduced the number of reported cases. These shifts were stimulated, in turn, by the unmanageably large mass of legal material. They represent an attempt by 19th century lawyers, following growing concerns over the size of the legal corpus, to slow down and filter the total amount of caselaw. According to hypothesis 1, the culmination of these changes was the ‘Era of Selective Reporting’, a period of ultra-low reporting ratios continuing to the present. We can summarise this causal chain as follows:

The number of reports rises -> The volume exceeds what is cognitively manageable -> Lawyers develop strategies to filter cases, such as leading cases, a clearer court hierarchy, and an institutional reporting body, producing a formal law of precedent -> These filtering systems dramatically reduce the total number of case reports.

I call the second explanation the ‘Overhang’ hypothesis. It posits that the main causal factor behind the fall (and initial rise) in reported cases was the eventual closing of a legal overhang. To explain this, let us return to the Feedback Model. A key component is the *environment* of the law: the new scenarios, pressures, and escape valves which modulate the pace of legal change. If there are rapid social developments apt for legal regulation, we should expect, all else being equal, legal change to accelerate. Conversely, if the rate of social change slows, we should expect legal change to stagnate. We need not posit a general acceleration or deceleration in society to explain the 1780-1850 / 1850-1914 growth or slump. Instead, we need only posit that given these dynamics far less law than one would expect was present in 1780. Due to the procedural framing of English law, an anomalously low amount of legal

doctrine existed in substantive terms. We can call this gap the ‘legal overhang.’ The growth in 1780 represents rapid closing of this overhang – immense catch-up growth to reach a quantity of law more reflective of the complexity of society. Once this overhang was closed however, the rate of change fell to an amount reflective of the true rate of societal change:

English law had far less substantive law than would be expected given social conditions -> the overhang became intolerable in 1780 and was rapidly closed through judicial law-making, producing more reportable cases -> by 1850, the rise in reports and growth of substantive law had covered the vast majority of previously untouched social areas -> with fewer open questions about legal regulation, the pace of law-making reverts to the slower rate of novel issues emerging -> case reports fall.

Before turning to the *gear-shift thesis*, it is worth emphasising the *gear-shift thesis* and the *overhang thesis* are compatible, and may even be required together to work. The trigger for formalisation appears to have been the vast generation of law, and, given the amount of law eventually formed, may in turn have been necessary for the complete closure of the overhang. I do not have space to explore this question, but it is central to the question of whether the formalisation of law, and ensuing complexity, was practically useful.

2.1a Hypothesis 1: A Second Gear-Shift?

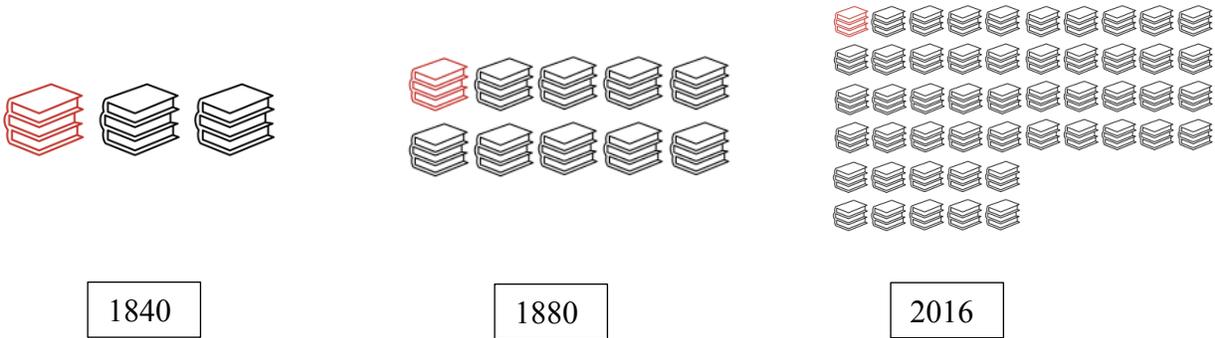
By 1840, the time of wheelbarrows was long past. The legal library is now staggeringly immense, its material stretching across a nightless empire.³⁷² The 18th century legal methods were breaking down under the strain of hyper-lexis and the clock could not be turned back: the abject failure of the Hilary Rules 1834 revealed there was no return to the old, comfortable world of pleading. The new system in all its gross scale had to go forward.³⁷³ I argue English lawyers adopted a two-stage solution. First, English law moved to a model of formal precedent which narrowed the criteria for legal significance. Second, following these formal criteria, a new era of selective case-reporting emerged, reducing the number of case reports.³⁷⁴ This did not necessarily mean fewer legally significant cases were available for reporting, rather that more cases had to be systematically ignored for the purposes of cognitive manageability. It was

³⁷² Law Reporting Reform, 1853 Report, cited in Daniel, *supra* (n195), 18.

³⁷³ RC Pleading *First Report*, 1851, 16-20.

³⁷⁴ Exemplified by the invention of the ‘leading case’ device. Described also as a ‘super precedent’ (Landes and Posner 1976), 251.

a system which moved from about 1 in 3 of all reportable trial cases being reported in 1840, to 1 in 10 in 1880, and, to bring the story to the present, to less than 1 in 50 in 2016.³⁷⁵



I argue that, prior to the 1820s, the legal system was significantly more inclusive. It was a system running on a democracy of sources anchored by common learning.³⁷⁶ The menu of possible sources of legal argument was broad, ranging from law dictionaries, digests, treatises, footnotes in law reports, to judgments from all manner of adjudicative level. To take a simple example, nisi prius reports enjoyed considerable currency in treatises and cases despite being ostensibly the lowest level of court.³⁷⁷ As Ibbetson notes, surprisingly senior lawyers can be found in nisi prius cases, such as the attorney general and leading silks.³⁷⁸ The entire system was informal, illustrated above by the messy court hierarchy and obscure law of precedent. These institutional features were paired with a similarly loose legal culture: faith in a common legal culture, based to a significant extent on oral consensus;³⁷⁹ and reliance on reason and common sense to determine cases. Importantly, the personal characteristics of judges and the conditions of their decisions were what mattered when citing their judgments, such as a judge’s wisdom, learning, and persuasiveness, and the presence of ‘full argument.’³⁸⁰ Under such a system, all manner of sources could be cited provided they contained ‘good sense’: a nisi prius report,³⁸¹ if decided by a skilled, reasonable judge³⁸² and careful debate, could provide valid support in argument.³⁸³

³⁷⁵ (Oxford University 2016)
³⁷⁶ Lobban *supra* (n17), 13-17, 90.
³⁷⁷ Oldham *supra* (n54); (Luther 1999); (Newman 2024b), 5.1. Newman suggests, besides acting as ‘makeweights’, the most common use for nisi prius reports was to support well-known principles, due to, *inter alia*, the correctness of the point, and the personal authority of the trial judge. Further, whilst nisi prius had less authority *qua* authorities, they nonetheless often crystallised early important matters of commercial law, sometimes via treatise citation. See (D. J. Ibbetson 2024).
³⁷⁸ Ibbetson, *ibid*.
³⁷⁹ Supplemented with extensive manuscript circulation, (Oldham 2000), 128. Cf (Arvind and Buset, 2024), the common learning of the latter half of the 18th century involved deep divisions.
³⁸⁰ Newman, *supra* (n377)
³⁸¹ See Evans, *supra* (n268), 70fn (a), suggesting that nisi prius should only be used as evidence of ‘accurate reasoning’; considering them as binding would be ‘giving them a station to which they have no pretensions on the ground of utility.’
³⁸² cf Evans’s comment, *ibid* Appendix, (314), KB and NP.
³⁸³ Following the notion that it was the principles underlying runs of cases, not the formal status of the cases *per se* which mattered. *Fisher v Prince* (1762) 3 Burr. 1363; *Rust v Cooper* (1777), Cowp. 629, *Rex v Bembridge* (1783), 3 Doug. 327. *Evans v Llewellyn*, 29 Eng. Rep. 1191, 1193. *Duke of Leeds v. Corporation of New Radnor*, (1788) 29 Eng. Rep. 189, 190.

As suggested above, this culture had already begun to change in the 17th century, but underwent radical, rapid change in the 19th under the weight of new cases. The destination of this path was clear by 1850: England had a formal law of precedent and a supporting, technical legal culture. Case reports were binding because of their source in the formal hierarchy of courts rather than anything substantively rational like their ‘principle’, or the personalities involved. Accompanying this formalisation was a new ‘modern’ culture in which judges, provided they occupied the right legal role, were all equally capable to make binding law. In the following section (i) I explore, first, the extent and causes behind the formalisation of English law (the ‘deluge of authority’); and, second, the translation of this process into doctrinal source rules. In section (ii), I will then connect this formal legal culture to the reduction in case reports.

(i) A Deluge of Authority

The formal rules of precedent are a complex historical adaptation to many simultaneous developments. These include philosophical developments, such as Bentham and Austin’s attacks on common law orthodoxy,³⁸⁴ and, downstream, general challenges to judicial legitimacy following the Great Reform Acts.³⁸⁵ These are important factors; I will focus here on one cause in particular: logistical challenges to the organisation of the legal system.³⁸⁶ The legal system buckled under pressure from several connected, rapid expansions: a growth in litigation and substantive adjudication, which in turn stimulated an increase in judges,³⁸⁷ lawyers,³⁸⁸ and reported cases. The last of these was the direct product of the generative period of the 1780s-1840s: substantive law was extracted from the murky depths of jury discretion and converted from existing oral consensus. The uncontrolled generation, alongside the growth of the number of lawyers, broke down the older oral consensus and undermined the old methods for organising the source material.³⁸⁹ The last judge who could be said to know all the laws of an age was, apparently, Lord Eldon (*in officio* 1801-1827).³⁹⁰ This phase-change is clear from two sources: first, judicial handbooks taken at *nisi prius* trials; second, the rate of citation in the nominate reports themselves.

³⁸⁴ See Cocks, *supra* (n65), 50 for an explicit link between Austin’s jurisprudence, educational reform, and the shifts in the culture of the bar. For Bentham’s influence, see (Dillon 1907); (Synge 1907)

³⁸⁵ (W. Cornish, Lobban, and Smith 2010), 35; Horwitz claims formalism was a tool for obfuscation, see Ferguson, *supra* (n83), 36.

³⁸⁶ See Brooks, *supra* (n169), 102; for contemporary recognition, see the RC, *First Report*, 218. For a similar linkage of judicial logistics and case-bindingness, see (Cross et al. 1991), 4-25.

³⁸⁷ See Cocks *supra* (n65), Cf Duman *supra* (n145), 18; there was opposition to increasing the number of judges out of fear it would ‘reduce their prestige’ and disrupt the diffusion of common learning, Denman, RC, *First Report*, 214, A.15; 237, A.17, 242, A.6. For a suggestion this process had begun earlier, see (Seipp 1991), 63; (Simpson 1981), 639.

³⁸⁸ Duman *supra* (n145), 8, 9; Cocks, *supra*, (n65), 8-9, 57; Sugarman *supra* (n145), 264. This growth appears to have fallen off by mid-century, however.

³⁸⁹ Daniel, *supra* (n195), 9 and 238, noting the volume of reports was so great no fraction of the profession could hope to know them all.

³⁹⁰ Twiss, *supra* (n37)

As noted by Oldham and Ibbetson, *nisi prius* cases acted as a powerful driver for legal innovation between 1790 and 1830. They also reveal, at a low level, the extent to which the new bulk of cases intruded on the thought processes of the judiciary. I used four sources to get an idea of this process. First, Lord Ellenborough's trial notes when he was sitting at guildhall *nisi prius* from 1802-1818 as the Chief Justice of the King's Bench, in 1802, 1806, 1810, 1814, and 1817. Second, Lord Ellenborough's notes relating to motions in banc and motions for new trials in 1804, 1806, 1810, 1814, and 1817. Third, the notes of Keating CJ and Chief Baron Pollock from 1845-1860 whilst sitting at *nisi prius*.³⁹¹ Fourth, Lord Mansfield's trial notes, recorded in his notebooks, in commercial cases,³⁹² as edited by Oldham, from 1757-1786.³⁹³ I then compare these sources to the printed reports of Peake, Buller, Espinasse, and Campbell.³⁹⁴

Lord Mansfield's trial notes predominantly contain excerpts of witness testimony. Nonetheless, they are not devoid of legal reasoning, and Mansfield recorded some of counsels' arguments. In general, the notes for each case are short, fragmentary, and very rarely cite any past cases.³⁹⁵ They presuppose a large amount of prior understanding, which is expected given Lord Mansfield used them as a private tool to aid his memory.³⁹⁶ Lord Ellenborough's trial notes are similar: they mainly concern witness testimony, and cases are infrequently cited. In addition, like Lord Mansfield, Lord Ellenborough categorised cases using the forms of action. Ellenborough's notes, however, reveal several changes. His notes are somewhat longer than Mansfield's, likely reflecting a general increase in the length and complexity of proceedings. He also recorded more cases and, from around 1810 onwards, increasingly included their exact reference. This allows us to date these cases more easily, indicating they are predominantly from 5-10 years prior to the trial note, and include a mixture of reports from the Common Pleas, King's Bench, *Nisi Prius* trials, Chancery,³⁹⁷ and, rarely, his own trial notes.³⁹⁸ The purpose of these citations varies. Sometimes they were added because they shared the same party,³⁹⁹ or were factually related in some way. In other cases they were included in-line as part of counsel's argument, for instance, noting that counsel referred to a

³⁹¹ See Bibliography, under *Reporters and Judicial Handbooks*

³⁹² Oldham *supra* (n281), 249-771

³⁹³ *Ibid.*, 162; see also (Horwitz 2002) for Ryder's and Hardwicke's earlier notebooks, noting 158-9 the prevalence of nonsuits and emphasis on forms of action.

³⁹⁴ See the *Reporters* section of the *bibliography*.

³⁹⁵ Rare examples can be found at 249, *Sidgier v Robotham* (1757) 449 nb 46 1757; 337, *Hawkes v Saunders* (1782) 485 nb 27 1782; 371, *Medcalf v Hall* (1782) 495 nb 89 1782; 352, *Martin v Hardy* (1782) 490 nb 84, referencing 'the statute.'

³⁹⁶ Oldham, *supra* (n281), 164-165

³⁹⁷ See Baker's Microfiche, slide 723761, No. II, 79.

³⁹⁸ 723723 No. II, p. 60 'Guildhall no 52, 19.'

³⁹⁹ 723688, No I, 35 appears to have been cited because the cases share the same defendant. Likewise, 723688, No II, 65 citing 'Same v Same' and 723705, No. I, 1.

‘lead case’ in 1802.⁴⁰⁰ The majority from 1814 were appended to one side within braces, typically pointing to parts of transcribed witness testimony.⁴⁰¹ Within these addenda Ellenborough will usually describe the legal point established by the case, or list a series of cases in a row.⁴⁰² Lord Ellenborough’s notebooks on motions are somewhat more technical, likely reflecting their concentration of more legally controversial cases. They contain copious case references which virtually always provide exact references to the case citation.⁴⁰³ It is also possible to find citations to legal literature, such as Roy’s *Maxims*⁴⁰⁴ and Comyn’s *Digest*,⁴⁰⁵ and more precise citations to legislation.⁴⁰⁶

These trends suggest textualization accelerated in 1810. The judge’s trial notebook is a private document and as such is far closer to their inner thought process than their public judgment. The trial notes indicate Lord Ellenborough, and Lord Mansfield, were still thinking around the forms of action.⁴⁰⁷ Cases were categorised, informally, according to the appropriate pleadings. By 1858 this appears to have changed: CB Pollock organised cases using the forms of action in 1845, 1848, and 1849, but by 1858 organised them substantively.⁴⁰⁸ The older trial notes also suggest cases played a marginal role in the majority of cases. Until around 1810, when Ellenborough recorded a case in his ordinary trial notebooks it was usually without a reference⁴⁰⁹ and counsel, when making a legal argument, rarely referenced case-law at all.⁴¹⁰ These are indicative of a predominantly informal legal culture - Ellenborough and counsel already knew the law and did not need to cite cases to demonstrate it. When they did, they presupposed the case was in common knowledge, and thus did not need a precise reference.⁴¹¹ From around 1810 - and at a minimum 1804 in the cases relating to motions - it would appear case-law was reaching such a volume Lord Ellenborough could no longer remember all the relevant cases without precise references.⁴¹² That this was true even for the ordinary trial notes is indicative of case-law reasoning beginning to permeate legal thought at the most fundamental levels. The pattern of case-citation also partially confirms the past-persistence theory: they suggest the predominant driver in new cases were cases decided a short time

⁴⁰⁰ 723670, no I, page 6. Likewise, see 723705, No. I, 12; 723722 No II, 68, and 723723 No. I, 37.

⁴⁰¹ Most post-1810 citations are like this. Eg, 723721, No. I, p. 69, 80, 86.

⁴⁰² Eg. 723826, No I, 43; 723732, No. I, p. 6, 29. 723732, No. II, p. 64. 723733, no. II, 67, 88; 723734, No. I, 8, 10, 21.

⁴⁰³ 723755, I, p 1, 3, 5, 7, 8, 9, 27, 33, 41, 43, 49. For reports which demonstrate clear case saturation, see 723761 No. II, 69; 723845, No. II, 78; 723755, No. I, p. 98, 132. I estimate cases are cited in around 1 in 4 cases in the motions notebooks.

⁴⁰⁴ 723755, No. I, p. 27.

⁴⁰⁵ 723845, No. II, p. 68.

⁴⁰⁶ 723761 no. I, 31, 33; 723761 No. II, p. 66.

⁴⁰⁷ To the extent Oldham explicitly records the form of action and pleas in each case; for indicative example in Ellenborough, see 723670 II, p. 59, 60.

⁴⁰⁸ See London Nisi Prius, Vol 13, 1858, 24, 56, 118, 160, 159, and 467.

⁴⁰⁹ Eg. 723670 No. I, p. 31, 54, 55, 723670, No. II, p. 60, 66, 75, 84, 86, 88, 93; 723671 No. I, 29, 44, 49, No. II, 72, 73; 723672 No. II, 64, 70; 723673 No. I, 11, 21, 25, 28, 37. For a clear example of untextualized law, see 723705, No II, 8 referring to an unreported case from the King’s Bench decided ‘last term.’ Exceptions can be found, eg, 723670 No. I, p. 8; 723672 I, 24 citing Cowper 573; 723673 No II, 65, citing Douglas; 723688 No I, 60, citing the Term Reports,

⁴¹⁰ See 723670 II, 70.

⁴¹¹ Eg, see ‘the case of Buller’, 723761, p. 1.

⁴¹² Many examples from this point can be found of precise references to cases. Eg. 723705, no. I, p. 15 (East). 723705, No. II 87, (East); 723706 No. I, 8 (Campbell), 28 (East), 29 (Taunton, East); 723723 No. II, 67 (Maule), 69 (Campbell), 70 (Douglas), 71 (Term Reports). In the motions series, we begin to find lists of citations only without names from 1814 onwards, 723773 No I, 38.

ago.⁴¹³ Nonetheless, these trends are not uniform. Keating and CB Pollock, whilst citing more cases than Lord Mansfield in their trial notes, appear to do so less than Lord Ellenborough.⁴¹⁴ This may be due to uneven formalisation, either between courts or judges, or idiosyncratic differences in the role trial notes played in the full thought process of different judges, who may, after all, have used other aide-memoires.⁴¹⁵

The final important conclusion indicated by the trial notes is the role of reporters and treatise writers in accelerating formalisation. As noted above, trial notes were created at a cognitively early stage of the lawsuit, reflecting the raw-material being legally constructed from the evidence. For a legally significant case, this raw-material went through several subsequent steps before it became a printed report. The judge must convert the notes into a judgment, or jury direction, addressed to the public. This judgment was then reported by court reporters who, as discussed above, played a more active role than is usually recognised. Their editing (sometimes with the assistance of counsel and the judges themselves) was extensive and could involve adding in case citations and treatise citations; lengthy discussions of case-law; factual context, such as explanations for the absence of a judge or the ending of a suit prematurely; and, in some unusual cases, the wholesale construction of a precedent where the judge never intended to make law. Some of this contextualising function was later adopted by treatise writers,⁴¹⁶ who indicated how cases could be organised together and, importantly, which cases were sound or doubtful.⁴¹⁷ The only reason such an editing process would be necessary is if the intended audience did not already know what was being added. In short, the additions in these reports and treatises are a direct reflection of a growing legal community which was not of one mind, and could not rely on receiving first or second hand experience of all the legally significant trials of the day.⁴¹⁸ They closed the gap between tacit knowledge, seen clearly in the trial notes, and the communication to a wider legal community at large.

The Nominated Reports: You Are Going to Need a Case for That

We can also track the intrusion of case reports at the level of discourse – within the language, justifications, and technical grammar of reports. The following are the results of a quantitative study of case citation in the 19th century.⁴¹⁹ It comprised a study of 3200 contract cases from the Queen’s Bench

⁴¹³ The oldest case reference I could find was to Saunders’s Reports. 723755 No. I, 43.

⁴¹⁴ *Supra*. For an example, see MSS 13B, Vol 1, 122, 387.

⁴¹⁵ For the varied use of trial notes, Horwitz, *supra* (n393), 156.

⁴¹⁶ For an earlier example in the context of nisi prius cases, see (Buller 1768), 125. Compare the degree of glossing in (Campbell 1809) and later reports, such as East, to get an indication of the changing role of the court reporter.

⁴¹⁷ Campbell, 41 describing an authority as ‘strong.’

⁴¹⁸ Eg, Espinasse believed cases which were not reported would be confined to ‘oblivion’ or the private use of an anonymous compiler. Espinasse, Vol I. (iv). Reporting reform in the 1850s were premised on a similar idea of total reliance on written records. Commentators noted the automatic status of a report as law, and the need for law to be dispersed accurately across the Empire.

⁴¹⁹ Cf the study in Ferguson *supra* (n83), 41 Ferguson’s sample, however, was much smaller than that used here.

reports. The period studied covers 1805-1914, amounting to 3251 contract cases, and around 6500 discrete judgments. These cases were not exclusively from the Queen's Bench: they also include cases from the Exchequer Chamber and the Court of Appeal.

The study constituted two strands: a quantitative part and a qualitative part. The quantitative part involved counting how many cases each contract case cited (Total Citations), how many unique cases were cited (Unique Citations), how often judges dissented, and the page numbers of each case. The qualitative part involved counting how often judges:

- Justified the outcome of a case by citing a precedent ('Justify')
- Regarded themselves as bound by a precedent ('Bound')
- Cited a non-legal justification for a case outcome ('Norm')
- Doubted the validity of a report ('Doubt')
- Cited a non-authoritative legal source, such as a textbook or foreign case ('NL Ref')

To ensure the qualitative stage was consistent, every time a positive finding was found this was recorded in a 'language table', so that future cases could be compared against it. The most difficult to interpret was 'justify', which was limited to instances where the judge resolved a case by citing a precedent by itself or included no reasoning except a precedent citation. 'Norm' captured any time the judge would cite 'justice', 'common-sense', 'convenience', or any other broadly normative justification. 'Bound' covered explicit use of the word 'bound' and a few instances where a judge suggested they had no freedom and provided no other arguments why this was beyond the cited case.

The analysis yielded the following results:

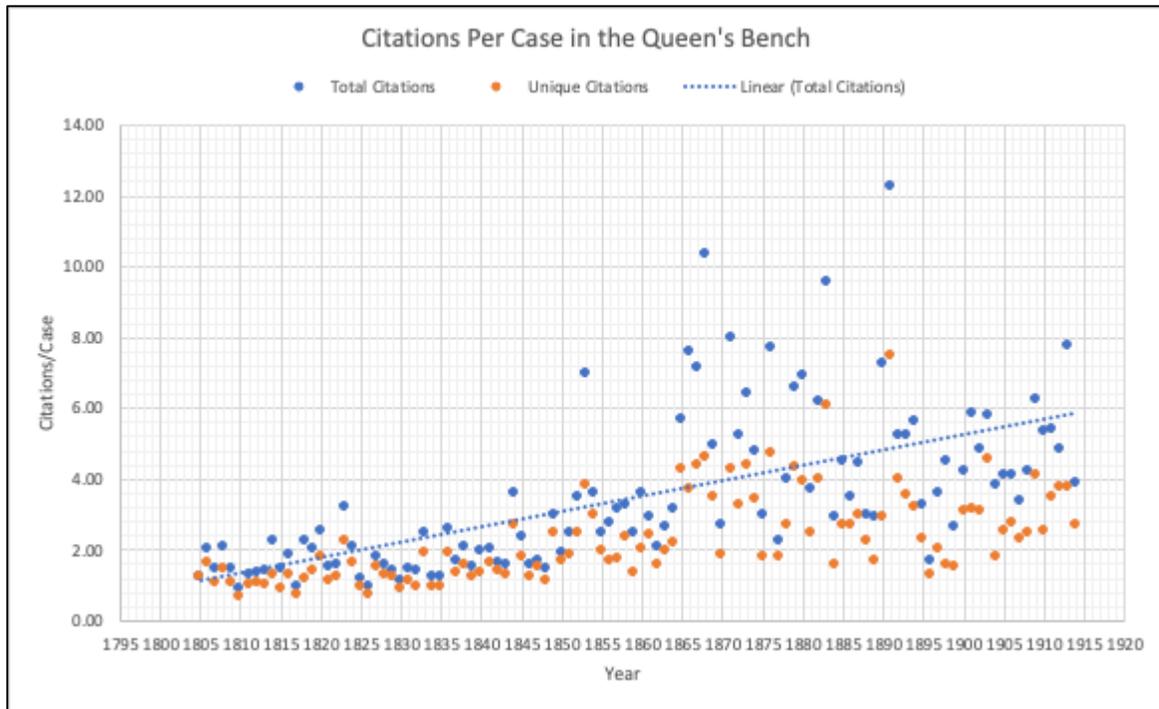


Fig 31. Total Citations All QB Contract Cases 1805-1915

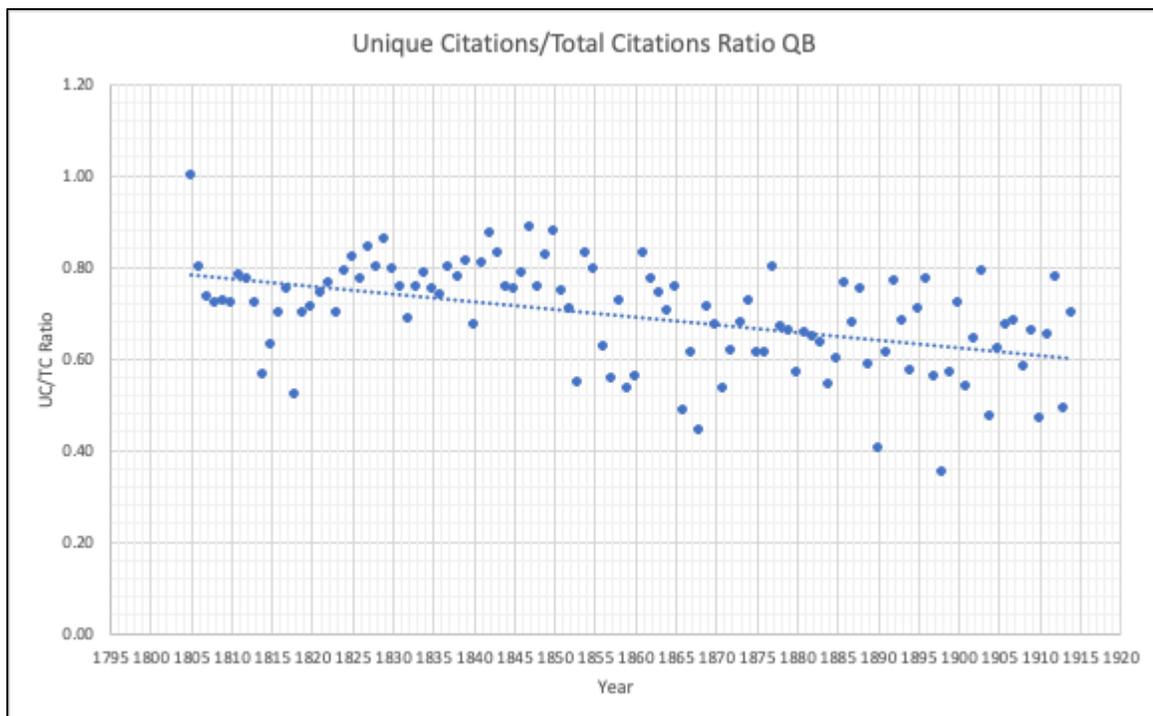


Fig 32. Unique Citation/Total Citation Ratio QB Contract Cases 1805-1915

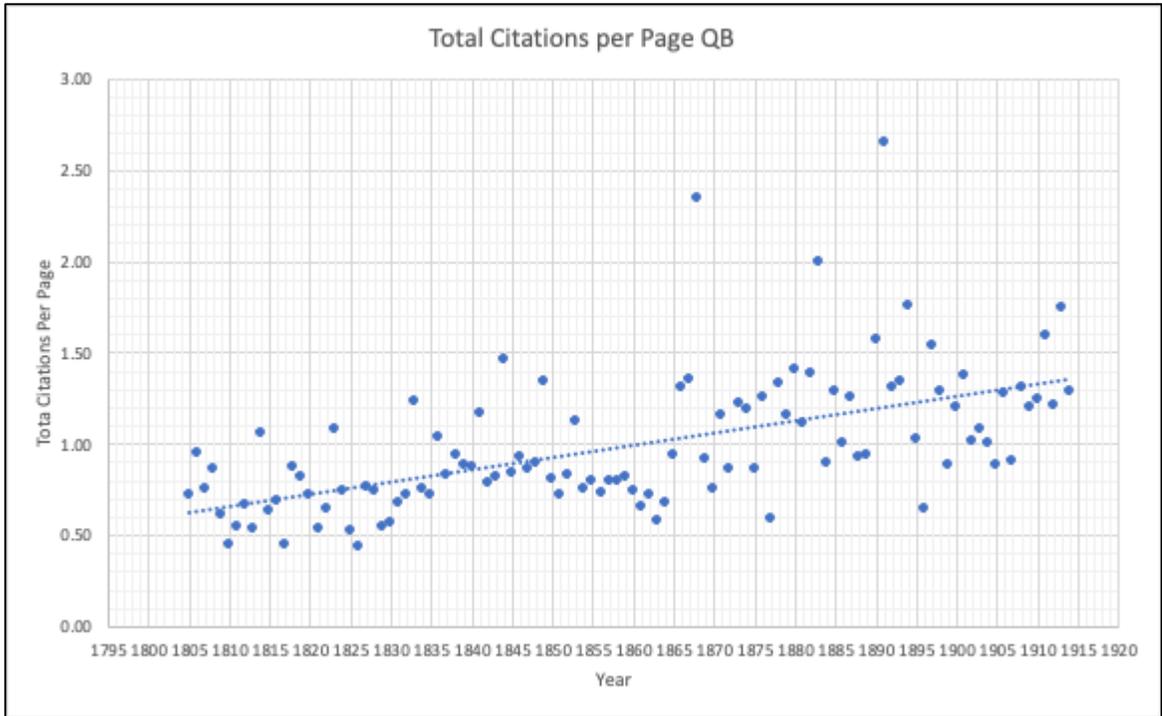


Fig 33. Citations/Page QB Contract Cases 1805-1915

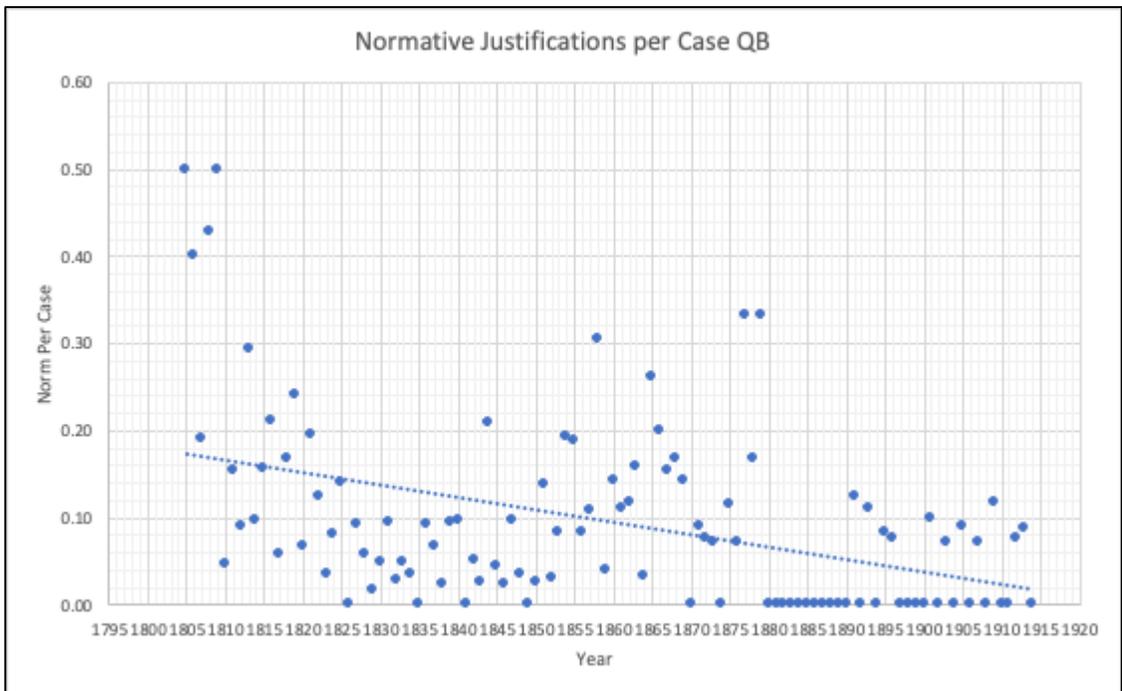


Fig 34. Normative Justifications QB Contract Cases 1805-1915

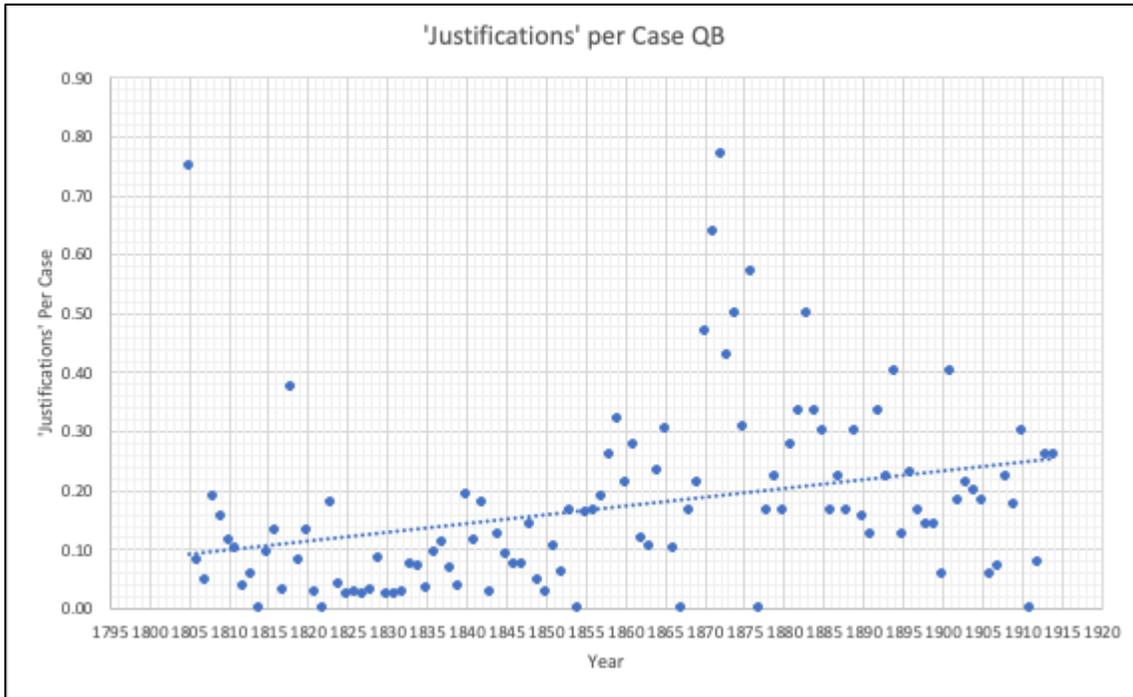


Fig 38. Justifications using Precedent QB Contract Cases 1805-1915

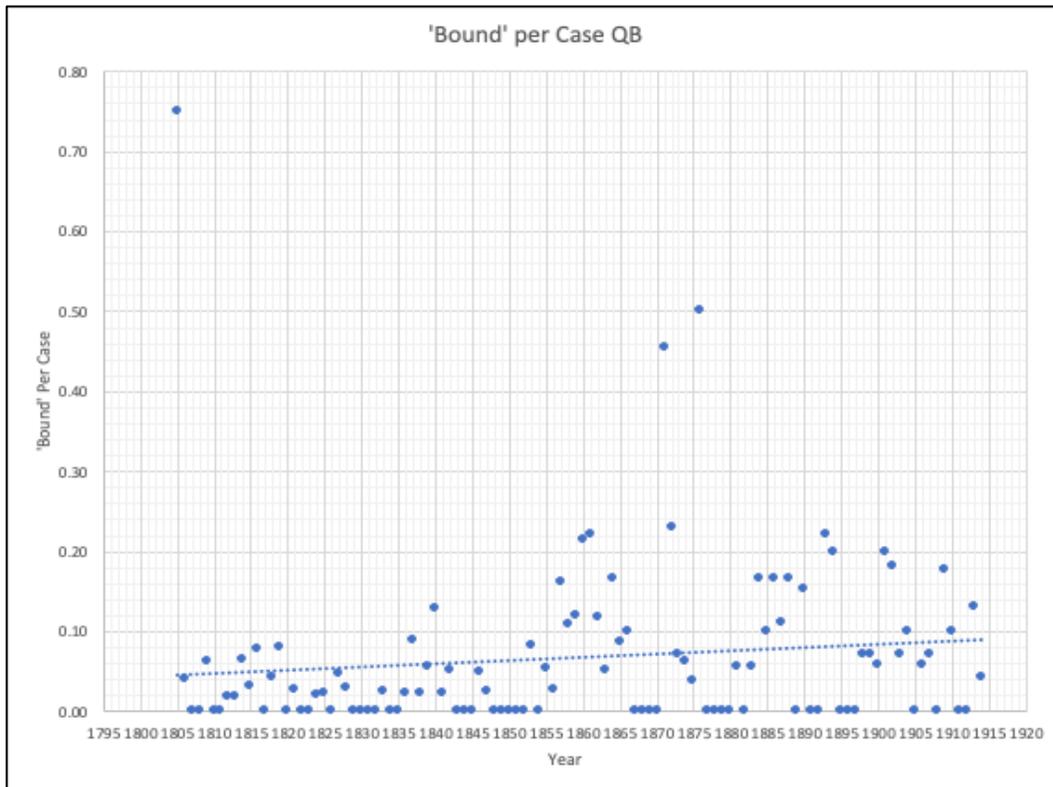


Fig 39. Expressions of being 'Bound' / Case QB Contract Cases 1805-1915

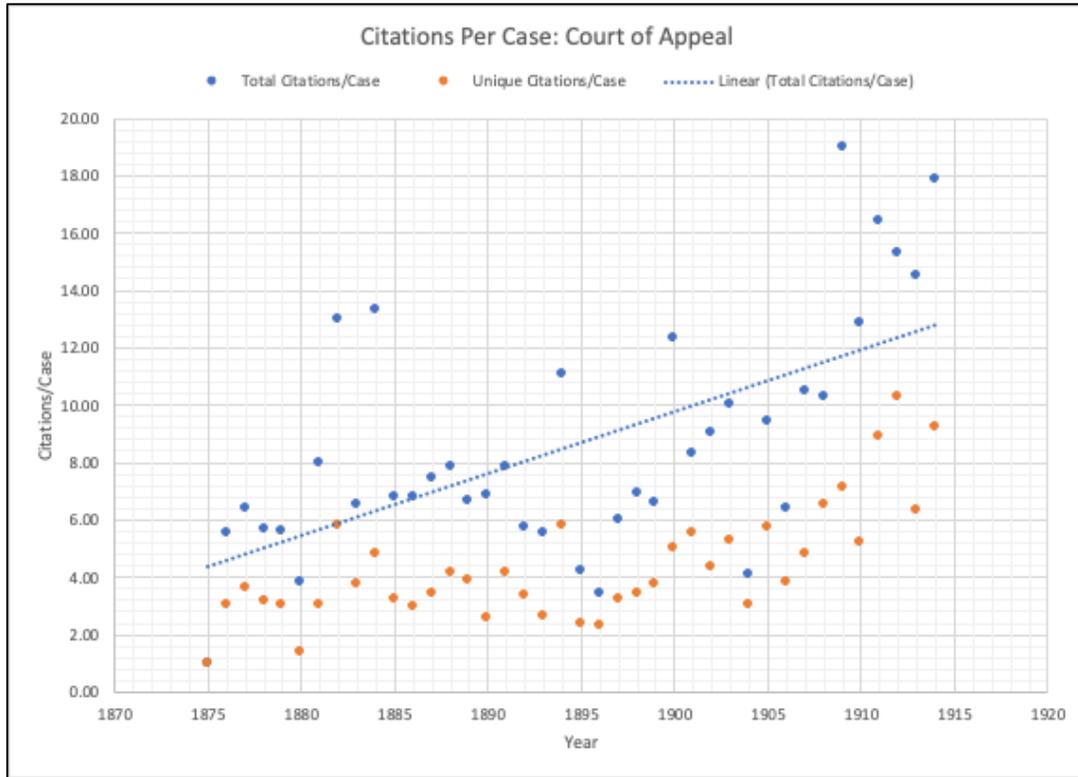


Fig 40. Citations/Case CA Contract Cases 1805-1915

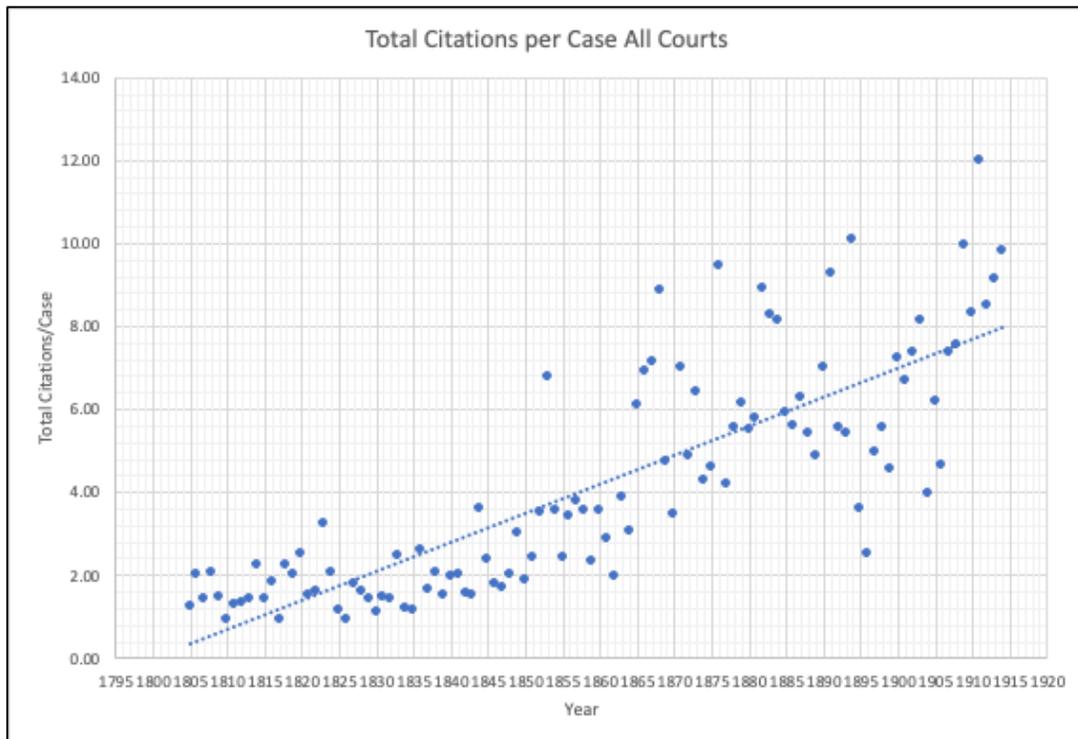


Fig 38: Citations/Case all Contract Cases 1805-1915

The total number of citations per case started to slowly increase in the Queen's Bench from 1835. It increased faster after 1850, until 1865 after which it suddenly spiked, and the total number of precedents cited per case doubled to 6 precedents per case (**Fig. 31**). This increase continued throughout the second half of the 19th century, though dipped in the early 20th century. The number of unique citations increased alongside total citations (**Fig. 31**), although the proportion of unique citations to total citations decreased by the second half of the 19th century (**Fig. 32**). The number of citations per page also steadily increased from 0.67 in 1805 to 1.4 in 1914 (**Fig. 33**). Together, these findings suggest that judges were citing more cases, more times, and that precedent was taking up a greater proportion of their judgments as the 19th century progressed.

In terms of qualitative finding, the number of normative justifications decreased throughout, eventually reaching its lowest ebb by the 20th century. (**Fig. 34**). Alongside a decrease in normative justifications, the number of justifications based on precedent increased slightly (**Fig. 35**). The period where judges express that they are bound the most was between 1860 and 1870, after which it dropped to a level slightly above the pre-1860 level, marking an overall increase (**Fig. 36**). The rate of cases with NL references to cases without increased after 1845, then remained constant until dropping in 1905. Dissent was highest in the period between 1850 and 1860, and it was very rare for judges to doubt reporting quality following 1865.

The data from the Court of Appeal shows its judgments consistently had a much higher citation rate, from double to triple the QB levels (**Fig. 37**). Whilst this was not analysed, it is likely this greater rate was in part due to a greater number of separate judgments per case. The citation rate increased throughout the period alongside the length of judgment. (**Fig. 37**). As with the QB, the number of citations per page increased, though the ratio of unique citations to total citations remained constant. The rate normative judgments were relied on in the Court of Appeal was consistently very low, and the rate they expressed they were bound was slightly higher than the QB. Although there were very few cases reported from the Exchequer Chamber, these tended to also have higher citation rates. Combining the three courts, the total citation rate of reports shows a similar pattern to the disaggregated Queen's Bench reports, but with a more drastic increase in the amount of precedent cited. (**Fig. 38**).

Thus, at both a low-level of private note-taking, and the public level of legal discourse, cases were intruding. In fact, intruding at ever-greater speeds and volumes. This raises the following questions: when there are vast quantities of substantive, potentially inconsistent legal reports exceeding human memory, how does the community determine which rules it should follow? There are various solutions to this problem. England adopted at least two: first, there was a steady increase in the specialisation of lawyers,

thereby reducing the total cognitive load on each individual lawyer.⁴²⁰ Second, more distinctively, English judges instituted a meta-rule indicating which cases would take precedence over others. These ‘rules of sources’, alongside organising sources like treatises, are inevitable when textualized substantive law reaches a certain volume. Legal historian Brian Simpson put it more bluntly: rules of precedent are only necessary in a system where there is no longer communal agreement on what the law is.

Meta-Law: Rules on Sources

The increase in substantive law did not directly translate into rules of formal precedent; as noted above, it was part of a complex multi-causal process.⁴²¹ The emergence of such rules was encouraged by, and themselves helped accelerate, changes to the legal institutions and culture. The three main causes appear to be:⁴²²

- (1) Reform and formalisation of the judicial appellate hierarchy
- (2) Reporting reforms and establishment of regular reports from 1780-1830
- (3) Changes to the culture of the judiciary and bar

First, the institutional structure of the court hierarchy and court reports were reformed. Prior to the early 19th century, the appellate structure was ambiguous and informal. When judges desired to settle an uncertain legal point, the typical procedure was to get as many senior judges as possible to consider it. The ensuing consensus was what thereby settled the uncertainty.⁴²³ This approach is clearly exemplified by the overlap of judicial personnel across subordinate and appellate levels, with the Exchequer Chamber being composed of a mixture of Common Pleas and Court of Exchequer judges (not to mention the informal Exchequer Chamber composed of all the judges).⁴²⁴ This method, like all informal modes of settling uncertainty, was limited: the rate of appealing cases increased significantly to the point of concerns of over judicial workload at the turn of the 19th century. In addition, the total amount of substantive law was much larger, raising more potential clashes and disagreements. Around 1820-30, the House of Lords became increasingly active as a final venue for appeal, producing reasoned precedents, a

⁴²⁰ The topic of legal specialisation is relatively understudied; see, ((Ariens 1994; Opeskin 2022; Polden 2010a), 1030-1052, generally (Ariens 1994; Opeskin 2022)). For a late-19th century pining for a system without specialisation, see Lord Romilly MR in *Mullings v. Trinder* (1870) LR 10 Eq 449 at 455, describing a fully general lawyer.

⁴²¹ I would like to thank my undergraduate students from 2021-2023 for their assistance in researching parts of this section.

⁴²² Evans, *supra* (n334); (MacCormick 1966), ff204 also suggest the ideas of Jeremy Bentham played a role. Cf Duxbury, *supra* (n237), 37-48,

⁴²³ Synge, *supra*, (n384), 522; (Oldham 2011), 294-9.

⁴²⁴ For some of the defects in partially overlapping judicial forums, see *Ricketts v Lewis* (1834) 2 C & J 11.

(mostly) separate judicial cohort,⁴²⁵ and dedicated court reports.⁴²⁶ One of the most powerful forces in converting informally persuasive reasoning into formally binding precedent was the creation of an institutional hierarchy with clearly defined roles.

Second, the existence of an extra-textual gloss on the reports, existing as professional consensus, was also undermined by the increased reliability of court reporting. The poor reporting of Chancery decisions gives an insight into its limiting effect on formalisation. In 1800 alone, it is possible to find Chancery judges: unable to find precedents⁴²⁷ and ordering ‘searches’ for reports;⁴²⁸ forgetting the location of cases, but citing them anyway;⁴²⁹ using their own personal reports,⁴³⁰ avoiding the binding effect of precedent through claims of mis-reporting.⁴³¹ These strategies were also used extensively by Lord Mansfield when avoiding precedents and can be found across the legal system.⁴³² An interesting feature of these doubts is that they persisted beyond the mid-19th century: courts in the 20th century continued to doubt the reliability of earlier reports.⁴³³ This pattern suggests that the quality of court reporting was a fundamental limit on the bindingness of precedent,⁴³⁴ without which a degree of glossing would always creep in. Further, as with many of these changes, the strengthening of precedent mentioned above seems to have encouraged improvements in court reports, in-turn strengthening precedent.

Third, following these ‘infrastructure’ reforms, the judiciary, and surrounding bar, underwent a cultural shift. The 18th century profession constituted a close-knit community, one which could sustain its own standards of legal validity. The 19th century brought a ‘rationalisation’ of this culture. The interpersonal relations between the judiciary moved from the fraternal to the professional,⁴³⁵ indicated by the rise of stereotyped, formal phrases to refer to one another and a shift from personal to technical authority, with references to the exceptional personal virtues of judges becoming much rarer.⁴³⁶ These cultural changes occurred on the backdrop of the formalised court hierarchy, described above, and widespread

⁴²⁵ Prior to this point, non-legally trained peers often participated in decision-making. Evans *supra* (n334), 66. Cross *supra* (n386) ff 12

⁴²⁶ The exchequer chamber was also reformed as an appellate body, see Administration of Justice Act 1830 (11 Geo. IV and 1 Will. IV c.70); for the course of reform, see (Polden 2010c).

⁴²⁷ *Greenwell v Greenwell* (1800) 5VJ 194; *Milsom v Awdry* (1800) 5 VJ 465; *De Bouchout v Goldsmid* (1800) 5 VJ 211 (not caring about recent cases)

⁴²⁸ *Wragg Ex Parte* (1800) 5 VJ 450.

⁴²⁹ *Campbell v Walker* (1800) 5 VJ 678

⁴³⁰ *Osborne v Duke of Leeds* (1800) 5 VJ 369

⁴³¹ *Baxter v Dyer* (1800) 5 VJ 656; *Holloway v Holloway* (1800) 5 VJ 399; *Harrison v Foreman* (1800) 5 VJ 207. For later Chancery examples: *Welesley v Duke of Beaufort* (1831) 2 R&M 639 (poor reporting used to consider case on own merits); *Amphlett v Parke* (1831) 2 R&M 221 (report defeasible to professional consensus); *Dixon v Wilkinson* (1859) 4 DeG 513; *Gilbert v Lewis* (1862) 1 DeGJ 38.

⁴³² (Oldham 2006), 141; for a useful survey, *Anon* (1848a).

⁴³³ *Sharp v St Sauveur* (1871) LR 7 ChA 343; *Heasman v Pearse* (1867) LR 7 ChA 275; *Re Imperial Land Co of Marseilles* (1872) LR ChA 587; *Edmondson v Copland* (1910) 2 Ch 301

⁴³⁴ (Dawson 1968), 78

⁴³⁵ (Hedley 1995) see *Duman supra* (n145), suggesting there was a general professionalisation of the judiciary between 1790-1875. See 5. For a summary of the changes, see 178.

⁴³⁶ This tendency is captured succinctly by Cocks, *supra* (n65), in describing the ‘traditional bar.’ 18, 27-9. The general suspicion of technical learning as an exclusive source of legitimacy can also be found in the judicial statistics, RC *First Report*, 241. A.17, and as late as 1856, Report, xi, Lord Coleridge; the same shift can be detected for the reporters, (Anon 1841), 22. Cf *Sugarman supra* (n37), 31 for qualifications.

demographic changes. The early-mid 19th century brought a significant shift away from the landed gentry towards the professional middle class⁴³⁷ and, by the 1850s, there had been a dramatic increase in the total number and geographic distribution of both judges and barristers.⁴³⁸ The greater distance and increasing numbers of community members caused a breakdown in the bar's traditional means of social control,⁴³⁹ and can help explain the turn to technical language. Of course, this cultural explanation is only a sketch and a closer analysis will be needed to determine the personalities and ideas behind the changes. A survey of all the cases in which judges state they are bound by precedent in the QB contract cases, for example, reveals a small but prolific minority of judges pre-1865.⁴⁴⁰ This minority is responsible for most of the uses of the term 'bound' and the early change in the approach to precedent corresponds with the replacement of individual judges, rather than judges slowly and collectively altering their views. After 1865, it seems the approach to strict precedent had fully percolated, with a wide variety of judges at different levels expressing themselves 'bound.'⁴⁴¹

These three shifts were translated on the doctrinal level into rules governing the legal sources: 'meta-rules.' The judicial approach to precedent clearly shifted from the mid-1830s, at least in the Queen's Bench's contract cases.⁴⁴² With the arrival of Patteson J and Denman CJ, cases begin to be regarded as binding regardless of their correctness.⁴⁴³ Indeed, they begin to emphasise the *lack* of merit in precedents they must nonetheless follow.⁴⁴⁴ By the late-1830s, Baron Parke's 'extremely unreasonable' escape valve had all but closed. In *Vedley v Burder* (1837), it was decided an inferior court could not depart from the repeated decisions of superior courts,⁴⁴⁵ and in *Hedger v Steavenson* (1837) Parke regarded himself as totally bound, regardless of the reasonableness of the decision.⁴⁴⁶ A stark example of this trend is in Maule J's judgment in *Emmens v. Elderton* (1852),⁴⁴⁷ stating:

⁴³⁷ Both in origin and the profession of their sons. See Duman, *supra* (n145), 51-2; 169-170.

⁴³⁸ Duman, *ibid.* 10; Cocks, *supra* (n65), Danzig, *supra* (n98), 275, 275 fn107.

⁴³⁹ See Cocks, *ibid.* 246, on the breakdown of the 'circuit culture' produced by an increase in barrister numbers, 57, the geographic distribution caused by the County Courts Act 1846 ('localism'), 87-8, and the railway, 126-7, 130, 169. Similar geographical distances required technical law in the network of trade across the Western Indian Ocean, Bishara, *supra* (n309)

⁴⁴⁰ Pre-1865, it is almost always the most senior judge in the court who expresses themselves bound. The most common judges in this period are Lord Ellenborough; Abbott J; Lord Tenterden CJ, Denman CJ, Coleridge, Crompton, Cockburn, and Blackburn.

⁴⁴¹ Pre-1865 five judges are responsible for over half of the uses of the term 'bound.'

⁴⁴² These trends are confirmed more broadly in the sources below, nonetheless, it may be a strong rule of *stare decisis* emerged quickly in contract cases because of a perceived commercial need for certainty. For some earlier indications, see Abbott J in *Harvey v Crickett* (1816) 5 M&S 335, and, possibly, Le Blanc J in *Claridge v Dalton* (1815) 4 M&S 225.

⁴⁴³ Patteson J's judgment in *Lockwood v Salter* (1833) 5 B & AD 303. This is made explicit by frequent judicial profession they agree with the reasonableness of decisions alongside the bindingness of them. The two are clearly separate by the late 1830s. Eg. *Archer v Marsh* (1837) 6 AD & E 959 and *Bayley v Ashton* (1840) 12 AD & E 493

⁴⁴⁴ Denman CJ in *Mitchell v Townley* (1837) 7 AD & E 164, stated he was bound by a 'clearly wrong' decision. Likewise, *Hartley v Wharton* (1840) 11 AD & E 934; and *Perrins v The Marine and General Travellers' Insurance Society* (1859) 2 EL & EL 317. Coleridge J in *Heinekey v Earle* (1857) 8 EL & BL 410 stated the law prevented a just result but that he was bound regardless.

⁴⁴⁵ *Veley v Burder* (1837) 1 Curt 372

⁴⁴⁶ *Hedger v Steavenson* (1837) 2 M + W 799; see also *O'Connell v. Reg* (1844) xi Clark & Fennelly, 155 for an explicit connection between precedent and legal science.

⁴⁴⁷ 4 H.L.Cas. 624, 658

“[i]f a rule is well established by decisions, it is not necessary to give any reasons in its support, or to say anything to show it to be a good and useful one.”

In the 1840s we see many judges in courts of co-ordinate jurisdiction expressing how they were bound by the decisions of one another, although at times the rule is a bit fuzzy.⁴⁴⁸ Further, by the 1850s the decisions of the House of Lords were formally recognised as absolutely binding on inferior courts⁴⁴⁹ (although in practice had been so for longer) and the debate moved on to whether it was bound by its own decisions.⁴⁵⁰ In 1861 the House of Lords decided it was bound by its own decisions, a position repeated several times until it was decisively resolved in *Tramways*.⁴⁵¹ A key turning point seems to be 1865: after this point, it becomes common for judges to express they are ‘bound’ by a decision in short, succinct sentences.⁴⁵² The occasional statement by a judge that they agree with the case binding them slowly shifts to either unitary statements they are bound, or, from the 1870s onwards, statements they are bound regardless of what they think.⁴⁵³ A high water mark can be seen in the judgments of Channel J and Grantham J in *Davies v Jenkins*⁴⁵⁴ and *Stokes v Spencer*⁴⁵⁵ respectively. In each half-page, assembly-line judgment, the judge states they are bound, finds the facts are analogous, and decides accordingly with little else in the way of discussion. The position of the Court of Appeal regarding its own decisions was less rigid following its establishment.⁴⁵⁶ Nonetheless, by 1890 it regarded itself as bound in practice.⁴⁵⁷ Whilst some Lords Justices regarded themselves restricted only insofar their previous decisions came from a court of coordinate jurisdiction, eg. out of courtesy, most denied they had this discretion.⁴⁵⁸ In sum, the 19th century saw the judiciary increasingly relate to each other, both inter-personally and in terms of decision-justification, through the medium of institutional language in the place of personal and cultural ties.

⁴⁴⁸ Most of the time, judges blankly express they are bound by courts of coordinate jurisdiction. It is taken as a given by Erle J in *Henderson v Australian Royal Mail Steam Navigation Co* (1855) 5 EL & BL 409 and *Wheulton v Hardisty* (1857) 8 EL & BL 232; and Blackburn J in *Clapham v Atkinson* (1864) 4 B & S 722. For the contrary, cf (Marshall 1863), speech given in 1860.

⁴⁴⁹ *Re Direct Birmingham Ry* (1851) 1 Sim 187; Marshall, *ibid*, 331 regarded vertical ‘bindingness’ as absolutely settled by 1860.

⁴⁵⁰ See Evans *supra* (n334) ff 56, and (Duxbury 2008) ff 42

⁴⁵¹ *London Street Tramways Co Ltd v London County Council* [1898] AC 375.

⁴⁵² See, *inter alia*, *Le conteur v London and South Wester Rly Co* (1865) 1 QB 54; *Donald v Suckling* (1866) 1 QB 585; *Macrow v Great Western Rly* (1871) 6 QB 612

⁴⁵³ Eg, Williams J in *Beer v Foakes* (1883) 11 QBD 221; Field J in *Cambefort v Chapman* (1887) 19 QBD 229; Charles J in *Meek v Wendt* (1888) 21 QBD 126; and Esher MR in *Vagliano Brothers v Bank of England* (1889) 23 QBD 243

⁴⁵⁴ [1899] 1 QB 133

⁴⁵⁵ [1900] 2 QB 483

⁴⁵⁶ See *Mills v Jennings* (1880) 13 ChD 639; *In Re Hallett's Estate* (1880) 13 ChD 696; *In Re South Durham Iron Co* (1879) 11 ChD 579; *The Vera Cruz No 2* (1884) 17 QBD 259

⁴⁵⁷ *Pledge v White* (1895) 1 Ch 51; *Lavy v London County Council* (1895) 2 QBD 577

⁴⁵⁸ *Gathercole v Smith* (1881) 44 LT 439 for a case of courtesy, CF Stirling LJ in *Farquharson Bros v King* (1901) 2 KB 697 and Moulton CJ in *Nelson & sons v Neslon Line* [1907] 2 KB 705.

(ii) The Era of Selective Case-Reporting

The changes in the preceding section do not directly explain why reports fell from 1840 onwards. For that, we must turn to the reporters and their incentives. As noted in part 1.2a, reporters chose cases if they believed lawyers would be interested in them. In turn, lawyers were interested in cases if they contained useful points of law, either for arguing cases or other legal activities. These links were disrupted by the changes mentioned in the preceding section. First, under the new paradigm of formal precedent fewer cases possessed ‘authority.’ The criteria for authority were narrower, more technical, and artificially limited the number of legally relevant cases. Second, under the old paradigm, the criteria of importance were not only wider, but more ambiguous. They therefore likely contributed to over-reporting, with reporters unsure of the relevance of a case erring on the side of inclusion rather than exclusion. With formal precedent, ‘relevance’ became sharper – although never unequivocal – cutting down the amount of superfluous cases.

I have broken the development of reporting and precedent into three eras. **First**, prior to formal rules of precedent, there was an ambiguity over which cases were significant. Whilst the number of reports remains small, contradiction and super-profusion could be restrained with common learning; it was, as noted above, an era of source democracy.⁴⁵⁹ This period ended with the breakdown of common learning under the immense mass of text, and changes to the professional body. In Bligh’s preface to his reports he notes it had become difficult to ascertain what was report-worthy due to “sufficient uncertainty to admit of a latitude and diversity of opinion among those who preside in the courts of judicature and administer the law.”⁴⁶⁰ This marks a fundamental shift in the operation of common law reporting. For the first time, the total volume of plausibly report-worthy cases exceeded the bounds of a single, readable set of notes. The reporter started to become an editor. Which caselines ought to be supported and reported, and which ought to be ignored? As noted in Part 1.2a, the dynamics of case-reporting ensured reporters would tend towards including, rather than excluding, doubtful cases; further, precedent continued to increase in persuasive strength, thus stimulating further reporting. This led to a **second** period, one of rapidly expanding reports and extensive ambiguity. With the now super-profuse legal library, several strategies had to be introduced to reduce the number of cases which needed to be read.⁴⁶¹ The most well-known was the creation of legal treatises in the late 18th century. These gestated from long glosses in the footnotes of the case reports and were designed to ‘distil’ the case law by abstracting out the general principles.

⁴⁵⁹ There are clear parallels here with the sources of European law pre-codification, (Rocheton 2024) 16-17.

⁴⁶⁰ Bligh, (v)

⁴⁶¹ Later solutions, mirroring the consolidating statute, were statutes consolidating past cases, such as the Bills of Exchange Act and Sale of Goods Act, and upper-tier tribunal cases which summarised, and replaced, prior case-lines.

Another distinctive 19th century invention (or ‘coping mechanism’) was the leading case, which rendered knowledge of the previous cases superfluous.⁴⁶² The leading case could be found in specially dedicated volumes, as well as in the heavily curated footnotes of legal treatises. Both innovations represented a new view that many - if not most - cases were repetitive and a single case or principle could be used to summarise their content.⁴⁶³ They were tools for information compression, albeit ones which, like all legal abstraction, could be used creatively.

The era of profusion and ambiguity lasted until 1840-50, after which we enter the **third** period: the era of ultra-selective case reporting.⁴⁶⁴ By this point, precedent had not merely been strengthened: it had been made formally absolute. Lower-tier tribunal decisions, past and contemporary, could be automatically regarded as less legally significant. This period marks the beginning of the steady-state reporting of the 1880s continuing into the 20th century. In this new phase, the standard for reporting - and thus overreporting - changed. First, the new filtering system of case significance reduced the number of important cases at the *nisi prius*, county court, and high court level, such that the traditional focus in their reporting was unnecessary. According to this interpretation, there was a brief period of systematic overreporting caused by the old report formats failing to catch up with a new, more efficient selection and funnelling process of the formal court hierarchy. Second, even if the filtering was inefficient, the formal law of precedent rendered all past, current, and future judgments from these lower courts automatically less significant, regardless of their content. The extent to which the ignored cases included important, useful, and relevant rulings can be designated as the information loss caused by the rules of formal precedent. It was likely these retrospective revaluations which produced the extensive criticisms of overreporting in the 1860s and contributed to the ICLR’s establishment in 1865. On either view, we can confirm that the court origin was a partial driver of the reduction by observing the proportion of judgments from each court which were reported. First, we can disaggregate *Nisi Prius* reports, which were ceased in 1865 in the movement to the ICLR:

⁴⁶² See also (Campbell 1894); (Smith 1837); (Indermaur, 1874); (Tudor and White 1849, 1856, 1860); (Capom 1911); (Finch 1886), (Shirley 1908). Nb (Simpson 1979), 662, fn206. These were foreshadowed by Williams’s abridged edition of Saunders’s reports.

⁴⁶³ For the jurisprudential theory behind this view, (Pollock 1882), 243; see also (Langdell 1871), cited in Duxbury *supra* (n237), 303. Cf the prior view on case uniqueness, Lobban *supra* (n17), 87, or, conversely, support of general, underlying principle: (Plucknett 1956), 34.

⁴⁶⁴ Cf the American system, (Berring 1987), 21-5; (Goodhart 1931), 57.

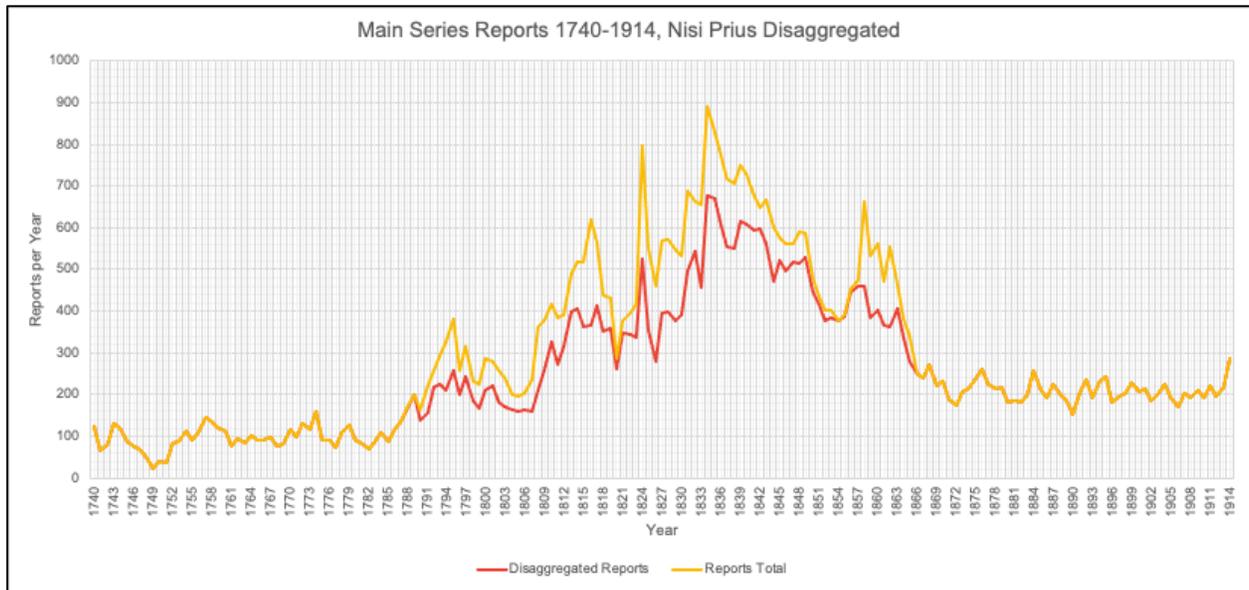


Fig 39. Main Series Nisi Prius Disaggregated

Thus, part of the dramatic 1865 fall is purely attributable to the discontinuation of nisi prius reporting in 1865.⁴⁶⁵ A survey of these cases, carried out whilst coding them by doctrinal subject matter, suggests the second wave of reports, from 1857-1866, contained very little in terms of substantive reasoning of meaningful precedent.⁴⁶⁶ They are therefore a reasonably indicator of ‘overreporting’ in the sense of containing little substantive content; in addition, by 1865 the nisi prius level had also depreciated significantly in formal precedent value, substantive content aside.

The most powerful and direct indicator of a ‘gear-shift’ is in a falling ratio of reported cases. This will reveal immediately the extent to which the court system has increased the extent of its filtering. One difficulty is ascertaining the right comparison to estimate a reporting ratio with. I have used several here. First, we can plot the reported cases at common law to the total number of Writ of Summons:

⁴⁶⁵ Note, for a full comparison of nisi prius reports to litigation, further data-processing will be required to disaggregate the duplicate nisi prius reports also reported in the upper-tier courts. A similar consideration can be made regarding court of appeal cases.

⁴⁶⁶ The point at which nisi Prius cases stopped being reported. (Mews 1898) 180, suggests that nisi Prius cases had next to no precedential value. In addition, similar comments are given in (Cababé and Ellis 1885), viii noting Trials by judges alone were becoming so dominant that nisi prius trials barely existed at all.

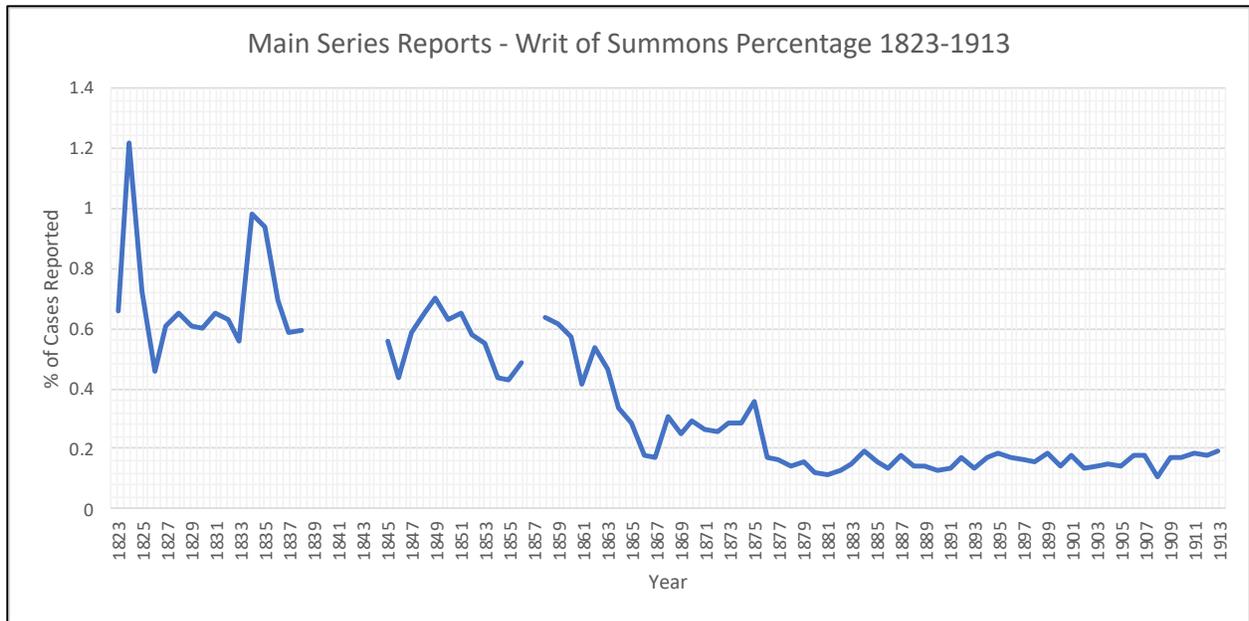


Fig 40. Main Series Reports / Writ of Summons Ratio

Immediately, it is evident that something has happened around 1859, although apparently starting earlier, which has produced a fall in ratio. We might, however, doubt the use of writ of summons as a comparator insofar as the issuing of a writ is about as far as possible from the reporting of a case. A more reliable measure of potentially reportable cases is the total number of cases being resolved at trial. I was able to gather this data for common law courts in London and Westminster from the 1857-1913 *Judicial Statistics Series*. My basic assumption was that a case could only be reported if it was tried and a verdict was given. The judicial statistics record the total number of causes going to trial in the superior courts, breaking these down by result:

1. Verdict for Plaintiff
2. Verdict for Plaintiff subject to Special Case
3. Verdict by Consent with Reference
4. Verdict for Defendant
5. Jury discharged without verdict
6. Juror withdrawn
7. Nonsuit
8. Stet Processus, venue changed, Record withdrawn &c.
9. Reserved for Further Consideration
10. Judgment Dismissing Action

11. Referred to Official Referee
12. Referred to Special Referee
13. Otherwise Disposed of in Court

I also assumed that a legal precedent requires a written record of an adjudicator’s decision regarding the facts. Not all of these results produce such a record. Number (5), (6), (8), (9), (11), and (12) all result in an outcome without a verdict or recorded decision.⁴⁶⁷ It is ambiguous whether (10) and (13) do so. Usefully, as these are recorded separately for the total trials at Westminster and for trials at circuit these can be disaggregated from the final figures. When included, I record this as ‘Low Reportable Cases’, when excluded ‘High Reportable Cases.’ Given the above, a rough picture of the total volume of possible reportable cases can be produced both for contract and civil litigation as a whole:

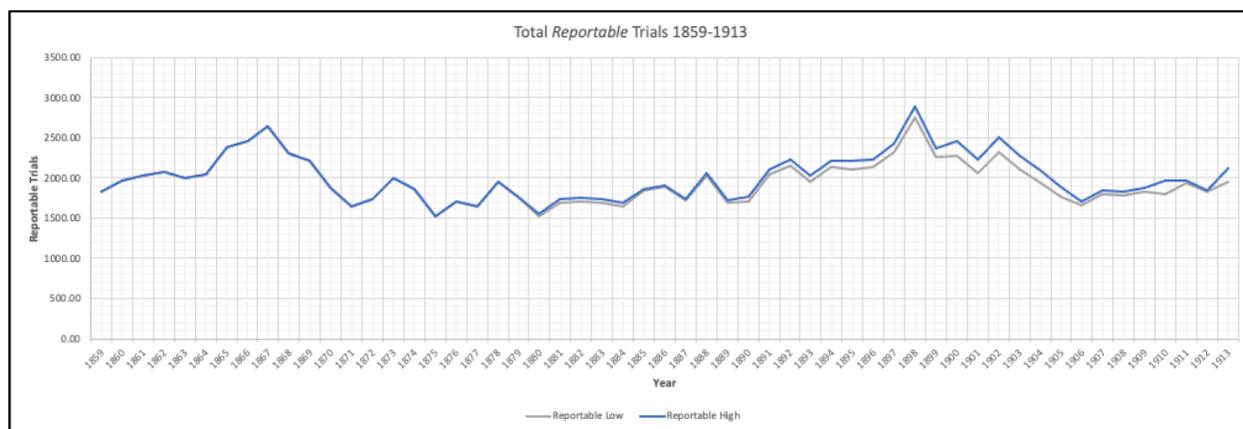


Fig 41. Total Reportable Trials 1859-1913

We can also add data from the earlier enquiries, though for trials this is far less reliable as it is unclear what stage of trial is being recorded in the 1824-1829 figures, and the figures omit figures for the Exchequer and Common Pleas. Assuming the rate of causes entered for trial making it to trial was roughly similar between the Common Pleas, Exchequer, and King’s Bench - by no means a reliable assumption - we get the following line graph (HIGH):

⁴⁶⁷ There is a difference between the juror being withdrawn and discharged. Both result in no verdict, although if the Juror is withdrawn it puts an end to the cause (T. Chitty 1862), 246.

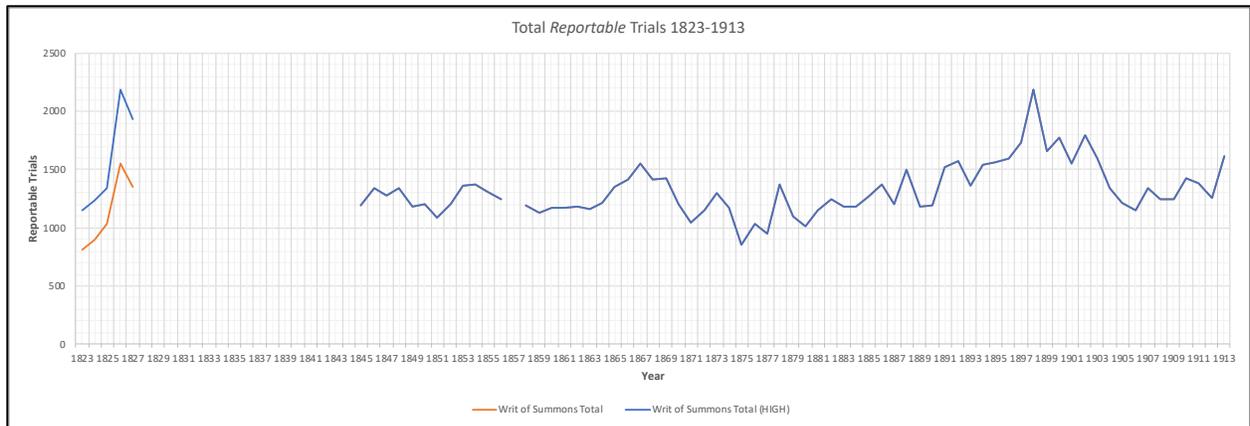


Fig 42. Total Reportable Trials 1823-1913

We can plot these figures against the total number of common law court reports, minus those at nisi prius and Court of Appeal reports. The predictable result is that with total trials increasing slightly, and reports steadily falling, the total ratio of reports-trial cases plummets sharply. Using the complete trials graph above, the following pattern emerges:

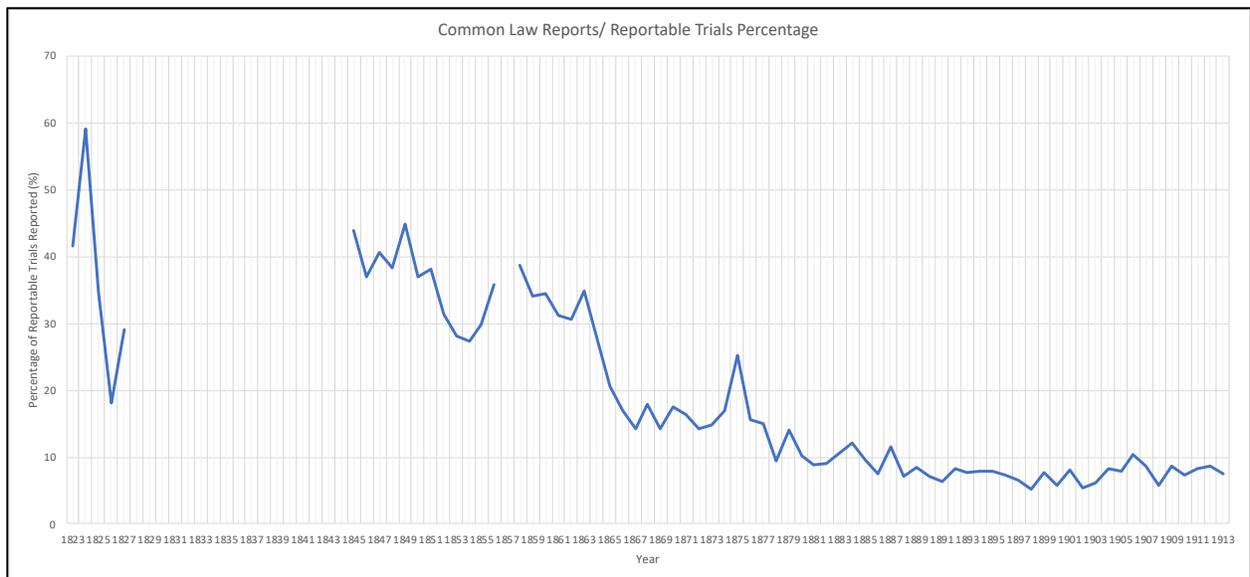


Fig 43. Percentage of Reportable Trials Reported, 1823-1913

From this, it would appear that 30-40% of all trials were being reported during the high-point of the generative era (1840-50). These figures then eventually drop to a fairly consistent 10% by 1879, matching the periodisation of the period of ultra-low reporting. Finally, one additional possible measure is the ratio

between the reports and cases in advanced stages. When these two are plotted together, a rather different pattern emerges:

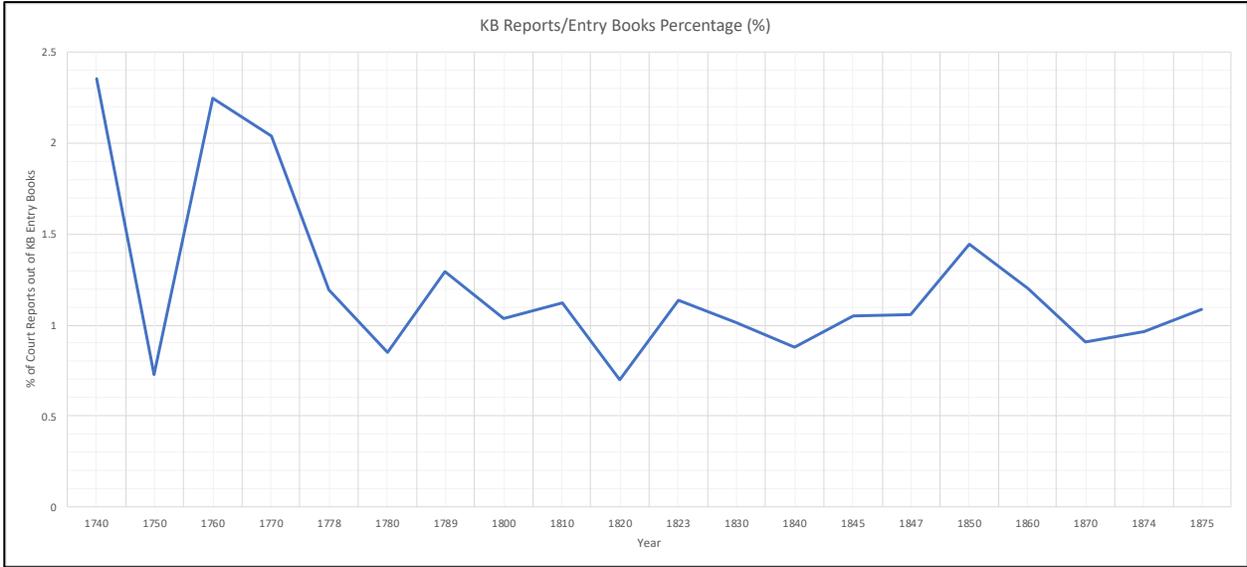


Fig 44. Percentage of Advanced Cases Reported, 1823-1913

This graph suggests that the rate of reporting in the King’s Bench, out of all cases being recorded in the Entry Books, remained at fairly constantly range of 1-2%. According to this pattern, rather remarkably, the entire fall can be attributed to shifts in the rate of cases making it to advanced stages. It is, however, quite limited: it only records numbers on a decade-decade basis; concludes in 1875; and, crucially, covers the King’s Bench alone. When we carry out the same exercise with the complete series of judgments from the *Judicial Statistics*, we get a different ratio for both the King’s Bench and Common Law Courts as a whole:

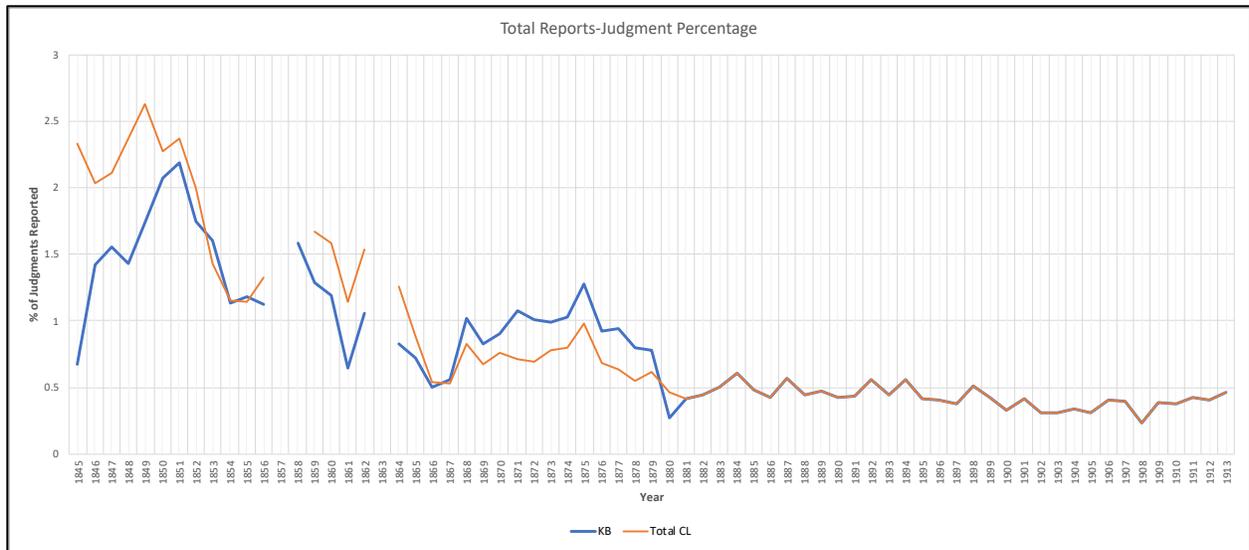


Fig 45. Percentage of Advanced Cases Reported, 1823-1913

In summary, although more data certainly needs to be gathered, this initial survey suggests there was a fundamental change in the extent of filtering and selective reporting. I have attempted to contextualise this data using a detailed narrative of changes in the methods of legal reasoning and culture, specifically the emergence of formal precedent and selective case reporting. Nonetheless, this is not the only possible explanation and more is required if we want to understand why litigation rates *also* slowed.

2.1b Hypothesis 2: The Overhang Thesis

In 1861, the famed legal anthropologist Sir Henry Maine suggested the English legal system was at long last catching up to the sophistication of Roman law.⁴⁶⁸ Maine's magnum opus *Ancient Law* from which this claim is referenced is generally regarded to be as anthropologically and historically dubious,⁴⁶⁹ yet there may be something to his throwaway claim. Thus, my second hypothesis: the fall in reports represents the closure of a legal overhang and the end of historically unusual catch-up growth between 1780-1850. This claim has several components, theoretical and historical, making it a complex, intricate, and somewhat speculative theory. For it to be persuasive, you must accept that the notion of a new rule or doctrinal becoming 'settled' can also apply to the legal system as a whole. The overhang thesis has four parts:

⁴⁶⁸ (Maine 1861), 154, 200; for a more direct statement, (Maine 1856), 2, referenced in (Stein 1980), 103.

⁴⁶⁹ Stein, *ibid.*, 103-110.

- (1) First, that social conditions alter the rate of legal creation, and therefore the total amount of law. All else being equal, a more rapidly changing society will have more rapidly changing law; a more complex society can have more total law; and a society slowing down will have a period of legal stagnation. If this is accepted, ‘legal overhangs’ become possible, where the total amount of law does not reflect what could be produced given the complexity of a society. Importantly, the causal influence of an overhang is dependent on perceptions of law-making: as noted in Chapter 1, a crucial aspect of the feedback model is judicial perceptions of whether the law needs to be changed/expanded.
- (2) Second, that England had an anomalously small amount of substantive law – given the complexity of its society and economy – in the 18th century. Whilst I only explore this in the context of Contract law in Chapter 3, there are plausible grounds to extend it to other doctrinal areas. The rapid formalisation and production of law, described in 1.2 above, represents a general approach of leaving issues to the jury, deliberately limiting the amount of possible substantive law across the legal system.
- (3) Third, that in 1780 the English judiciary began altering its standards for law creation, change, and regulation. With this change, whole swathes of social practice became newly classified as unacceptably unregulated. As a result, there was a powerful burst of ‘catch-up growth’ as judges scrambled to formalise huge quantities of substantive law to cover these situations. This rapid generation led to many report-worthy cases as entire doctrinal areas were gestated, triggering in turn legal treatises to stabilise the growing legal corpus.
- (4) Fourth, that by 1850 the catch-up growth was more or less complete as the judiciary, with the assistance of treatise writers, had successfully covered the majority of common scenarios. With the legal overhang mostly closed, legal change slowed down. Instead of catching up, legal development post-1850 tracked the slower pace of new situations emerging or existing legal rules being destabilised. Although such legal change can certainly speed or slow down, it does not appear to reach to the same levels of feverish law-making as closing a legal overhang.

I am going to focus on claims (1) and (4), leaving (2) and (3) open (albeit supported, to a degree, by my analysis in Chapter 3 and part 1.2 above respectively). Following this, I will analyse contract law as a case study. I note how contract’s slowdown was greater than other areas of law, a drop significant enough to provoke contemporary comment. To explain this, I suggest an additional process was involved for

Contract law – extra-legal coding and alternative dispute resolution – which slowed contract cases faster than other doctrinal topics.

(i) A General Solution to Law?

The *overhang thesis* suggests that by 1850 most doctrinal areas had been settled (or ‘solved’), covering the majority of possible disputes thrown up by society.⁴⁷⁰ Although apparently outlandish, a seductive analogy can be devised to support this thesis. Consider the commonplace process of legal change: a new scenario or social issue emerges; law is rapidly made to cover it; and then, after the burst, the pace slows down as the law becomes “settled.” From that point on, the cases slow to a trickle, covering the various edge cases which occasionally crop up. Can this trajectory be applied to a full doctrinal area, or even the legal system as a whole? If one accepts the pattern of change – creation, growth, stabilisation – then the extension seems irresistible. The total rate legal change in the system is merely an aggregate of many specific cases of this rise-settle-fall pattern. In contract, for example, the law of bills of exchange, marine insurance, and sale of goods, all rapidly grew and declined across a similar time-frame. The closing of a ‘general legal overhang’ is simply where many situations are simultaneously unregulated, rapidly developed and covered, and then finally become settled. The extensive use of procedural devices to avoid law-making could contribute to exactly this situation: where commercial law, land law, criminal law, parish law – all doctrinal areas - were collectively underdeveloped.

The more difficult question, hidden by the seductive analogy, is what defines whether a scenario is ‘anomalously unregulated’ versus ‘not a legal issue in the first place.’ For an early 20th-century English lawyer, East German contract law would appear remarkably underdeveloped; as, indeed, the professional and industrial regulations of the 1840s to the lawyer of both Edward VII’s and Elizabeth I’s England. According to the feedback model described in Part 1, legal change reflects environmental pressure, but how this is mediated depends on judicial perceptions. The traditional judge of the 1800s would not have regarded the somewhat sparse collection of commercial rules as anomalous. Instead, he would have seen them as a reflection of the proper allocation of decision-making authority to the jury. Conversely, to the progressive treatise writer and judge expecting rules, these absences are remarkable and, if all is right, will be filled sooner rather than later. The production of an ‘overhang’ is therefore explicable in terms of important changes in law-making perception: the decision, for example, to produce substantive law at the expense of the jury. Similarly, the action of Parliament in regulating new fields – new industries or

⁴⁷⁰ (Kagan 1984), 339ff posits this occurred in 20th Century America, describing a state of ‘legal rationalization’ allowing sophisticated litigants to plan more effectively.

professions – can also be regarded as redrawing the map of the legally possible, thereby producing new lexi-generative potential.

To claim that a vast legal overhang was produced in the 18th century as a consequence of judicial attitude-change is a bold claim. In its support, I merely refer to section 1.2 above in the discussion of commercial law in particular (which, it must be remembered, constituted a significant portion of all law-making). There, I argued the rapid creation of law followed a large deficit of substantive law – for reasons of commercial facilitation. Whether this body of law could have been created earlier, or was reliant on the industrial developments of the 1800s, is a matter I consider in Chapters 3, 4, and 5. The claim I will focus on here is that the closure of this overhang produced the slowdown post-1850. One piece of evidence in support of such a claim lies in the timing of the 19th century legal treatises. We can take the legal treatise as both an indicator of legal maturity – as treatises tend to only be written once a sufficient amount of law has formed – and a cause of stabilisation of the law. There was no need to report yet another case on offer and acceptance if it was covered exhaustively in *Chitty*. At least regarding commercial law topics, the majority of common law legal treatises had emerged by the 1850s-1860s and had reached a stable form. This is apparent when we trace the total number of unique citations in contract textbooks:

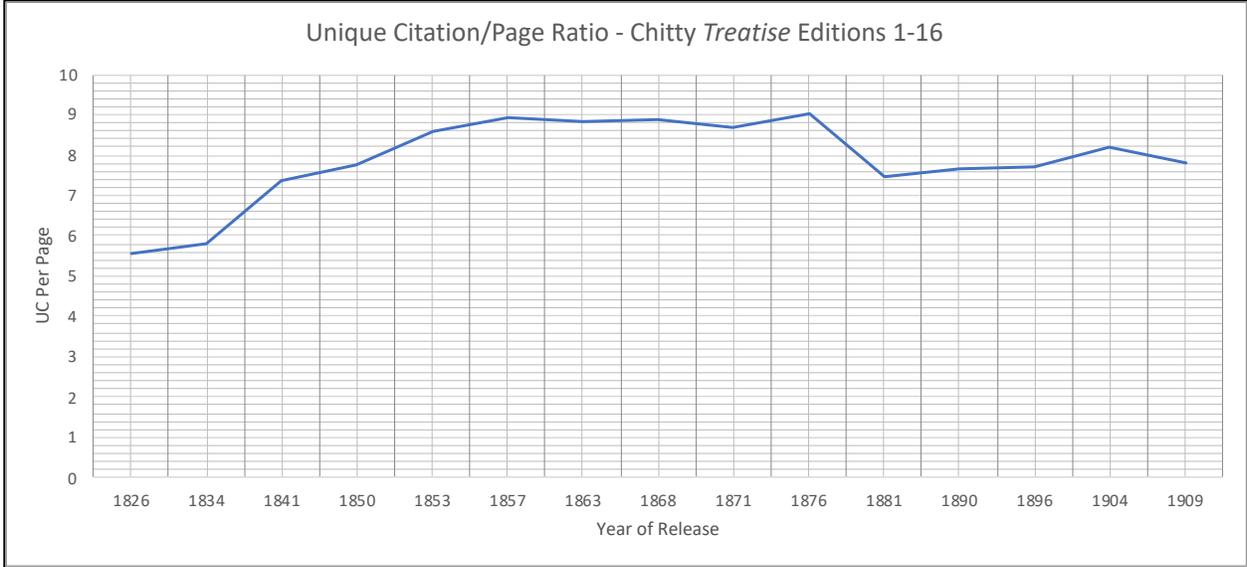


Fig 46. Unique Citations Per Page, Chitty's Practical Treatise, 1826-1909

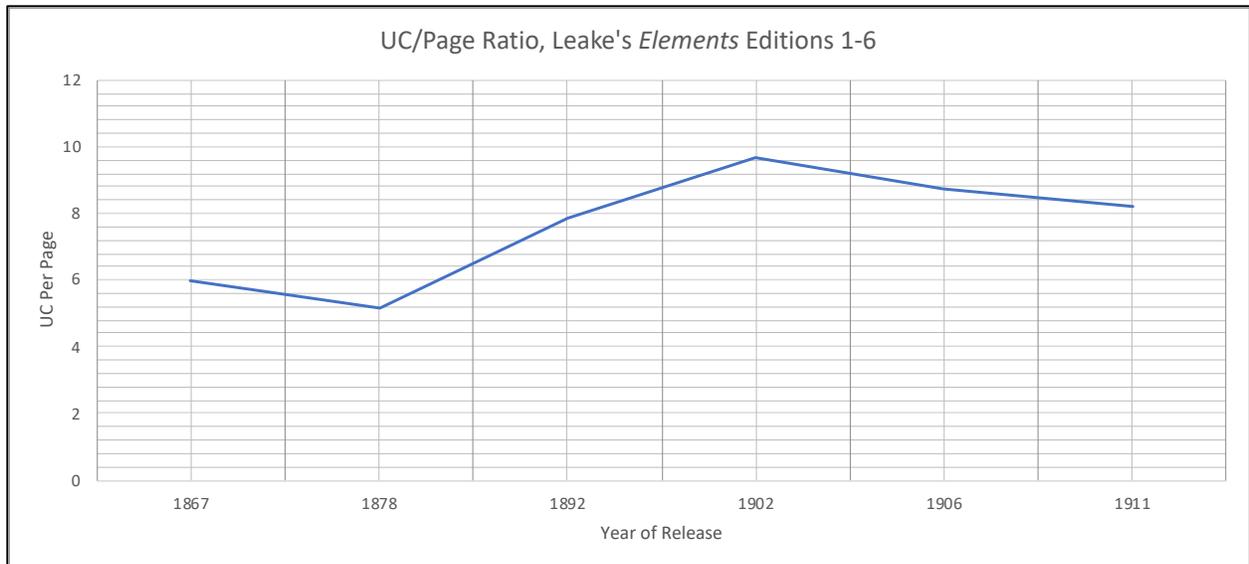


Fig 47. Unique Citations Per Page, Leake's *Elements* 1867-1911

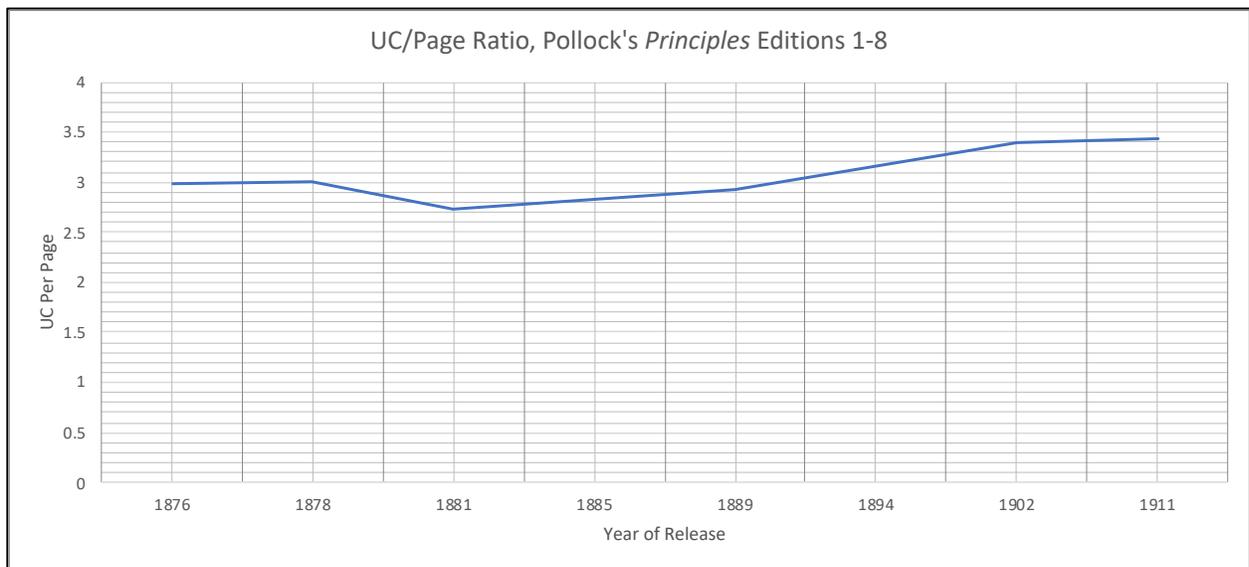


Fig 48.: Unique Citations Per Page, Pollock's *Principles*, 1876-1911

The drop in cases and density in all three can be attributed to the stabilisation of the law following a period of flux. As explored in the analysis of specific contract rules in chapters 4, 5, and 6, not all of the law produced in the generative period was adopted. Instead, the 1810s-1850s can be seen ‘working out’ period, where cases and concepts proliferated far beyond the limited problems they addressed, assisted by a divided court system. The generation of separate case-lines can be taken as the working of a ‘free marketplace of doctrines’, one where the overlapping, over-determination of cases by concepts is the product of testing potential ‘efficient abstractions’ on commonly litigated cases. Once enough material

had been generated, a formulation can be codified, either in case-law, treatise, or statute. With these generalisations (or, in Simpson's terms, the 'mountain' scaled)⁴⁷¹ the pace of development slows and, in its wake, all that is left is the adding, tweaking, and modest rearranging of existing topics. A useful, albeit tentative, contrast can be made with the slower, more linear development of equitable topics, which had to await their canonical textbooks later. This would help explain the divergence in slowdown between equity and law discussed above.

A proper test of the overhang thesis requires more than this cursory analysis. It will require, first, a comparison with other countries. If all nations, regardless of their available substantive law, underwent a similar boom and bust in legal development (however measured), then the cause would appear to be a general 19th century acceleration and deceleration of society. Natural experiments, in the form of later industrialising nations, could be used to identify how strong the link between social development and legal complexity are. Conversely, if they are absent, or proportionally smaller, then this would push in favour of a unique English overhang. Second, it will require an intra-system series of doctrinal analyses. Not all doctrinal areas formalised at the same time: can we identify individual tri-partite patterns, and does it respond to the timing of their treatises (as can be done for contract law)? If the link is tight, then this would strengthen the case for using treatises a bellwether for legal stabilisation.

(ii) The End of Contract History

Contract law is a special doctrinal subject. In addition to being ostensibly more unified, coherent, and 'scientific' than other areas, it is also far more voluminous. Following a survey of litigation statistics and the main report series, it appears contract cases alone made up a significant proportion of all legal activity— 50-60% of cases going to trial and between 20-25% of all reported cases. Interestingly, although the trial-rate remained fairly constant, the reporting ratio dropped in the late-19th century. In other words: contract reports dropped faster than the average doctrinal subject. In this section, I do two things. First, I explore the quantitative dimensions of contract - its prevalence in trial and reports – and the questions they raise. Second, I provide a contract-specific explanation for this fall, linking it to the feedback model and private coding strategies.

“Over Half Our Law”

⁴⁷¹ Simpson, *supra* (n387) 652

Contract is merely one part of private law, itself a fraction of the complete body of law. As will become apparent, however, this fraction is rather large. To the extent the dynamics of contract also apply to other private law areas, then they provide a general explanation for the sizeable post-1850 drop. For the *trial-rate*, my primary sources for estimating court activity were the *Judicial Statistics* reports from 1857. These reports recorded cases in enough detail that it is possible to estimate the proportion of contract cases making it to trial. I define a ‘contract’ case using the classificatory system of the reports themselves. As the English legal system changed, the classification headings also evolved: nonetheless, a deliberate effort was made to keep them consistent enough that comparisons between 1858 and 1913 were possible.⁴⁷² The main changes between these periods are the breakdown of broad categories, such as ‘special contracts’ into more specific headings, and the addition of new doctrinal headings which had not previously existed.⁴⁷³ Here is the final 1913 list, with the doctrinal areas I treated as ‘contractual’ emphasised in bold:

Goods Sold and Delivered	Breach of Guarantee	Other Breaches of Covenant	Replevin or other Actions in Respect of Distress or Wrongful Seizure
For Money Paid, Advanced, Lent or Received	On Bonds	Nuisance	Fraudulent Representations
On promissory Notes, Bills of Exchange, &c.	Other Breaches of Contract	Malicious Prosecution	Infringement of Copyright
On Life Policies	For Commission	False imprisonment	Infringement of Patents
On Fire Policies	By Solicitors for Costs	Assault	Infringement of Trade Marks
On Marine Policies	Other Actions for Work and Labour Done	Seduction	For taking Accounts
On other Policies	Royalties and Penalties	Libel	Indictments and Informations

⁴⁷² 1894 *Judicial Statistics*, 17.

⁴⁷³ Though, as Macdonell, 25 notes in the 1901 *Judicial Statistics*, the headings are still vague.

On Charter Parties and Bills of Lading	On Judgments and Awards	Slander	Interpleader and other issues
On Stockbrokers' Accounts	Recovery of Land (ejectment)	Actions against Professional Men for Negligence	Other actions
For Calls on Shares	Recovery of Rent	Other Actions for Compensation for Personal Injuries	
Breach of Promise of Marriage	Actions as to Right of Way	Other Actions for Compensation for Injuries from Negligence	
Wrongful Dismissal	Actions for Trespass relative to Land, Houses, &c.	Against Carriers for Negligence	
Breach of Warranty	For Dilapidations	Trover and Detinue	

I do not intend to make a controversial point about the correct boundaries of contract here. I coded those headings as 'contractual' to maintain consistency with my quantitative study of reported cases. Overall, they show an incredible proportion of all case decisions were contractual out of all common law civil litigation, hovering around 55% and 60% of the total throughout the period:

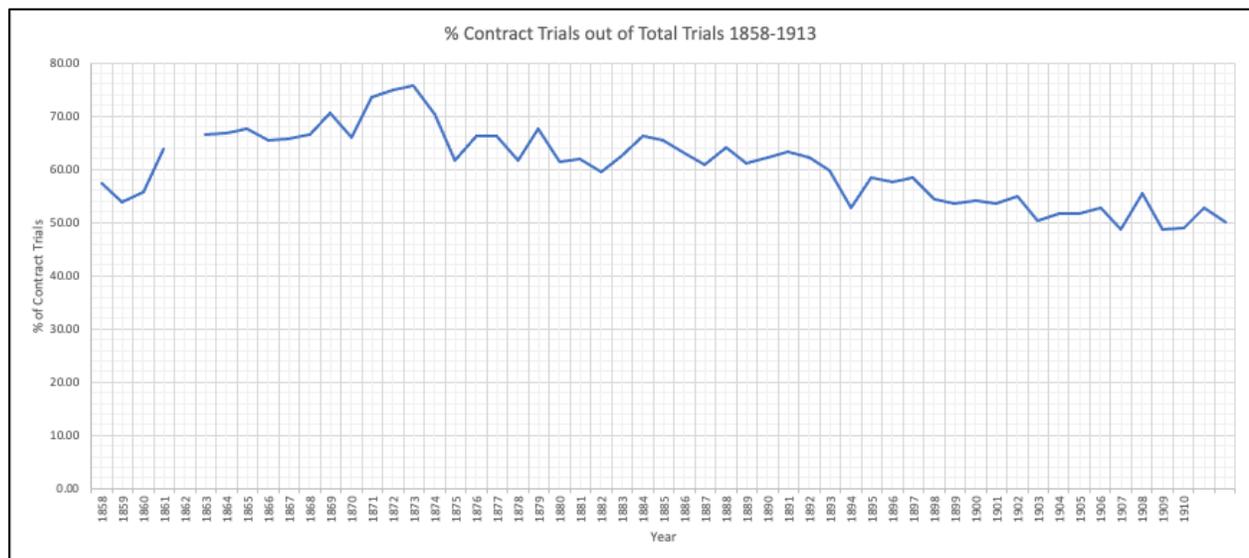


Fig 49. % Contract Trials out of Total Trials, 1858-1913

Moving from trial figures to the case reports, we can get a rough indication of the proportion – out of the main series – from my 1800-1914 mass-case survey analysis. This survey constituted around 25,000 case reports and recorded virtually every contract case in every court from this period. The full graph for all contract cases is as follows:

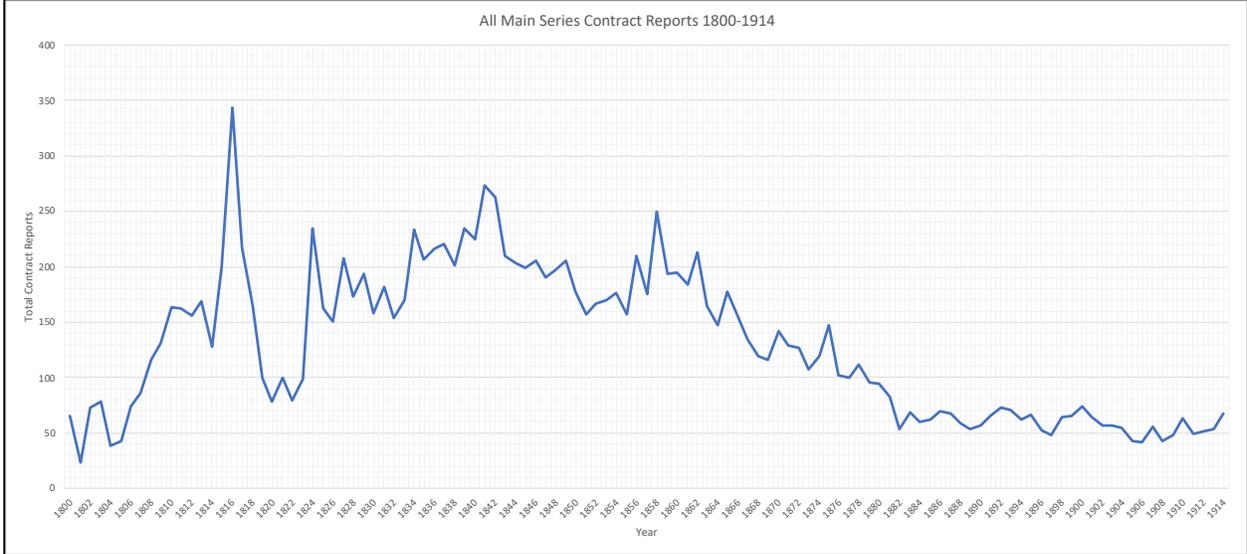


Fig 50. Main Series Contract Reports, 1800-1913

These figures correspond fairly closely with the main series of reports and indicate, to an extent, the degree to which contract cases contributed to the overall ebb and flow of the legal system. Nonetheless, the actual percentage of reports ends up much lower than the rate of cases making it to trial, and steadily decreased as the century progressed.

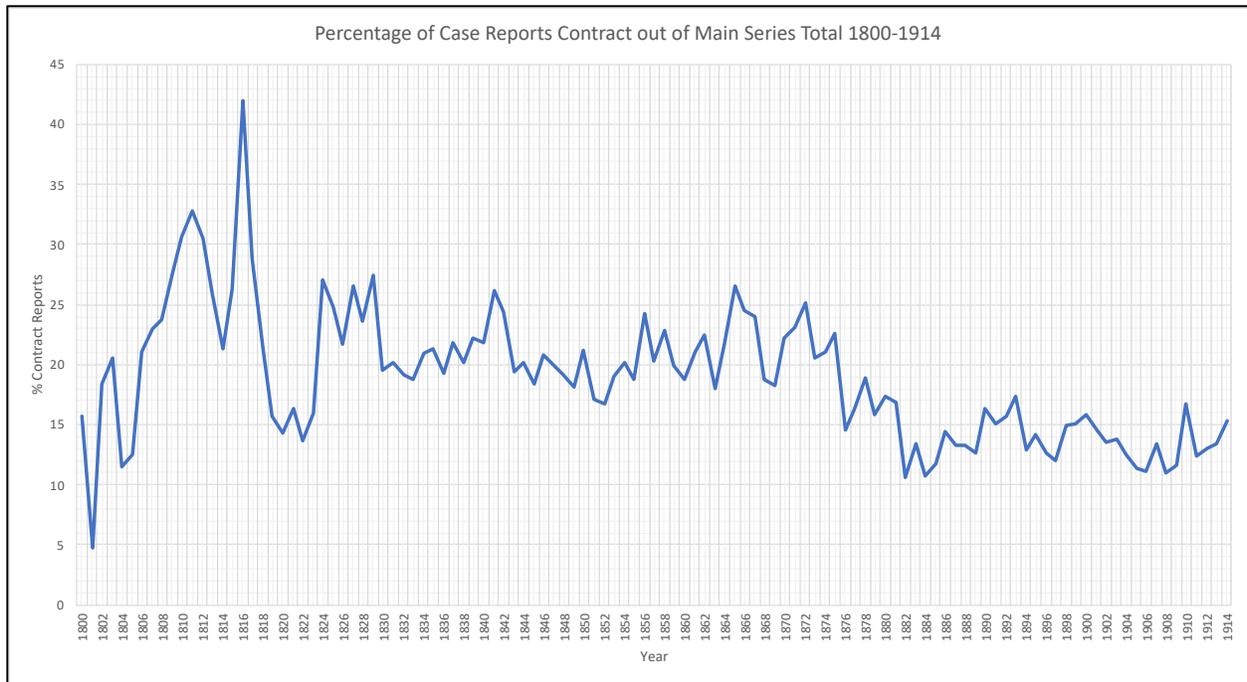


Fig 53. % Contract Out of Main Series Contract Reports, 1800-1914

The highest percentages are in the early 19th century, between 1802-1830, before falling to between 20-25% in 1832-1870, and then 12-15% from 1870 onwards. From these figures we can infer that contract cases alone made up a significant proportion of total cases during the generative period: half of all cases at trial, and between a fifth and quarter of all reported cases. A puzzle also emerges: why did the proportion of contract reporting drop in the 1870s?

“The Merchants are Shy of Litigation”

The provisional answer is that the drivers of contract law – commercial litigants – increasingly avoided the law courts. To sketch the contours of this argument, I am avoiding any claim that business slowed down, or that society ceased to develop as rapidly from the 1870s onwards. Rather, I merely suggest that the *link* between business and law weakened in the 1870s, just as it strengthened in the 1770s. The turn to law in the latter is mirrored by a turn away in the former. Further, it is important to distinguish two ways in which such a turn away could reduce contract reports:

- (1) Blanket avoidance: commercial litigants went to court less, producing fewer total cases which could be reported. Of those that did go to court, however, the same ratio were reportable.

- (2) Selective avoidance: commercial litigants avoided the courts with particular intensity for the kinds of cases which would be report-worthy. Thus, even with the same total number of cases, proportionally fewer would be report-worthy.

I will address these both in turn. I believe (1) is essentially uncontroversial, and is supported by the *Judicial Statistics* and contemporary late-19th century reflections. The second, (2), is more speculative, although is lent some support by the constant rate of contract trials against a fall in reports. Both are of importance to the claim that the site of commercial law development shifted to private sources in the 19th century. Following these claims, I then connect them to the feedback model, using them to explain the fall in contract reports.

Commercial litigants avoided the courts at all times during my period, just as they made criticisms of its slowness, expense, prolixity, and complexity, and turned to their own private alternatives. Yet it would appear the *intensity* with which they did this fluctuated. There are signs of a particularly intense turn away from law in the 1870s, one which continued beyond the economic depressions of the following decades up to, and likely past, 1913. The compiler of the 1893 statistics, John Macdonnell, was aware of this shift. He noted both the absolute fall in writs of summons and court appearances, and the more drastic fall in the amount of litigation *per capita*. Although Macdonnell seems to have generally preferred a model based on economic cycles, he provided a list of more specific causes in 1912: (1) the rise in alternative dispute resolution (“many trades have completely organised systems of arbitration for the settlement of disputes relative to quantity and quality of goods and as to the performance generally of mercantile contracts”); (2) the prevalence of arbitration clauses in contracts; (3) a rise in clauses appointing an engineer or architect to be the sole and final judge in all disputes; and (4) statutes with provisions for arbitration or special administrative ways. E.g., the Patents, Designs, and Trademarks, and the statutes governing agricultural and railway cases.⁴⁷⁴

Macdonnell was not alone in diagnosing these as the main causes of the fall. Contemporary accounts pointed to procedural changes making the law courts less attractive than arbitration. A comment in an 1889 *Times Law Report* noted: “the evils of the present system of procedure... explain how it is that commercial causes have of late years to a great extent disappeared from the courts, being largely referred to arbitration.”⁴⁷⁵ Boorman and Markless attribute the problems to two procedural changes in particular: the adoption of equitable interrogatory and discovery procedures in the common law, and the declining

⁴⁷⁴ 1912, *Judicial Statistics*

⁴⁷⁵ *The Times* 1 Feb 1889, Page 3

quality of juries following changes to their qualification requirements in the *Juries Act* 1870.⁴⁷⁶ Regardless of whether these are sufficient or merely a part of the general trend it is clear the law courts were becoming less attractive. The fall provoked concern in the courts, familiar today, of a drain in business. In a comment on Judicial Reform, one 1890s barrister summarised the trend: “Between the Law Courts of 30 years ago and the law Courts of to-day.... There is one remarkable and growing difference. The bulk of the disputes of the commercial world seldom in these modern days finds its way into the courts. Merchants are shy of litigation.”⁴⁷⁷ He attributed this to the infrequency of judicial sittings, arguing the courts were so poorly set up for handling commercial litigation that – betraying a typical common law bias - litigants would even accept ‘the hazardous and mysterious chances of arbitration.’⁴⁷⁸ Other letters and comments reveal a similar attitude: reflections of the noticeable fall in commercial litigation and resignation that no reform could hope to bring them back.⁴⁷⁹

Whether this is actually a problem depends on the logic one uses to assess the legal system. According to the older, 18th century ‘litigation means legal business’ logic, it is of course troubling and steps would have to be taken to return business to the courts. On the other hand, the modern logic of ‘litigation means legal inefficiency’, suggests falling litigation rates – provided they are not indicative of deeper economic malaise – are a sign of the stability and clarity of the law. This is evident in the later movement to encourage and develop arbitration practice, especially in the form of arbitration agreements. The latter approach grew more popular, and by 1850-60 the judiciary had more or less given up control of the levers which might mediate the rate of commercial arbitration.⁴⁸⁰ The legacy of this abdication is profound: by 1914, the transition to a semi-autonomous sphere of mercantile dispute resolution, the so-called ‘mercatorcy’, was nearing completion.⁴⁸¹ A helpful report in 1917 on the state of English arbitration provides an overview of this new world. The authors noted a large proportion of disputes never reached the court due to the existence of tribunals and trade associations. They give a remarkable picture of the pervasiveness of arbitration agreements:

“So firmly established is the custom of arbitration in these lines that every contract-form used by shippers, brokers, buyers and users of these articles contains a clause binding the parties to submit to arbitration any dispute that might arise out of the contract. But it is not these trades alone that resort to

⁴⁷⁶ (Boorman and Markless 2024), 19, 91, 204

⁴⁷⁷ *The Times* 10 Aug 1892 ‘The Judges’ Reforms’

⁴⁷⁸ *ibid*

⁴⁷⁹ *ibid*, letters to the editor; see also Law Society *Proceedings and Resolutions of the Annual Provincial Meeting of the Members of Society Held at Nottingham on October 7 and 8, 1890*. 13-14, 59-60, cited in Boorman and Markless, *supra* (n476),

⁴⁸⁰ (Brekoulakis 2019), 127 suggests the English policy in favour of arbitration had to await the mid-19th century. See also Boorman and Markless *ibid* 113-5.

⁴⁸¹ See (Schinazi 2021); (Cutler 2003)

arbitration. The arbitration clause will be found in every charter-party for the hire of a ship, in every bill of lading for goods carried by sea, in every salvage agreement, in every policy of marine, accident or fire insurance, in every building contract, in every engineering contract whether mechanical, electrical or gas, in every lease of property, in every partnership or agency agreement, and in innumerable other forms of contract.⁴⁸²

These hint at a systemic change in the nature of commerce in the late-19th century. This period brought a rise in regular banking;⁴⁸³ the use of arbitration;⁴⁸⁴ and the stabilisation of standard form contracts⁴⁸⁵ supported by trade associations.⁴⁸⁶ Cranston provides an exhaustive account of these changes, focusing in particular on the work of the trade associations. He portrays a commercial world at a scale and speed far exceeding that manageable by the legal system. One of his case studies - commodity traders – avoided the law through trade associations which covered dispute resolution and constantly tweaked the collective, standard form contracts. These moderations were complex, occurring under ever-changing patina of member interests, bargaining power, and market conditions. The courts were not placed to carry out these subtle and difficult calculations, a fact recognised by both merchant and lawyer.⁴⁸⁷ That these trends had to await the 1870s can be explained through two necessary pre-conditions. The first is that commerce had to reach a sufficient scale and maturity, one where standardisation became necessary and possible.⁴⁸⁸ Once this occurred, the moderation of disputes could be taken out of the legal system, and indeed increasingly out of protracted arbitration. Instead, it could be fixed as a cost of business neatly through standardisation methods: measures, gauges, standard clauses, to be disputed only in rare fringe cases.⁴⁸⁹

The second pre-condition, although contestable as such, is the presence of an enabling framework of legal rules.⁴⁹⁰ The creation of sophisticated standard form contracts which can produce precise legal effects is the central case of a ‘private-ordering strategies.’ As noted in Chapter 1, recent scholarship by Professor Simon Deakin and Professor Katharina Pistor suggests these strategies require law.⁴⁹¹ They argue the

⁴⁸² See also (Rosenbaum and Harley 1917), 25-26; (Macassey 1938), 190

⁴⁸³ (Couturier 1997), 94-5, explaining a similar post-1870 fall in litigation in Gloucester, New Brunswick with the growth of banking and credit-rating. Kagan, *supra* (n470), 326, 352ff tracing a fall in debt-related cases in US courts, described this process as ‘systematic stabilisation.’ Kagan argues this stabilization may only have been possible with a high degree of legal rationality. 352.

⁴⁸⁴ Brooks *supra* (n169), 12; (Abel-Smith and Stevens 1967), 1-2; Arthurs *supra* (n87); Ferguson *supra* (n164), 31 emphasises, in the place of doctrinal solutions, the role of arbitration; for more detail Ferguson *supra* (n83), 145-148; Cranston *supra* (n106) 363-73; and comments from Scrutton in *Hillas & Co. Ltd. v. Arcos, Ltd.* (1931) 40 L.L. Rep. 307 at 311.

⁴⁸⁵ (Prausnitz 1937), 1-2; 10, 15; (Llewellyn 1938), 700-703; (Ferguson 1980), 150-151.

⁴⁸⁶ Cranston, *supra* (n106), 9-12, 37-41; (Ferguson 1980), 143 for the scepticism of the Trade Associations regarding the cost of the English legal system.

⁴⁸⁷ Due to the international nature of commodity trading, many of these standard form contracts were also used outside of England. Schinazi, *supra* (n481) citing Vulliemin, *Du recours à l'arbitrage*, 167

⁴⁸⁸ (Sgard 2016), 157-9.

⁴⁸⁹ Sgard, *ibid* 159; (Velkar 2010), 25-26

⁴⁹⁰ (Macassey 1938), 187-9 suggests 1855 onwards saw the endorsement of judges and the legislature of private arbitration agreements. He cites *Livingstone v Ralli* (1855) 119 ER 430, although Boorman and Markless, *supra* (n476) suggests the decisive case was *Scott v Avery* (1856) 10 ER 1121, with consolidation of this policy in the last quarter of the 19th century 113-5.

⁴⁹¹ For an extended defence by the former, see (Chen et al. 2017), 265; (Chen and Deakin 2015), 128-136

bedrock of the modern economy is legal: a framework (or set of ‘core modules’) is required before private parties can engage in private-ordering.⁴⁹² On this view, law is prior to economics, and there is no shortcut through the frenzied law-making of the early 19th century. Business had to enter the courts, if only to produce a set of rules by which they could leave. The dispute here is truly one of extent – very few argue that private parties could have created their own property, partnership, company, or bankruptcy law. Further, there is little doubt that some legal backstop was required, if not at the least to enforce arbitration agreements within contracts.⁴⁹³ As explored in Chapter 6, the legal system often supplies coercive tools which are ordinarily unavailable to private parties. How far this extends to contract law is an open question.

When these pre-conditions are met, private-ordering and routine alternative dispute resolution on large scale becomes possible. It is obvious how this could have the effect of suppressing the total case numbers. A more subtle argument, point (2) above, is that this effect is of secondary importance to extracting important cases. Here, we may distinguish the *law-making* and *dispute resolution* functions of the legal system. Commercial litigants clearly did continue to use the courts for routine dispute resolution and *small-value* debt collection. This is evident in the County Courts’ immense contractual caseload and provides an explanation for how contract trial rates could continue at the same proportion and volume. Nonetheless, although the commercial world continued to throw up new, legally difficult questions, these high-value cases would justify expert drafting, and could therefore be handled far away from the dusty court rooms. Even if interesting cases might occasionally sneak through, they would sufficiently anomalous that the courts could dispose of them without creating new legal rules. In this legal steady state, the subsequent pattern of legal change would simply be the anomalous contact, every so often, of a contract term hitting the courts. This scenario is importantly different from a mere drop in case volume. It implies that not only can contractual drafting develop independently – and divergently - from the courts (dislocation), but that it has the effect of extracting legally significant cases. Thus, its mere presence will dampen the development of contract law generally.

2.3 Summary: What Do We Know?

Events, proximate causes, and their deeper causes form a historical chain in which each link is more opaque than the last. Regarding events, the statistics provided in part 1.1 and part 2.1 paint a compelling

⁴⁹² Pistor, *supra* (n106) for a persuasive argument regarding the necessity of law for long-term economic planning, such as the issuance of 50 or 100 year bonds, see (Ford 2020), 100.

⁴⁹³ Sgard, *supra* (n488), 158, 159-165 also argues that 20th century changes to commercial activity – to become more complex and international – undermined a model of arbitration closely tied to a particular national legal system.

picture of a legal system undergoing a growth spurt, peaking in 1850, followed by a system-wide slowdown. These trends are supported at many levels, from litigation rates, advancement of cases, court appearances, and total reports, across both the main series and periodicals. The proximate causes for both are also reasonably transparent. The rise in cases, as noted at the time, followed procedural changes to substantive decision-making. This produced a greater number of note-worthy cases, in turn stimulating a rise in reports. The fall, on the other hand, can at least be partially explained through selective case reporting – the removal of the nisi prius reports and the falling litigation-report ratio. When it comes to contract law specifically, the particularly sharp fall can be explained through a turn, by commercial litigants, to private-ordering. These immediate causes were all significant and obvious enough that 19th century contemporaries could diagnose and describe them in detail.

Accordingly, I believe they provide at least partial explanations for the rise and fall in reports and use them in subsequent chapters. They contextualise and explain changes in the legal literature (Chapter 3), and I explore how they played out in contract law particularly (Chapters 4, 5, 6). Together, they produce my narrative of the *Age of Complexity*: a legal system undergoing turbulent changes in size, speed, and volume, and the repercussions on the culture, doctrine, institutions, politics, and philosophy of the legal system. I have not, however, stopped at two links, but attempt to go one step further and explain the deeper, underlying causes behind the rise and fall. One is an *internal* thesis based on legal saturation: the overhang thesis and the concept of total possible law in a given time. The law was not worked out in the 18th century, but by the 19th it had managed to catch up to social change. The other is a logistical explanation, attributing the statistical patterns to the build-up and management of complexity. I argue the collapse of 18th century pleading between 1780-1834, the stimulation of reports, turn to formal precedent, and aggressive filtration and selection of reports, are attributable to the logistical problems of legal complexity. Going forward, I will explore one such response: the 19th century innovations in collecting, conceptualising and ordering the new masses of law.

Chapter 3: Ordering Ten Thousand Cases

Legal doctrine is a creature with many moving parts: legal concepts; their organising taxonomy; the literary form expressing them; and their deeper philosophical foundations. In this chapter, I use contract law as a case study in the transformation of these parts under the weight of a thousand new cases per year. First, I argue the growth of caselaw challenged the pre-existing, 18th century paradigm of contract and its organisational scheme. Second, that lawyers in the 19th century adopted new legal techniques to overcome these problems. I focus on the 19th century legal treatise, exploring its role in information compression, codification of caselaw, and the extent to which it was market-driven. Third, I examine the process by which these new techniques collided with the burgeoning 19th century case-law. I adopt a tripartite periodisation: (1) an early run of ‘failed experiments’, consisting of older 18th century approaches to treatise writing; (2) the early treatises which, from their first editions, rapidly expanded, channelling new cases into a more scientific structure; and (3) the post-1870s treatises, consisting of the more theoretical, university-focused projects. Overall, I claim the 19th century treatise writers did not ‘invent’ contract law, but, in a form of private codification, *filled out* existing contractual topics, *reorganised them* more scientifically, and *reconceptualised* them in austere will-based terms. The resultant conceptual product was the ‘classical model’, a thin, liberal reading of contract law which ignored the local, transactional and personal features of contracts. This construction was evident in the changing subject matter of the contract treatises, and its underlying political-economy appears in the writing of the treatise authors.

Part 1: Before The Wave

The orthodox historical narrative is that contract law was an invention of the 19th century.⁴⁹⁴ Before this point, typically dated to Powell’s *Essay on the Law of Contracts* (1790),⁴⁹⁵ contractual matter was chopped up and divvied up across the forms of action. Accordingly, it is said, no unified concept could emerge. I believe this narrative needs qualification. Most importantly, comparing 19th century literature to that from the 18th does not suggest a revolution in terms of themes or topics. Earlier works covered aspects of formation, consideration, damages, vitiating factors, illegality, and a whole variety of specific ‘mercantile’ contracts. They also listed substantive categories, with general definitions of contract and, in some instances, prefigure the later general principles of consent and will. The revolution was not in the basic intellectual program of contract law but the structure of legal information itself. First, whilst

⁴⁹⁴ For a survey of this view, see (Lobban 2017), clii.

⁴⁹⁵ E.g., (Horwitz 1979), 161; and Simpson, *supra* (n16) 250-1; Waddams *supra* (n48), 306 who treat Powell’s treatise as the watershed moment. Cf (Baloch 2007), 415ff.

familiar topics and principles were present in the 18th century, the detail was minimal, and there was accordingly no way to derive legal rules from general principles in an overarching or consistent way. The 19th century law-makers substantially filled out the basic headings of the 18th century, thus providing a sufficient number of dots to join up under the general principles of the ‘will theory.’ Second, in the 18th century formal written materials were still primarily understood within a wider informal legal culture. The abridgments and treatises from this period were essentially reference works, and imply the existence of an informal legal culture. With a few rare exceptions, the only systematising devices present in formal texts were the alphabet and the forms of action. The 19th century procedural system broke this culture down under the weight of new cases. In its place, the role of organisation was captured by jurists in their immense, increasingly ‘scientific’ treatises. I carry out a brief survey of 18th century legal literature before exploring the two ‘revolutions’ which brought it into the 19th.

1.1 Setting the Contractual Program

The basic themes, topics, and principles typically treated as nineteenth century inventions can all be found in the 18th century. Two early common law treatises, Gilbert’s unpublished manuscript from 1720 and the ‘Tradesman’s Lawyer’ from 1703 are good examples.⁴⁹⁶ Together, they contain: substantive legal thinking; the notion of contract as an independent and separate doctrinal area;⁴⁹⁷ the unifying capacity of the principle of party consent; and lists of themes and topics which anticipate most of those found in later work. Gilbert’s *Treatise of Property and Contract*⁴⁹⁸ was structured according to the forms of action, but within these headings included topics like consideration; illegality; writing, evidence, and form; interpretation; capacity; damages; conditions and performance; privity; impossibility; frustration; restraint of trade; vitiating factors like duress, fraud, and mistake; and, in his *Treatise of the Law of Nature*, offer and acceptance.⁴⁹⁹ Gilbert’s work also demonstrates significant conceptual sophistication: it was premised on the belief contract was an independent doctrinal category and attempted to unify it on the basis of ‘will.’⁵⁰⁰ He also adopted a similar view on freedom of contract, arguing parties should be free to set their own prices; that anything, whether commodity or labour, could be reduced to a pecuniary sum by contract; and was opposed to using consideration to impose a fair contract price.⁵⁰¹ *The Tradesman’s Lawyer*, though somewhat shorter and less conceptually sophisticated,⁵⁰² is notable for its discussion of law in exclusively substantive, outcome-oriented terms. Its *Table of Contents* included ‘Interpretation,

⁴⁹⁶ Anon, *The Tradesman’s Lawyer*; Lobban *supra* (n494)

⁴⁹⁷ cf Oldham, *supra* (n281), 228

⁴⁹⁸ See Lobban, *supra* (n494) for a detailed account of Gilbert’s life and method.

⁴⁹⁹ Lobban, *ibid*, clviii.

⁵⁰⁰ *ibid*, cliii. See also (Hamburger 1989) 266, who also notes the role of the will in Chancellor Henley’s commonplace book.

⁵⁰¹ Lobban, *ibid*, clxix,

⁵⁰² The definition listed for contract is somewhat garbled, p. 3.

Deceit and Warranty, Executory contracts, Promise to another for my use; Good Pledges and Pawn'd; and Borrowing and lending.⁵⁰³ Within these, its topics covered capacity,⁵⁰⁴ conditions,⁵⁰⁵ performance,⁵⁰⁶ agency,⁵⁰⁷ privity,⁵⁰⁸ formation of contracts,⁵⁰⁹ and, most interestingly, disperses the forms of action throughout as a residual matter. The author also used a variety of taxonomies, dividing the law on the basis of 'Real, Personal, Express, Implied, Absolute, and Conditional contracts'; 'Contract by writing, or by word of Mouth'; and 'Executed and executory contracts', as well as numerous specific topic-based contracts.⁵¹⁰ This flexibility suggests early 18th century legal writers,⁵¹¹ whilst conventionally structuring their literature in terms of the forms of action, were capable of seeing the law in a substantive way.

Later writers, such as Ballow, Bacon, the anonymous author of 'A general abridgment', and Viner also treated the majority of topics and themes found in later contract writing. Ballow, for example, discussed topics like 'agreement in general,' capacity, mistake, fraud, inadequacy of price, construction, remedies, bonds and deeds, impossibility and frustration, illegality, usury, gaming, restraint of trade, privity, and consideration. A comparison with the topics in the second edition of Chitty on Contracts reveals very little which would be revolutionary or unprecedented to earlier writers. Subsequent writers, possibly influenced by Gilbert, also discussed the law in 'scientific' terms.⁵¹² Bacon's New Abridgment considered agreements in general and gave a general definition of contracts: "an agreement is the consent of two or more persons concurring, the one in parting with, and the other in receiving some Property, Right, or Benefit."⁵¹³ Other alphabetical headings included Bargain and Sale, Carriers, Conditions, Damages, Duress, Fraud, Ideots and Lunaticks, and several specific contracts listed under 'Merchant and Merchandise.' These are not the mark of a writer in the sway of the forms of action; indeed, if you took the headings above and assumed they were filled out, you would get a body of law close to that in Chitty. Given these precedents, it is reasonable to regard the substantive role of the 19th century as extending and developing these thematic headings. This pattern lends some support, in addition, to the *overhang thesis*: the behavioural patterns - in our case, commercial practice - which formed the subject matter of later law-making appear to have already been in existence for many years before being legally regulated. If so, the body of substantive law formed in the 19th century could have been created earlier, had 'the machinery

⁵⁰³ See *Table of Contents*.

⁵⁰⁴ *ibid*, 71

⁵⁰⁵ *ibid*, 28

⁵⁰⁶ Found throughout, for performance related to executory contracts in particular, see *ibid* 57ff.

⁵⁰⁷ *ibid*, 15, under *How we may be charged by others contracts*.

⁵⁰⁸ *ibid*, 64, under 'promises made to another for my use.'

⁵⁰⁹ *ibid*, 9, discussing earnest money and when a contract of sale is 'binding'; and *ibid*, 57 discussing 'how one promise may be the Consideration of another Promise.'

⁵¹⁰ *ibid*, Table of contents; page 1.

⁵¹¹ *ibid*, Frontispiece whilst the author is unknown, it is aimed at tradesmen and 'Professors of the law',

⁵¹² (Holdsworth 1938), XII, 169.

⁵¹³ Bacon, Vol. 1, 67

existed to produce it',⁵¹⁴ and merchants been incentivised to litigate around it. The later flowering would therefore reflect less an evolution in the content of commercial practice - though of course examples can be found, such as railways, stock trading, impersonal credit networks, and manufactured-commodity markets - than a change in the relationship between commercial parties and the courts.

1.2 Two Revolutions

The most striking difference between Chitty and Gilbert is not their themes or topics, but their organisational schema. These differences stem from two interconnected revolutions in *organisational method* and *conceptualisation*. Following the generative period of the 1780s-1840s, a large quantity of new legal information was converted into formal text. This new body of formal contract law caused a breakdown in pre-existing organisational schemas, such as the forms of action and alphabetical abridgment, requiring a new model inspired by works from the continent. It also altered the way contract was conceptualised. The common law origin of these new formal texts meant they were often commercial in nature and involved a variety of types of contract. This diet of cases shifted the conceptual framing of contract law away from the traditional 18th century focus on property and land. Instead of treating contract as a mode of conveying property, treatise writers began giving it a more abstract, general form capable of encompassing a wider variety of specific contracts. The culmination of these revolutions led to a new brand of more formal, abstract, and organizationally sophisticated works of contract law.

1.2a Organization

One of the greatest obstacles to the theoretically-minded treatise writer was the absence of material to organise.⁵¹⁵ Most of 18th century literature, whilst including a wide variety of topics on contract, treated each very briefly. Partly this was due to their common-placing method of giving a general topic but then merely listing various relevant cases. Bacon, Gilbert, and the *General Abridgment* of equity all took this approach; even where they started with a general definition, they quickly lapsed into listing undigested cases. This prevented any kind of logical accumulation of learning - at most, the reader was left with potentially useful examples, but no general structure or rules linked together.⁵¹⁶ At other times there simply wasn't enough law: the headings on 'damages' could not include extensive detail because it simply did not exist - any calculation of damages was a matter at common law, and in the common law

⁵¹⁴ Baker *supra* (n250)

⁵¹⁵ See Ibbetson's discussion of the earlier 'maps of the law' in (Ibbetson 2000); Blackstone's treatment was sketchiest in the areas with the lowest amount of prior systematisation - such as contract law, (Lobban 1987)

⁵¹⁶ E.g., Gilbert's lapse into common-placing at 225, Lobban, *supra* (n494)

courts the jury was responsible for calculation.⁵¹⁷ Similarly, discussions of agreement were usually cursory, usually due to leaving matters of detail to the jury - as Gilbert states “our law herein is not so nice and scrupulous as the Roman civil law was. For if there be any words whatsoever that show an intention to be obliged our law will create an assumpsit.”⁵¹⁸ Thus, whilst Gilbert was aware of systematising principles, and made some attempt to make his treatise consistent with them,⁵¹⁹ he was unable to derive complete sections.⁵²⁰ Similarly, Bacon, though appearing to offer a fairly complete schedule of substantive contractual topics, often filled them with procedural material.

The lack of theoretical organisation may appear sloppy and unworkable. Yet the 18th century writer did not intend for his work to be the sole reference used by a lawyer. For Bacon, Viner, and the other abridgment writers,⁵²¹ the alphabet, like an index today, was enough for a work intended only to supplement, rather than comprehensively structure, the user’s framework of the law. A natural side effect was that whilst abridgments could exhibit some substantive legal thinking, their general approach was schizophrenic. They listed sources of law, specific statutes, substantive doctrines, and forms of actions next to one another despite the extensive overlap it produced.⁵²² Again, this was not necessarily a problem: as MacNair notes, lawyers in this period would have turned to other sources to structure their ‘map’ of the law, such as legal maxims, Coke on Littleton, pleading treatises, and, most importantly, the Register of Writs.⁵²³ The real problem was this: these supplementary sources, produced in a period where it was neither necessary nor easy to produce principled, substantive legal treatises, were totally incapable of digesting vast masses of law. These limits became clearer as the 18th century drew to a close. The alphabetical abridgment grew unmanageable,⁵²⁴ demonstrated by the frequent, confusing cross-references made necessary by a scheme which had separate headings for ‘assumpsit’, ‘agreement’, and ‘mercantile law.’ Viner’s abridgment stretched to 24 Volumes, took a decade to get to the letter P, by which point one suspects the ‘A’ section was already out of date. Similarly, the perambulatory treatise, exemplified by Ballou and Powell, began to collapse under the weight of increased citation. Fonblanque’s edition of Ballou had footnotes so long they often stretched to multiple pages, making it extremely difficult to read. As the editions of these legacy works stretched into the 19th century they became more outdated, more clogged with cases, and more incapable of integrating new material. We may also mourn the ‘maxims of law’ genre, which held out the promise of universal ‘middle-order’ generalisations applying across all

⁵¹⁷ E.g., Bacon, Vol. 1, 69-70; (Ibbetson 2013)

⁵¹⁸ Lobban, *supra* (n494), 251

⁵¹⁹ E.g., his derivation of contracts to do impossible things; capacity to contract; and vitiating terms; duress; and consideration. *ibid*, cl.

⁵²⁰ See Lobban, *ibid*, cxvii.

⁵²¹ MacNair, *supra* (n254), suggests this is because the Register of Writs acted as a substitute for the larger, macro-organization (‘map’) of the law.

⁵²² E.g., Bacon, Vol. 1, page 71.

⁵²³ MacNair, *supra* (n254), 157, referencing *Coke’s Tenures* and Fitzherbert’s edition of the *Natura Brevium*. See also (Lobban 2018), 3, for a list of other supplementary literature; and (Lobban 1987), 312-313 for a similar thesis.

⁵²⁴ See exceptionally long footnotes the 5th edition of Comyns’s Abridgment, 284.

legal sub-fields.⁵²⁵ That this method could not accommodate the new, highly particular and technical body of commercial law - such as the law of negotiable instruments and marine insurance - is obvious from their somewhat marginal 19th century role.⁵²⁶ This fragmentary breakdown accompanied a deeper shift in the bedrock of English legal thinking: the abandonment of the forms of action as a map of the law.

As noted in Chapter 2, the intricacies of pleading had already become mostly irrelevant as a matter of practice.⁵²⁷ Nonetheless, despite their growing procedural irrelevance, the forms of action, and the Register of Writs, continued to exert a powerful hold on common law thinking. This was evident in most – albeit not all – 18th century legal literature and their reliance on the technical forms of action, such as debt, covenant, and, most importantly of all, *assumpsit*. The register of writs had acted as a kind of code from the 14th century onwards.⁵²⁸ As a code, however, the forms were organised on quite different principles to the ‘scientific codes’ of the 19th century. Their desiderata, such as comprehensivity, consistency, and non-contradiction, were similar to ‘legal science’, but their subject matter was procedural rather than substantive. Factors such as notice to the defendant; the availability of remedies; the mode of proof, and the speed of process, were treated as the basis on which the forms, and derivative pleadings, were divided.⁵²⁹ The developments of the 19th century brought a recognition of the utility of substantive law - and therefore schemes which prioritised its efficient arrangement - over these procedural desiderata.⁵³⁰ In addition to their basic classification, the two schemas also differ in their logical structure. The forms of action have several distinct and important qualities as a ‘map.’ One is that their highest level of organisation, the Register of Writs, was fixed in the 14th century and henceforth was rarely altered.⁵³¹ The wording of these forms were invariant: although they could be massaged at the edges using the rules of pleading, such tweaking was arduous, slow, and limited. In contrast, a substantive map of the law⁵³² is not fixed but can rapidly respond to developments at lower-levels of legal development. In England, this process occurred through the reformulation of higher-order doctrinal categories, either via judicial decisions or by academic writing. This gives substantive schemes useful traits: it allows the law to develop more flexibly; increases the potential for information compression; and allows lawyers to legally categorise complex fact-patterns more easily, albeit at the expense of procedural coherence. These traits all have a premium where large volumes of substantive law are being produced. At some point it became

⁵²⁵ (Kocher 1957), 5-8; (Williams 2016), 14-15.

⁵²⁶ Simpson, *supra* (n387), whilst Broom’s maxims remained in print until 1939 (647) the genre disappeared therefore. For a clear examination of the reasons why, (650-651).

⁵²⁷ Nor was joinder a decisive issue following the consolidation of the ruling in *Slade’s Case* in the early 17th century. (J. Baker 2019), 369. The use of broad pleas, and lax evidential standards at *nisi prius*, rendered much of the law which had accreted around the different forms - such as the various pleas in bar - irrelevant.

⁵²⁸ MacNair *supra* (n254), 157, 158

⁵²⁹ (Stephen 1824)

⁵³⁰ Note, this was explicitly Bentham’s goal in his proposed procedural reforms, (Draper 2004), 17

⁵³¹ Synge *supra* (n384) 520 describes the forms as ‘Aristotelian’

⁵³² (Birks 1997), describes these as ‘causative events.’

possible and necessary to digest law in abstract categories. Blackstone, assimilating past work, gave the first proof of concept for an analytical, discursive survey of English law in 1865;⁵³³ this formed the basic pattern for virtually all subsequent treatises. The map of the law was changing. The forms of action, special pleading, and jury were all part of the last century's jurisdictional system: as the latter two were discarded, so too was the former.

1.2b Conceptualisation

The second revolution was more abstract, relating neither to the volume nor topics of contract law. This was a revolution in how contracting was conceptualised from the 18th to 19th century. Atiyah, following Horwitz,⁵³⁴ suggested this change was primarily a movement from a model based on *executed* contracts, performance, property rights, and preventing unjust enrichment, towards one based on *executory* contracts, formation, and damages based on expectations.⁵³⁵ Typically, these narratives link this shift to deeper changes in the political, economic, and philosophical commitments of judges - specifically, a radical shift from paternalism towards liberal free trade. As argued in chapter 2, I am sceptical of this latter linkage - instead, I suggest the 'turn to business' was merely the reflection of a different kind of commercial involvement in the courts.⁵³⁶ The former thesis of conceptual change, on the other hand, is more plausible, albeit not in the stark terms proposed above. It is clear, *contra* Atiyah, that a theory of executory contracts existed prior to the 18th century, alongside the notion of compensation for a lost bargain.⁵³⁷ Nor is it likely lawyers thought of contract law in primarily proprietary terms, as argued by Horwitz. The 18th and 17th century courts regularly encountered contracts for labour, marriage contracts, wagers, insurance, and various financial instruments, none of which are easily reduced to the movement of property rights. This is not to deny changes in the conceptualisation of contract law, merely to question any straightforward narrative. The difficulty is two-fold: first, there was significant conceptual uncertainty in the 18th century around the nature of contract, produced in large part by the jurisdictional divide between equity and the common law, and the forms of action. Second, judges found it convenient to use a fragmented law of contract. This flexible, if messy, model seemed to apply distinct principles depending on the type of contract and the commercial sophistication of the parties. The 'contract' itself was not as important as the context of the agreement, such as the property or status related effects, or the position

⁵³³ See (Milsom 1981), 9

⁵³⁴ Horwitz, *supra* (n495); Atiyah, *supra* (n299).

⁵³⁵ *ibid*; Atiyah's position is supported by Oldham, *supra* (n281), 213. For contrary opinions, see Simpson, *supra* (n462); Baker *supra* (n250); (Lobban 2010c); (Swain 2015)

⁵³⁶ Oldham *ibid*, 242-244, suggesting there was a turn from a more equitable approach focused on unjust enrichment - compatible with jury, and endorsed by lord Mansfield, to a 'sterner', more constraining approach later.

⁵³⁷ Simpson, *supra* (n462), 543, 552; Baker *supra* (n250), 468; Ibbetson *supra* (n517). For a survey of the debate, Tofaris, *supra* (n155), Ch 5.

and behaviour of the parties. Thus, even though we may detect some of the trends described by Atiyah and Horwitz, they are virtually always complicated by the idiosyncratic and messy procedural context of the 18th century.

The Influence of Equitable Subject Matter

Regarding the former complication, the divide between equity and common law is crucial. Surveying the 18th and 19th century contract literature suggests there were substantive differences in Common law and Chancery cases: the latter's subject matter was dominated by contracts involving real property.⁵³⁸ It is possible this was behind the tendency for equitable treatises to treat contract law as a doctrinal and historical outgrowth of property law.⁵³⁹ The *Treatise of Equity* by Henry Ballow⁵⁴⁰ is a useful example. Ballow's *Treatise*, first published in 1737, engages in an extensive discussion of 'Agreements in General' under Book I. His general definition of a contract considered agreements only insofar as they "induce an obligation, or contain a conveyance of some right."⁵⁴¹ As discussed below in the context of Gilbert's work, this did not necessarily mean a *property* right - it could also refer to a general 'legal' right. Nonetheless, in the case of the *Treatise of Equity*, Ballow seemed to be thinking in proprietary terms. Shortly after, when he considered the contracts which are enforceable, he allowed only for "those particular Contracts which are limited to the benefit of certain persons, and presuppose property and price."⁵⁴² Later, when considering the 'Want of Testimony of Assent,' he suggested 'a covenant... if it be of a matter in *praesenti*... vests an immediate property, and amounts to a gift or grant, the nature of which is to be executed immediately.'⁵⁴³ This focus on property was a natural choice given the majority of cases coming before the Chancery involved property rights, primarily in land.⁵⁴⁴ In Ballow, all the general contract rules were discussed in terms of the typical equitable subjects: deeds and their construction; specific performance of contracts for land;⁵⁴⁵ and the various 'inequities', such as inadequacy of price (typically, for expectant heirs),⁵⁴⁶ fraud, and mistake.⁵⁴⁷ In these areas, and others, cases involving property make up the vast majority of references. Thus, whilst Ballow was capable of discussing non-proprietary contracts, such as contracts involving marriage or relief for penalties, when he needed a

⁵³⁸ See Oldham *supra* (n281), 223, 241; Lobban *supra* (n78), 448, fn(50). Far fewer executory contracts are to be found in contract work focusing more heavily on equity, such as Ballow and Bacon.

⁵³⁹ Ballow treats the equitable rules of contract as a response to defects in conveyancing at common law (4-5).

⁵⁴⁰ The General Abridgement (Anon 1732), has less detail than Ballow, and most of its content relates either to procedure, remedying inequity, or, as with Ballow, property-related subjects. For examples, see pp 16-27 on 'Agreements, Articles, and Covenants', and pp 84-91, on 'Bonds and Obligations.'

⁵⁴¹ c.f. Hamburger *supra* (n500), 272 who takes Ballow's discussion as an indication of his influence from Civilian writers.

⁵⁴² Ballow, 3

⁵⁴³ *ibid.*, 14.

⁵⁴⁴ For example, considering agreement in terms of 'the Translation of Property' (6); considering formation of contracts in terms of grants and conveyances (14); the great emphasis on leases in the context of consideration (37-42); of performance in terms of moving or altering rights in land; (43) frustration in the context of Littleton exclusively (21-23), Fonblanque, (197-200); impossibility regarding land grants (22); and the formalities required for land conveyances exclusively when discussing the Statute of Frauds (17).

⁵⁴⁵ *ibid.*, 17

⁵⁴⁶ *ibid.*, 12.

⁵⁴⁷ *ibid.*, 10ff.

general definition of contract, transfer of property was the most natural central case. Bacon's and Viner's abridgments, written between 1736-40 and 1741-750 respectively, also provide some insight into the effect of equitable cases. Bacon gave the traditional common law definition from this period, taken from Plowden:

“An agreement is the consent of two or more persons concurring, the one in parting with, and the other in receiving some Property, Right, or Benefit.”⁵⁴⁸

Despite this seemingly capacious definition, Bacon soon drifted back into discussion oriented around property. A few lines later, he gave a historical explanation for the growth of contract law in terms of ‘Increase of Commerce’ and protecting man from losing his ‘Property by the Turn of an unwary expression.’⁵⁴⁹ This is unsurprising as, throughout the section on ‘*Agreement*,’ Bacon relied heavily on cases involving property in land, primarily, though not exclusively, from the Chancery.⁵⁵⁰ When discussing ‘*Voluntary Agreements*,’ Bacon gave as his central cases the conveyance of land or giving of goods, justifying the effect of contract on the basis ‘as men have a right in their Acquisitions, so may they dispose of them at their Pleasure.’⁵⁵¹ Bacon was certainly capable of discussing other kinds of contract - he did so under *Agreement*, considering marriages⁵⁵² and loans of money;⁵⁵³ under *Assumpsit*, treating a wide range of contracts. He also used separate sections for *Carriers*,⁵⁵⁴ *Merchant and Merchandise*,⁵⁵⁵ and *Bills of Sale*,⁵⁵⁶ and when he turned to *Covenant* gave a more general definition: “[a]n Engagement entered into, by which one Person lays himself under an Obligation to do something Beneficial to, or to abstain from an Act, which if done, might be prejudicial to another.”⁵⁵⁷ Rather, the significant trend is that when it came to his general definition of *Agreement*, he turned to equitable cases and thus his discussion was skewed heavily towards property.⁵⁵⁸ We can contrast Bacon's Abridgment to Viner's later attempt. Viner's Abridgment was significantly less theoretically ambitious and the closest he got to theoretical subheadings was under Volume 5: *Contract and Agreement*.⁵⁵⁹ Viner gave a broad definition apparently traceable to *The Institutes of Justinian*:⁵⁶⁰ “A contract is an agreement entered into by several persons,

⁵⁴⁸ ‘Plowd 1’, referring to *Reniger v Fogossa* (1550) Plowd 1, 17; 75 ER 1, 27. Gordley, commenting on this citation, suggested ‘one could scarcely imagine more wretched authority for the proposition that a contract at common law is a mutual agreement.’ 136. This criticism notwithstanding, the common law has a history of more general definitions of contract law, such as those in West's *Symboleography* in 1592; Sheppard's *Faithfull Councillor*. For an indicative 18th century example, see Comyn, 5th edition, Volume 2 Agreement 529.

⁵⁴⁹ 67

⁵⁵⁰ From the reports cited, just under 75% are from the Chancery.

⁵⁵¹ 70.

⁵⁵² 73

⁵⁵³ 71

⁵⁵⁴ 343

⁵⁵⁵ 583, Volume 3

⁵⁵⁶ 322

⁵⁵⁷ 526

⁵⁵⁸ Eg, his examples under sections (A) and (B) within ‘Agreements’, p. 67; the lengthy discussion of conveyancing under *Bargain and Sale*, 273 compared with *Bill of Sale* only receiving a cursory analysis.

⁵⁵⁹ 504.

⁵⁶⁰ See Swain *supra* (n535) 14

inducing an obligation by its own nature.” Whilst it is likely Viner simply lifted this civilian quote as a place-holder, it is also notable the examples he lists in this section are highly varied, with far more common law and non-proprietary cases, such as contracts for service and composition, than Bacon’s corresponding section.⁵⁶¹

Returning to the treatise genre, John Joseph Powell’s *Essay Upon the Law of Contract* (1790) is a useful transitional work.⁵⁶² The *Essay* demonstrates the slightly confused state of contract literature at this juncture, partially attributable to his combined use of Ballow’s *Treatise* and a much larger volume of common law precedent.⁵⁶³ As Simpson and Horwitz identify, this gives some of Powell’s chapters a more modern feel.⁵⁶⁴ For instance, he discussed the rules of consideration,⁵⁶⁵ illegality,⁵⁶⁶ and interpretation,⁵⁶⁷ areas illustrated primarily by common law cases, using a variety of transaction types. Nonetheless, when it came to his abstract definitions of contract, Powell was closer to Ballow and Bacon than Chitty or Comyn. In the preamble, he barely distinguished conveying property and making contracts; for Powell, contract was both historically⁵⁶⁸ and commercially⁵⁶⁹ indissolubly mixed with property. He then proceeded, helpfully, to give three alternative general definitions: first, the traditional common law definition from Plowden;⁵⁷⁰ second, a definition taken from Pothier,⁵⁷¹ which in turn was taken from D.2.14.1.2: “the consent of two or more persons in the same thing, given with the intention of constituting, or dissolving lawfully, some obligation;”⁵⁷² and, third, his preferred definition:

“a contract is a transaction in which each party comes under an obligation to the other and each reciprocally, acquires a right to what is promised by the other.”⁵⁷³

As examples of transactions moving ‘some property or right’, under these definitions, he lists ‘feoffment, gift, grant, lease, loan, pledge, bargain, covenant, agreement, promise, &c.’⁵⁷⁴ Later, he noted the ‘regular effect of all contracts [is] on one side to acquire, and on the other to part with or alien some property, or to abridge and restrain natural liberty by binding the parties.’⁵⁷⁵ Thus, whilst Powell’s definitions are broad

⁵⁶¹ Another contrast is to Sir John Comyns’s more theoretical *Digest of the Laws of England*. Comyns follows Plowden’s reports closely, and uses a much more general definition than Bacon.

⁵⁶² Though notably Powell’s treatise was not seen as ground-breaking by contemporaries; see Baloch, *supra*.

⁵⁶³ This is despite his emphasis on dividing equity and law, *preface* viii-ix.

⁵⁶⁴ For example, Powell’s entry on *Contract* in the *index* is cross-referenced to *Assent*, and is defined in terms of consent and the free assent of the parties.

⁵⁶⁵ 330, where it seems the basic example of consideration is to build a house *de novo*.

⁵⁶⁶ 164

⁵⁶⁷ 370

⁵⁶⁸ See *On the Primitive State of Property*, (ii-iv).

⁵⁶⁹ See, *preface*, iii; iv, v.

⁵⁷⁰ *Vi*

⁵⁷¹ p.3.

⁵⁷² vi.

⁵⁷³ *ibid*

⁵⁷⁴ *ibid*

⁵⁷⁵ vii.

enough to include a variety of transactions, he clearly still saw property-conveyance as the central case of contract. This pattern flowed from his source material: Powell often drifted into treating the contractual rights and property rights as synonymous when discussing cases involving land. For instance, in his discussion of ‘idiots and lunatics’, he cited cases involving land from Finch’s and Ventris’s reports, and correspondingly described their general contractual incapacity in terms of conveying, owning, and controlling their property.⁵⁷⁶ Later in the chapter, Powell equated the contractual incapacity of a married woman with her inability to hold property,⁵⁷⁷ seemingly a view shared by the judges,⁵⁷⁸ and from the fact, under common law, she has ‘no will of her own.’⁵⁷⁹ Later, when discussing *The Remedy to Enforce Agreements in Law and Equity*,⁵⁸⁰ he noted contracts ‘presuppose also property and price’, lifted directly from Ballow;⁵⁸¹ and in his discussion of executed and executory contracts he emphasised the distinction lies essentially in when property is conveyed, relying on contracts involving land.⁵⁸²

We can contrast the treatises and abridgments with Gilbert’s earlier *Treatise on Property and Contract* and *Treatise on the Law of Nature*. As Lobban notes, Gilbert, drew almost exclusively on common law cases⁵⁸³ and consequently relied on cases involving contracts with a variety of subject matter.⁵⁸⁴ Did this affect his concept of contract? Gilbert gave several definitions across the two treatises and their various editions. In *Treatise on the Law of Nature* Gilbert defined contract as “an act of the will made known by lawful significant signs that transfers my right to another, together with an act of his will concurring with mine to accept it.” The essential question is whether Gilbert was thinking of ‘right’ primarily in terms of property, or whether it was merely a catch-all term for a legal right.⁵⁸⁵ Lobban gives a persuasive account of the catch-all interpretation, and there are numerous instances which support this reading. In Gilbert’s *Treatise on Property and Contract*, Gilbert described contract as “the act of two or more persons concurring, the one in parting with and the other in receiving some property, right or benefit.”⁵⁸⁶ This is wider, and explicitly distinguishes property from ‘right’, as Powell did in his *Essay*.⁵⁸⁷ Indeed, elsewhere in the *Treatise on Property and Contract*, Gilbert gave more general accounts of contractual liability. His definition of conditions, for example, read “a condition is that part of an agreement that suspends the

⁵⁷⁶ 11-14; later, at 33-34, he relies on Croke’s reports, and ends up discussing an infant’s incapacity both in terms of conveyances and bargains in general, the latter being necessary to encompass contracts involving educational and employment necessities.

⁵⁷⁷ See 59ff; also, 104.

⁵⁷⁸ Powell extracts the judgments of Justices Ashurst and Buller from *Corbett v Poelnitz* which stress property-holding as a determinant of contractual capacity. (1785) 1 T.R. 5, 85;

⁵⁷⁹ See Powell’s general definition at 93, which lists as three reasons: a ‘want of POWER to assent so as to bind *herself*, she having no *will* of her own’; circularly, her lack of power to bind her husband; and finally, her lack of property.

⁵⁸⁰ Albeit, cf page 319 for a more general definition of contract in the context of Equity.

⁵⁸¹ Powell, vol 2, 2.

⁵⁸² 234, though he also seems to contemplate other forms of transaction which involve the exercise of ‘free-agency.’

⁵⁸³ Clxiii-cxxiv

⁵⁸⁴ *ibid*

⁵⁸⁵ (Waddams 2012b) takes the latter interpretation. 159.

⁵⁸⁶ 205-206; This is reflected in his discussion of the Roman *stipulatio* in terms of conveyance, 251.

⁵⁸⁷ Lobban gives a useful inter-textual reading of Gilbert’s work, *supra* (n496), 56-58

force of an obligation, grant or assurance till some act or thing be done or omitted or defeats it by the doing or omitting it;”⁵⁸⁸ for covenants “where[] the covenantor promises the covenantee to do or not do some act or thing, or that some act or thing should be done or not done.”⁵⁸⁹ The main indication Gilbert equated contract with property rights is in his introduction. Prefiguring Powell, Gilbert provided a brief history of contract in his *Treatise of Property and Contract* emphasising the origin of contract law in property holding.⁵⁹⁰ Nonetheless, as Lobban points out, this discussion seems to have been inspired by Thomas Hobbes, and Gilbert did not hold to a view that contractual liability involved the transfer of one’s ‘contract rights.’⁵⁹¹ Indeed, the variety of contract-types listed by Gilbert, ranging from agreements not to prosecute to the making of linen, seem to foreclose a proprietary model of contract law.⁵⁹²

A final point suggesting the jurisdictional source material of a treatise alters its subject matter, and consequently its concept of contract, is that the conceptualization shift coincides with an important quantitative change. As noted in Chapter 2, the mid-18th century saw a revolution in the quantity and *jurisdictional origin* of contract case-law comprising treatises. The emergence of the modern paradigm is possibly a feature of the growth and increasing centrality of common law cases in contract literature. The process first appears in Samuel Comyn’s *A Treatise of the Law Relative to Contracts and Agreements not Under Seal*, reflecting the delayed absorption of the body of case-law which had been produced by the King’s Bench. The importance of these cases is also evident in other metrics of ‘legal relevance’: Schmidt’s case-citation study, for instance, suggests that the older volume of case-law was largely replaced by a newer body of case law which was more jurisdictionally divided between law and equity⁵⁹³ and, if Oldham is correct below, more transactionally varied. This quantitative shift possibly marked a new paradigm in which equity was only a supplement to an immense body of self-sustaining and more transactionally varied common law learning. Nonetheless, even if all of this is true, it is important not to confuse the direction of causation and mistake the role of the general concepts of contract. Although writers such as Powell and Ballow defined contract in terms of property rights, they obviously did not think exclusively in those terms. We find plenty of cases in both treatises in which property rights do not feature; in addition, contrary to Atiyah’s suggestion, there is never a suggestion that contracts could *only* transfer property rights. Unlike later treatises, these earlier writers, perhaps with the exception of Gilbert, use their definitions of contract as a central case rather than an axiomatic starting point. Naturally, therefore, their definitions often fail to capture all the examples they list subsequently. Given this

⁵⁸⁸ 340.

⁵⁸⁹ 445

⁵⁹⁰ cxlviii, SS; much of Gilbert’s material was influenced by Hobbes, see cxlvi. For a lengthier discussion, see 54.

⁵⁹¹ 59

⁵⁹² See above, Lobban, *supra* (n592), 58

⁵⁹³ See figure 9, page 214.

different structural role, the shift in conceptualisation is probably better treated as an epiphenomenal rather than causal factor. It can be used to indicate and potentially support other trends, such as a reflection of the subject material making up the case-body and changing socio-economic perceptions of the role and functions of contract law.

A Pen-Knife Model of Contract Law

If we accept the above, then the lack of a general model in contract law is partially due to the limited variety in the equitable source material used by legal writers.⁵⁹⁴ Nonetheless, it is unlikely to be the sole cause. Blackstone's *Commentaries on the Laws of England* acts as a good counterexample in this regard. As noted elsewhere,⁵⁹⁵ Blackstone primarily thought of contract law as an incident of other legal rules, in particular those related to property⁵⁹⁶ and status.⁵⁹⁷ This cannot be attributed to a reliance on equitable learning given Blackstone's common law precedential and academic source material.⁵⁹⁸ Instead, there are at least two basic theses about the place of contract in the *Commentaries*. The first suggested by Simpson, is that Blackstone was merely following Hale's earlier structure in *The History of the Common Law and Analysis of the Civil Part of the Law*.⁵⁹⁹ The second, put forward by Cairns, is that Blackstone's treatment of contract – whilst influenced by the genre he was writing in – primarily followed from the role of contract in 18th century England. These are not intrinsically exclusive - indeed, may be mutually supportive - but they have different implications for my explanation as to the absence of a general law of contract. It is also worth emphasising the lesson from the discussion above: the lack of a general concept of contract does not thereby mean Blackstone was incapable of conceptualising contract as a distinct field, or that he denied the operation of executory or non-proprietary contracts.⁶⁰⁰ Instead, as above, I believe the structure of the *Commentaries* is most useful as a potential epiphenomenal factor.

Cairns and Simpson both agree that Blackstone's structure was heavily influenced by Hale.⁶⁰¹ Indeed, this is confirmed by Blackstone himself, who acknowledged he 'principally followed' the structure of Hale's

⁵⁹⁴ Likely due to the Chancery's role as a supplementary body of rules based, to a large extent, on procedural differences. For an argument as to why this does not provide a coherent base for (any) body of law, see (Birks 2004)

⁵⁹⁵ For Blackstone's fragmented discussion of contract law, See (Kennedy 1979), (325); (323); Liebermann, *supra* (n244), 103; Simpson, *supra* (n387), 655; Simpson, *supra* (n462), 524; (Blackstone 1979), xii; (Waddams 2012), 127. A particularly critical account is (Kahn-Freund 1977). See also (Cairns 2015), 353 for a survey of early 20th century accounts.

⁵⁹⁶ See page 440

⁵⁹⁷ *Eg*, his discussion of contract in the context of master and servant law and marriage, 413 and 142; 421.

⁵⁹⁸ (Fernandez, Dubber, and Girard 2012) noting 'Equity plays almost no role in the work', 49.

⁵⁹⁹ Simpson *supra* (n387), 653; *supra* (n462), 545

⁶⁰⁰ There is no indication Blackstone believed a contract would only exist if it altered the status of a party or their property rights; indeed, there are many signs he was familiar with other kinds of contracts. For examples of his involvement in typical commercial litigation, see (Kadens 2009), 1570.

⁶⁰¹ See Lieberman, *supra* (n244), 35; Cairns, *supra* (n595), 340; Simpson, *supra* (n387), 69, *supra* (n462), 640.

Analysis in his *Commentaries*.⁶⁰² A brief comparison⁶⁰³ confirms that, at least in the area of contract, Hale was the blueprint for *The Commentaries*. As Simpson notes, Blackstone considered the general rules of contract in two places: Volume 2, in his discussion on *The Rights of Things* and the acquisition of title,⁶⁰⁴ and Volume 3, when analysing *Injuries to Personal Property*.⁶⁰⁵ In the latter, he considered contracts as a species of personal property in *action*, taxonomizing them as either express or implied; the discussion under this taxonomy, however, was primarily structured in terms of the forms of action.⁶⁰⁶ This structure was obviously taken from Hale's arrangement in his *Analysis of the Law*: contract is found, first, under *Acquisition of Property*,⁶⁰⁷ and, second, under his section on *Wrongs in Relation to Rights of Things*.⁶⁰⁸ In the latter, Hale treated contract as a 'Personal Thing in Action',⁶⁰⁹ taxonomizing these 'things' into express and implied contracts ('quasi ex contractu'); contracts made with speciality and those without; and then sub-categories based on the forms of action.⁶¹⁰ In addition to Hale, Blackstone noted he was influenced by Finch's *Law or a Discourse Thereof*, written in 1627, which may also have influenced Hale's *Analysis*.⁶¹¹ Book 2, Chapter 18 of Finch's *Law* categorised bailments and contracts a species of chattel personals in much the same way as Blackstone. Finally, it is possible to trace, as Watson does, a similar organisational logic in all these works to their adoption of the Justinianic tripartite structure of 'persons, things, and actions'⁶¹² According to Watson, there is a general problem⁶¹³ in finding a place for contracts and delict (or tort) under this scheme.⁶¹⁴ Thus, given several characteristics of English law,⁶¹⁵ Watson suggests it was natural for Hale and Blackstone to categorise tort as an action, and contract across 'things' and 'actions.'⁶¹⁶

⁶⁰² Cairns, *ibid* 341, noting contemporaries also drew this connection, alongside tracing influence to Justinian's Institutes.

⁶⁰³ See Simpson, *supra* (n462), 546 for a short overview.

⁶⁰⁴ Volume 2, Chapter XXX, following other chapters on acquiring title, such as by prerogative, custom, and succession.

⁶⁰⁵ Volume 3, Chapter IX. Simpson, *supra* (n462), 920. Incidental discussions can also be found in Volume 4 when discussing wager and betting contracts, 173, and usury, 156; and in Volume 1, under Master and Servant, 410.

⁶⁰⁶ Volume 3, 153-166.

⁶⁰⁷ Section XXVIII, II.2 'Acquisition of Property by Act of the Party... By Contract.' (Watson 1988), 801, suggesting this placement was "Hale's solution to the arrangement problem for contract."

⁶⁰⁸ Section XLI, 105, as a *Personal Thing in Action*. Cairns, *supra* (n595), 343, describes this as a "curious melange of substantive law and the law of actions."

⁶⁰⁹ Wood, in his *Institute of the Laws of England*, treated contract in purely procedural terms. 557. There is no suggestion that contract was a form of personal property usefully categorized next to title in goods and money. Whilst Wood may have influenced Blackstone elsewhere, it appears unlikely his discussion of contract did so.

⁶¹⁰ 106-7, dividing contracts made by specialty into those involving debt and covenant; dividing those without into debts and 'promises.'

⁶¹¹ Blackstone *Commentaries*, iv-vi. See (Prest 1977), 326; Seipp, *supra* (n387), 73-78. Many thanks to Professor Seipp for his kind help regarding the legal taxonomy of the Common Law.

⁶¹² For influence on Finch, see Lobban *supra* (n17), 23, referencing Wood's opinion. For the influence on Hale, (Watson 1988), 799. See also Cairns *supra* (n595), 341-2, 344. Watson also attributes direct influence of Justinian's Institutes, and other civilian work, to the *Commentaries*. See Lobban, *ibid*, 34 for a similar view.

⁶¹³ *ibid*, Watson 798 implies the problem is inherent to the structure with his wide-ranging examples. See also fn 25, 802, and 807ff for his argument Gothofredus's tabulation of the *Corpus Iuris Civilis*. Note, unlike Blackstone, Gothofredus treated obligations arising from wrongs alongside contracts as a 'thing' rather than a facet of procedure as Hale did. 811.

⁶¹⁴ Watson, *ibid* 798.

⁶¹⁵ *ibid* 799, specifically, the prominence of land law, comingling of substance and procedure, absence of contract law, and elementary state of tort law. Watson does not discuss these in detail, however, and is mistaken in his diagnosis of the state of contract law.

⁶¹⁶ *ibid*, 812. Though Watson neglects Blackstone's discussion of contract under Book 3 and, in turn, Hale's similar treatment, as a 'chattel personal.'

Can it be said then, as Simpson implies⁶¹⁷ and Watson states,⁶¹⁸ that this intellectual legacy is the predominant cause in the structure of Blackstone? The structures of treatises can exhibit significant path-dependency: sufficiently strong, perhaps, that Blackstone would have adopted it even if it produced ‘incoherence.’⁶¹⁹ This counterfactual is significant as it would suggest Blackstone’s structure was largely a response to internal, taxonomic tensions, and therefore provides little insight into the relation between treatise structure and underlying economic conditions. Such a counterfactual is, however, extremely difficult to test; at best, we can explore the extent to which Blackstone’s structure did seem to mediate its structural legacy with its socio-economic environment.⁶²⁰ Cairns argues there was a close consilience, reflecting Blackstone’s desire to match structure to subject. He suggests Blackstone’s fragmented account of contract law followed from three related features of his source material: first, the traditional scope of the institutional work regarding commercial law; second the social role of contract in the 18th century; and third, the absence of a general concept of contract. I will consider these each in turn. Cairns suggests the institutional work in general tended to exclude commercial law, instead focusing on ‘traditional civil law.’⁶²¹ Blackstone followed this feature of the genre and seemed to deliberately exclude mercantile law, such as marine insurance, on the basis it had recently been formalised and was, as yet, undigested,⁶²² and because he viewed such law as separate from the common law.⁶²³ Without this body of heterogeneous contracts,⁶²⁴ Blackstone was able to reduce most of contract law to matters relating to property or status. Cairns also argues these two areas could encompass the majority of contracts in the 18th century, even those of employment. He notes that other institutional writers at the time⁶²⁵ treated employment as a matter of familial status (*eg*, masters and household servants); further, that, given the economic structure of England in the 18th century,⁶²⁶ this was “totally realistic, and encompassed virtually the entire economic landscape.”⁶²⁷ Cairns concludes by suggesting Blackstone’s persons-based scheme, treating servants as a member of the household, was a reasonable reflection of the mid-18th century conception of employment. Cairns’s final feature, the absence of a general model of contract, is the most complex. The argument is not that Blackstone omitted a general law of contract merely because it did not exist - which appears circular - but that there was no general concept in circulation amongst practitioners.⁶²⁸ The feature, if true, would support the interpretation that Blackstone was attempting to produce a map which

⁶¹⁷ Simpson, *supra* (n462), 546.

⁶¹⁸ Watson, *supra* (n612), 797 on the irrelevance of socio-economic context to legal borrowing, also elsewhere

⁶¹⁹ For later examples of this organisational bind, see *infra*, the works of Chitty Sr and Edward Chitty respectively.

⁶²⁰ Watson does not wholly deny such influence, *supra* (n612) though is habitually inclined to minimise it.

⁶²¹ Blackstone, Cairns, *supra* (n595), 353.

⁶²² See (Lobban 1987), 2, who argues Blackstone was strongest when pulling together areas of law already organized. See (Jones 1973) for a discussion of Blackstone’s ‘meagre’ analysis of commercial law. Xxxix; and Watson, *supra* (n612), 805, noting this is also ‘in keeping with a dependence on Justinian’s *Institutes*.’

⁶²³ Cairns, *supra* (n612), 354

⁶²⁴ Where Blackstone does discuss commercial law, such as negotiable instruments, he quickly ran into difficulties. Lieberman, *supra* (n244), 107.

⁶²⁵ 485-488

⁶²⁶ 489-491, also citing Millar and Adam Smith.

⁶²⁷ 490

⁶²⁸ Watson, *supra* (n612), 801, fn25, suggests there was essentially no contract law in England in the 18th century.

matched actual legal practice. Whether practice *did* lack such a general concept - the essential question - was dodged by Cairns in his tepid survey of Atiyah's thesis in *Rise and Fall*. Nonetheless, new evidence has been made available since Atiyah's work.

In particular, Oldham's study of Lord Mansfield's trial notes provide useful insight. The picture of contract law therein is ultimately fragmented and matches Cairn's reading of the *Commentaries*. A reconstructed account of Mansfield's contractual model resembles a pen-knife. Following 'basic principles of morality', Mansfield believed contractual liability was undergirded by two core principles: first, legitimate expectations, often generated by promises; and second, equitable obligations to pay money following from 'the honesty and rectitude of the thing.'⁶²⁹ Mansfield then bifurcated contract cases on the basis of whether they were mercantile or not. For the former, he controlled the jury tightly; emphasised the first principle and the moral importance of promise-keeping; and stressed the need for stability and certainty in the commercial sphere. In the latter, noncommercial cases, his paramount concern was to do justice between the parties, often achieved via unstructured jury verdicts. Importantly, in this sphere, Mansfield was happy to run cases involving agreements alongside those we would characterise solely as 'unjust enrichment.'⁶³⁰ Oldham suggests several reasons for this view: Mansfield's view that the dynamic element in these cases was the moral principle of the matter, applicable to both kinds of cases, leading, in turn to a tolerance for the habitual practice to join general and specific counts of contract, and the fact the majority of cases in his trial notes involved executed consideration, enabling this pleading practice.⁶³¹ Mansfield therefore used a fragmented law of contract: several discrete 'commercial' and specific contracts, applied sharply against a highly fuzzy general law of contract left mainly to jury discretion. Blackstone's choice to exclude the latter and focus on a subset of the former, then, is a sensible choice for a 'scientific' treatise. Oldham suggests that the breakdown of this bifurcated model was caused by new law restricting the broad, equitable discretion of the jury and by the separation of law and equity, reducing the divergent role of equitable conscience in both commercial and non-commercial cases.⁶³²

To summarise, we can attribute the absence of a general concept of contract in the *Commentaries* to a combination of factors, inversely weighted to the extent of path-dependency in treatise structure. These factors are: (1) Blackstone's artificially restricted, non-commercial subject matter, giving a narrowed

⁶²⁹ 242-44

⁶³⁰ *ibid*

⁶³¹ Which, in turn, may be connected to the preponderance of cases involving real property, *supra* above. For examples of expressions that a contract is not binding because property has not passed, see *Tradesman's Lawyer* p.8; *Bacon Vol 3*, 70; *Ballow 37*. Powell 158 discusses the executed/executory distinction almost entirely in terms of property.

⁶³² 242-44

ordinandum; (2) the economic structure of England in the 18th century which allowed for a status and property-based analysis of the remaining subject matter, particularly employment; and (3) the absence of a general law of contract in legal practice, following from broad jury discretion and, possibly, the suffusion of equitable principles. Thus, whilst distinct from the equitable subject matter thesis above, it is nonetheless compatible and suggests deeper trends are shared between them, such as the importance of substantive law creation, the inductive relevance of subject matter, and the marginalisation of equitable authorities.

Part 2: New Techniques for a New Century

The late 18th and early 19th centuries reflect a turning point where it became both possible and necessary to organise the law under highly structured, inductively derived, substantive categories. New volumes of formalised legal material required organisation and the existing schemas - where they existed at all - were impracticable. The early warning signs of this build-up can be detected within the footnotes of reports which start to include lengthy syntheses of the growing, seemingly inconsistent case-lines.⁶³³ We can directly quantify the change in literature through a rough metric: the number of cases cited per page (C/P) in different treatises:

Treatise	Powell	Newland	Chitty 2nd	Addison 2nd	Leake 1st	Pollock 1st
Date	1790	1806	1834	1849	1867	1879
C/P Ratio	2.5	2.0	5.6	5.8	6.0	3.0

This metric is not a measure of total case citations per se (although this figure also rose), but the *density* of citations. Powell and Newland demonstrate comparatively low densities, only occasionally throwing in a case to justify their legal propositions. By the 2nd edition of Chitty, this ratio has risen considerably: every paragraph has a citation, and by Leake, every legal proposition. Intriguingly, the ratio *falls* when we reach Pollock's treatise. This rise and fall is the product of a new *legal science*. Its fluctuation, acceleration, and stagnation, can all be explained through the purposes and methods of the legal treatise.

⁶³³ E.g., *Berrolles v Ramsay* (1815) Holt, NP 77. These could have significant doctrinal influence: for instance, the note on moral consideration in *Wennall v. Adney* (1802) 3 B. & P. 247, 249, note (a).

2.1 Information Compression

The response to the breakdown of the forms in the domain of contract law was to adopt new methods to produce ‘scientific’ schemes of organisation.⁶³⁴ There is scholarly disagreement over the extent to which these methods were *stylistic* rather than *practical* choices. The former thesis runs as follows: 18th and 19th century English jurists borrowed from civilian sources exclusively for reasons related to status or general trends in fashion. Watson’s well-known thesis is that the motive for most so-called ‘legal transplants’ was, and is, perceptions of relative *prestige* from civilian sources.⁶³⁵ Macnair, along similar lines, suggests the replacement of a procedural for ‘Gaian institutional’ taxonomy” was not about order over chaos, but “a fashionable classicism...reflected in the character of 18th century public and elite architecture and in political rhetoric.”⁶³⁶ This status-driven, or cultural, motive is clearly a partial explanation: Addison’s *Treatise*, for instance, received extensive criticism for not following Pothier’s ‘scientific’ *Traité*. To produce a treatise, to do ‘scientific law’, and, perhaps, to be seen as a serious academic discipline, were all synonymous with using the scientific methods of the civilians. Nonetheless, I believe there is also a significant *practical* utility to using these ‘scientific’ methods. The alternative schemes, such as the procedural taxonomy or alphabetical abridgment, were functionally incapable of handling the new surge of complex litigation and ensuing substantive case-law. Instead, only new ‘scientific’ legal methods from the continent could manage the product of the Generative Period. In this section, I will consider one particular technique: the production of successive nested categories, beginning at the title of the work, before proceeding through table of contents, subsections, legal concepts, and finally cited cases. In sorting contract law, each successive round of treatises increased the degree of nesting. We can produce the following diagrams of nested subcategories as an illustration:

⁶³⁴ Simpson, *supra* (n387), 633 provides an extensive overview, emphasising the links between legal theory and the treatise genre.

⁶³⁵ (Watson 1983), 1147. This dynamic is well-covered in studies of cultural evolution, see (Richerson and Boyd 2005), 69; (Laing 2011), 695-6; for a recognition in legal studies: (Twining 2004), 5-6.

⁶³⁶ Macnair, *supra* (n254)

Fig 54. John Powell, *Essay Upon the Law of Contracts and Agreements* (1790)

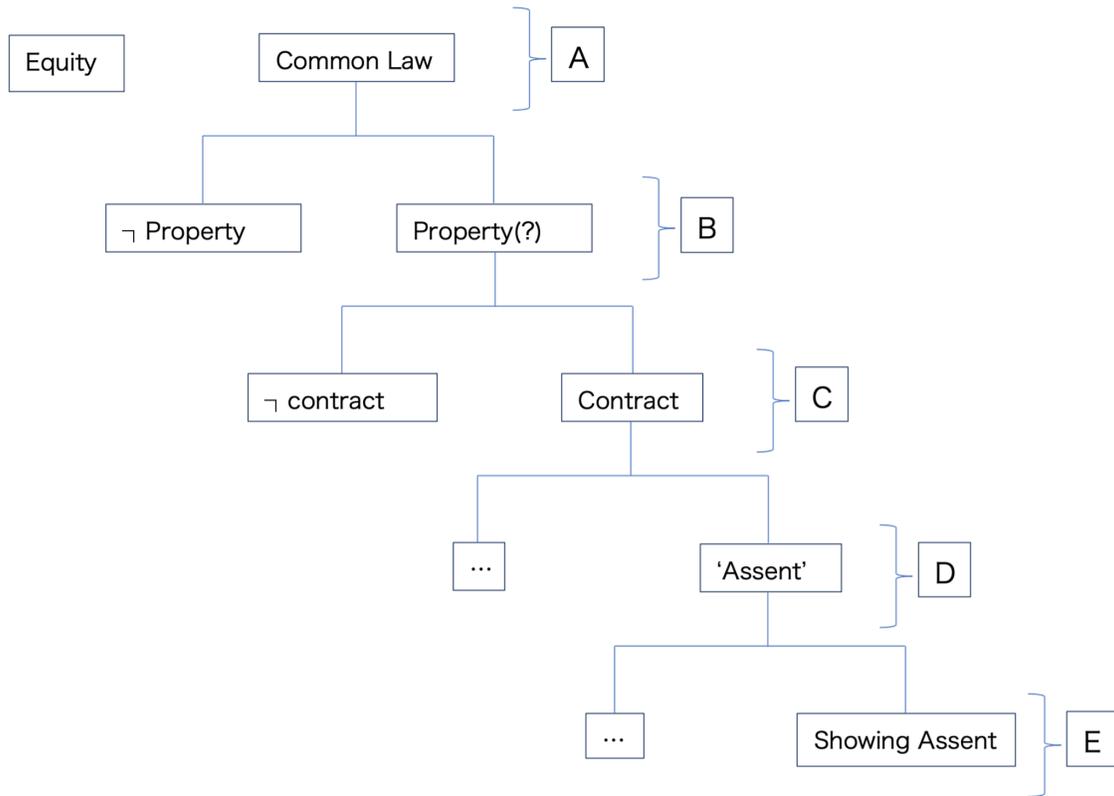
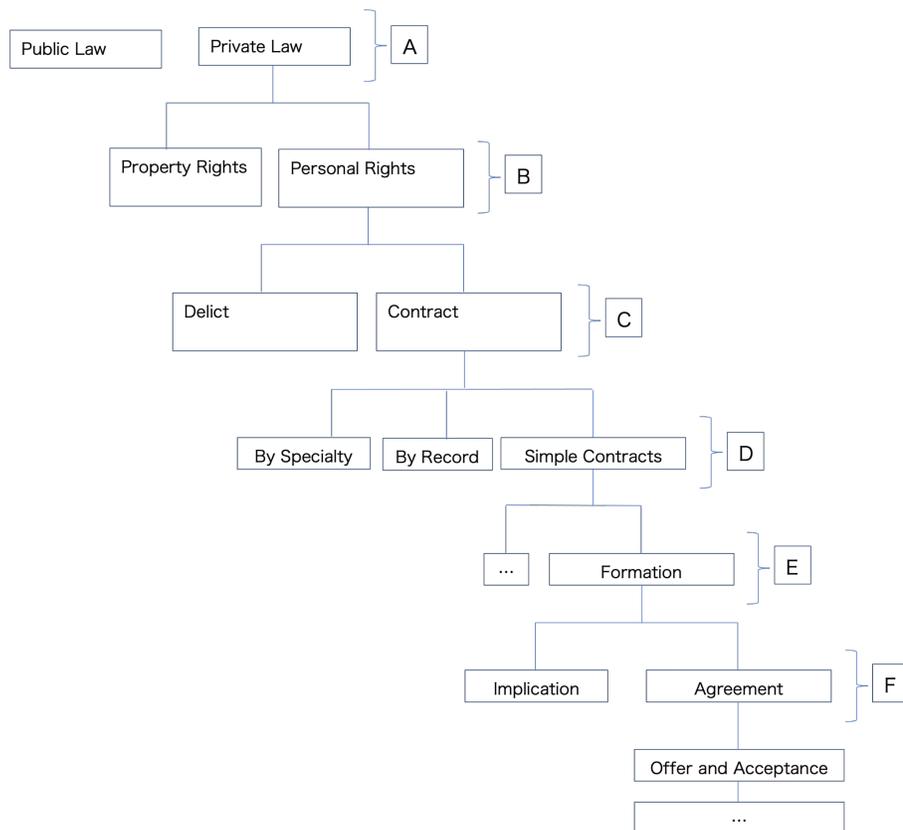


Fig 55. Stephen Martin Leake, *Elements of Contract Law* (1867)



The informational and political aspects of this technique are relatively understudied; I will provide a brief overview. No legal taxonomy is entirely apolitical, just as no two taxonomies are equal in how effectively they sort the relevant information. The general *practical* operation of a taxonomy is fairly straightforward. Each level of sorting conveys information about its contents and thus successive subdivision allows for information compression. Consider *Fig 3* above. A case like *Adams v Lindsell* is sorted under 6 successive categories: A, Private Law;⁶³⁷ B, Personal Right; C, Contract; D, Simple Contract;⁶³⁸ E, Formation; and F, Agreement. Each conveys explicit or, if either obvious or elsewhere treated, implicit,⁶³⁹ information about its contents. Thus, even without knowing anything about *Adams v Lindsell*, we can make a series of guesses about its legal effect. Contrast this to *Fig 1*, where many of the subcategories are either unclear (B) or procedural (A). Knowing Powell places *Clare v Earl of Bedford* under ‘E - Showing Assent’ conveys some information about its topic and principles, including the likely procedures involved, but comes nowhere close to the amount of *substantive* information contained in Leake’s subsection F. This can actually reduce the amount of text required: as described in Chapter 1 when discussing ‘efficient abstraction’, the use of abstract categories can maximise legal information from the same, or even less, legal text.

The success of each subdivision depends on whether the information it conveys is ‘useful’ - that is, whether it helps us apply the divisions we see as relevant and important. ‘Usefulness’ is an inherently contestable metric, though, once fixed, the relative ‘usefulness’ of two schemes can appear apolitical. Consider the division between ‘Contract’ and ‘Not-Contract’ (Subsection C). The possible existence of relevant and important features common to all transactions was recognised early by Gilbert and Powell, but only taken seriously by 19th century writers. Nonetheless, these writers rarely gave explicit defences of their arrangements, instead treating them as natural taxonomies.⁶⁴⁰ Various historians have doubted the general utility of this approach, usually on the basis it occurs at a ‘surface level’ of generality. The mere fact these categories are highly abstract is not, however, an objection; the question is whether they are *useful* abstractions. This ultimately depends on the material being abstracted: the social practice of making bargains. Although appearing to be an empirical question of whether builders, tenants, debtors, or sailors, make contracts in relevantly similar ways, it is also political. Blackstone’s *Commentaries* and Chitty Sr’s *Treatise on Commerce* both deliberately worked towards producing a unified, national commercial legal sphere. Chitty Sr’s ‘General Part’, like all standardisations, therefore reflects both a

⁶³⁷ Leake cannot take credit for bringing all these divisions into English law: many of them, such as A, B, and C, presupposed contrasting categories which had yet to be carefully formed and distinguished in 1790.

⁶³⁸ This procedural division followed Chitty Jr, *infra* 3.3.2

⁶³⁹ Leake, for instance, did not explicitly define A, though provides it elsewhere at (Leake 1861), 158. His taxonomy was drawn directly from Austin’s lectures, who also gave a detailed account of this distinction in Lecture XLIV. See (MacMillan 2011), 6-8, 18.

⁶⁴⁰ Chitty, 1st edition, iii, describing them in genealogical terms (‘collateral’, ‘lineal’)

description of growing commercial uniformity and a *prescriptive* project to produce it. The same kind of taxonomic logic occurs at every level of subdivision. What ‘matter’ is relevant, and what is irrelevant? What do we, the organisers, believe ought to be relevant or irrelevant? The relative positions between the parties? Their ongoing commercial relationship? The long-term outcomes of their bargain? The early treatise writer, who likely enjoyed the greatest freedom, made a series of decisions on what to abstract out and what to abstract away.

2.2 A Private Codification

We do not normally ascribe the power of prescriptive taxonomy to the ‘descriptive’ treatise writers. Rather, the paradigmatic example is the legal code, which, in an explicitly political moment, must synthesise what is relevant and irrelevant into a single document. The legal codification can be analysed from many angles, such as its underlying political philosophy, connection to the nation-building project, and inherent centralising effects.⁶⁴¹ It can also be seen as a response to a problem: rendering functional the mass of undigested, recorded substantive law built up in any legal system requiring legal certainty.⁶⁴² The raw mass inevitably produces a power vacuum. A group must step in to tame the wilderness of single instances, and, given the thin line between ‘redundancy’ and ‘undesirability’, will inevitably acquire a degree of control in selection. This is the power of abstraction described above, and partially explains why Codification is highly politically charged.

England solved this problem in two ways. The first was a small number of codifying statutes in the late-19th century and early 20th century.⁶⁴³ These were the *Bill of Exchange Act* (1888); *Partnership Act* (1890); *Sale of Goods Act* (1893); and the *Marine Insurance Act* (1906). Nonetheless, these were seen as pragmatic exceptions for areas requiring an especially high degree of clarity; otherwise, there was to be no general contract code. The absence of a code was not due to infeasibility, as the Indian Contract Act 1872 clearly demonstrates, but a matter of professional resistance. The second solution, the English legal treatise can be seen as a private substitute for this centralised solution.⁶⁴⁴ Contemporary commentators explicitly recognised this⁶⁴⁵ - Dicey, for instance, regarded himself as a quasi-legislator⁶⁴⁶ - and textbooks

⁶⁴¹ (Rocheton 2024), 17-18.

⁶⁴² See Yalnazov *supra* (n11), 31.

⁶⁴³ See (Rodger 1991), 161; (Irvine 2001), 277 on the interests of business in codification Ferguson *supra* (n164), 19 for a useful reminder this need was interpreted through jurisprudential philosophy and active interest by businesses must not be exaggerated; for the reasons England, given such philosophy, did not receive a full codification, see (Braun 2014), 212-5.

⁶⁴⁴ Macmillan, *supra* (n639), 10. c.f the codifications of English contract law in India, Tofaris, *supra* (n155); (Braun 2014), 204, 218.

⁶⁴⁵ Some of the treatise writers, such as Leake, were explicit supporters of codification. See Macmillan, *supra* (n639), 6.10, fn 39 for a closer examination of English codification. For a general approach to ‘private codification’, see (Jansen 2010)

⁶⁴⁶ Dicey, cited in (Sugarman 1986), 32

like Blackstone's *Commentaries* are argued to have prevented later attempts at legislative codification.⁶⁴⁷ Describing the treatise as a private codification helps capture their centralising tendencies. Like the formal codification, the English treatises sought to be *complete* descriptions of their respective areas of law.⁶⁴⁸ In this way, they essentially consolidated the previously heterogeneous variety of literature used by lawyers. These works were, alongside the nominate reports, sold as sufficient tools for the practising lawyer to find what they needed. It would no longer be necessary to educate oneself with a combination of the register, abridgments, legal maxims, Coke on Littleton, and the occasional law dictionary. This slow legal homogenisation appears throughout the whole legal system. As Hedley notes, and as corroborated by the statistical study in Chapter 2, the variety of sources in legal judgments continuously reduced in reports throughout the latter half of the 19th century. Diversity was also reduced within the treatises themselves: comparing the footnotes in Gilbert and Comyn to the later editions of Chitty and Leake reveals a shift from a varied common law library to a smaller diet of legislation, case-law, the occasional comparative study, and, of course, other textbooks. Contemporaries also recognised this shift, the most useful being Jelf's *Where to find your law* (1897).⁶⁴⁹ He noted there are three basic sources of law: statutes, case-law, and, 'by far the most important', 'textbooks.' Jelf argued that 'the law is administered throughout the length and breadth of the country by many a tribunal whose members have never so much as seen statutes and cases.' Even more experienced lawyers had to admit their dependence on treatises as indexes of the case-law. This was reflected in the sources Jelf lists for contract law. First, introductory works: Bullen and Leake's *Pleadings*; Smith's *Leading Cases*; Finch's *Cases*; and White and Taylor's *Leading Cases*. Then, for the bulk of substantive, general law, he recommended as 'leading works', Leake on Contracts and Pollock on Contracts, followed by a 'raft of competitors': Smith on Contracts; Addison on Contracts; Chitty; and finally Anson for students. A similar parade of textbooks followed for the specific contracts, increasingly following the statutory activity of Parliament in the late-19th and early-20th centuries.

This list, incidentally, reveals a unique feature of the 'private codification' not shared by its legislative cousin: options. Much like the mid-century reforms of reporting, the 'private treatise solution' replaced top-down organisation with a market-based one. Barristers and other lawyer-customers could vote with their purses for the organisational scheme they preferred. Textbook writers actively sought to tailor their works to practising clients, remarked on their many competitors, and received extensive feedback from dissatisfied customers.⁶⁵⁰ As Sugarman notes, the treatise writer was closely imbricated in this

⁶⁴⁷ Braun, *supra* (n644)

⁶⁴⁸ What constituted it being 'complete' depended on the defined boundaries of the topic. See Chapter 5.1.1 for an example.

⁶⁴⁹ Jelf, *supra* (n38)

⁶⁵⁰ It seems the first edition was released in two parts, with an interval of around a year between them, making it outdated the moment it hit the shelves.

profession,⁶⁵¹ more often than not actually practising as barristers, and signs of the bar actively influencing their content are clear in the later textbooks.⁶⁵² In fact, this kind of competitive control was likely an intended feature, as it was for the partial reform of law reporting. This is not to disclaim entirely the treatise writer's powers of legal reform. The 'private codification market' is one involving significant lock-in within organisational schemes and, similarly, network effects in usage by the legal community. By 1892, possibly the height of competition in these works, the practising barrister would have around four serious alternatives to choose between. Recognising the limits of the textbook market help in two ways: first, it explains the way treatise writers behave as if they are serving a role in the community, rather than producing an interchangeable product; second, it suggests that earlier writers, such as Chitty Jr's *Practical Treatise*, in addition to being written during a period of flux, also accrued significant influence merely by being first. These features raise a basic question: to what extent did the treatise writers enjoy discretion in using their 'power of abstraction'? The different techniques of treatise writers to 'massage' the caselaw (or 'organisandum') are well known. A common method was to omit or marginalise inconvenient material. The extent to which this was prescriptive as opposed to merely taxonomic is hard to assess and depended on the treatise writer's claim to being the exclusive source on a topic. The exclusion of specific contracts and statuses could be justified on the basis that other specialised work covered that ground. Conversely, the exclusion of equitable learning by the later treatises, especially from the judicature acts onwards, appear to be on the basis of legal irrelevance. The contract treatises also occasionally omitted cases on a more particular basis,⁶⁵³ but this appeared to be rarer - especially across all the major treatises - likely following similar competitive dynamics as occurred in the non-reporting of cases.

The other most common method of tacit legal reform was the flexible interpretation of cases. What to do when you need a citation for a legal proposition for which none are forthcoming? A typical strategy was to cite a case which could be authority, but on a detailed reading was strikingly ambiguous or altogether inappropriate.⁶⁵⁴ This could be in order to further a particular policy, as seen blatantly in the attempt of an editor of the *Practical Treatise* to narrow the Married Women's Property Act 1882 without explicit case support,⁶⁵⁵ or, less particularly, to construct a neater, coherent theoretical edifice.⁶⁵⁶ A variant of this strategy, seen especially in Chitty Jr's *Practical treatise*, was to extract or reinterpret lines of cases under

⁶⁵¹ Sugarman *supra* (n646), 33, notes that the community of law professors was quite cohesive and somewhat conservative, and 'unlikely to produce firebrands'; it was also one, noted which was closely associated with the legal profession (36).

⁶⁵² *ibid.*, 48. E.g., Addison, 5th Edition *preface*.

⁶⁵³ Sometimes they would choose one report over another, see (Ibbetson 2024)

⁶⁵⁴ Chitty 2nd edition, 26, citing cases previously used by Bacon (*James v Morgan* B.R. 15 Car 2; *Thornborow v Whitacre* 2 *Lord Raym* 1164) to show that the consideration had to be fair as evidence adequacy was sufficient.

⁶⁵⁵ See, *infra* p. 180;

⁶⁵⁶ See the massaging of mistake cases, discussed in (Macmillan 2010).

particular policies. The typical tools were emphasis, narrative, and gloss, for instance, Chitty Jr's use of freedom of contract to justify the older authorities on consideration, or Pollock's framing of public policy as 'exceptional' and under a long process of marginalisation. Finally, the later, more theoretical authors like Leake and Pollock also introduced a new, essentially academic danger⁶⁵⁷ of producing extensive legal doctrines which had little connection to practical needs. Consider a doctrine like mistake: if removed from a treatise, would it have re-emerged by demand from the practitioner body, or was it merely a decoration bearing no weight? These strategies and workarounds all occurred in the shadow of providing a 'practical' treatise which accurately reflected the state of the caselaw. Thus, in addition to the effectiveness of market competition, it is worth considering, as we did for the judiciary, the effects of the shifting weights of the legal web. A new statute, or case, could open up a period of fluidity, the doctrinal scope of which was circumscribed by the certainty and concreteness of the source's text, though never wholly removed. Chitty Jr and Pollock can both be said to possess significant discretion thanks to their first editions being released in wake of seismic changes to the legal sources. Conversely, those later treatises, like Addison and Leake, and indeed post-1830 editions of Chitty following earlier editorial decisions, were constrained by a much denser, pre-existing legal web.

Part 3: Architects of the General Part

The following is a survey of the contract treatises from 1800-1914; I suggest the macro-organisation of contract law which was produced, primarily but not exclusively, conformed to a simple pattern. This pattern, conventionally called the 'classical model' or 'general part', was premised on two fundamental abstractions.⁶⁵⁸ First, it presupposed there are general features common across all commercial transactions which can be used to produce general, useful, uniquely contract-based rules. The 18th century model of contract law lacked this conviction, instead preferring its fragmented 'pen-knife' model. The explicit justification for this programme was nationalistic, emphasising the unity of a domestic, British commercial sphere contra-distinguished from international markets. The sphere of contract law was treated as one particular module in a larger, carefully divided model of commercial law. Second, the classical model had a particular view of what these 'general features' were: a model of cognitively equal and statusless individuals making agreements under conditions of a free market.⁶⁵⁹ For this to be the case, all commercial parties, whether builders, tenants, debtors, consumers, or sailors, had to be presupposed to make contracts the same way.⁶⁶⁰ This model was ostensibly descriptive, matching the form and mode of

⁶⁵⁷ (Simpson 1975), 163 'too many doctrines chasing a limited number of problems.'

⁶⁵⁸ (Lobban 2010), 297.

⁶⁵⁹ For a qualification of the hegemony of this view, at least in literature and possibly wider culture, see (Rosenberg 2013), 167, 171-5; (Rosenberg 2017)

⁶⁶⁰ For a similar process of 'scientification' in 19th Century Russia, (Poldnikov 2017), 697, 700

creation of commercial contracts, though was implicitly prescriptive, frequently giving internal justifications as to why this mode of commercial behaviour would be desirable.

The construction of the ‘general part’ was a product of both treatise writers and the courts. It cannot be understood without four interconnected factors: ideology; precedent; legitimacy; and complexity. The causal story of the general part is therefore one of both institutional constraints and 19th century political economy. Here, I consider the role of 19th century treatise writers, tracing their transition from the previous generation of legal writers: the enduring legacy of the equity/common law division; the slow and partial abandonment of pleading and the forms of action; the adoption of new analytical techniques of ‘legal science’; and their increasing focus on a substantive, agreement-centred law of contract. In addition, I explore their ideological presuppositions - specifically their commitment to a liberal philosophy - which appear both explicitly (pre-1850) and implicitly (post-1850) in their treatises and wider writings. The growth of substantive law; the ‘neutral’ role of the treatise writer; liberal political economy; the ‘will theory’; and use of objectively scientific ‘legal abstraction’ come together to form a remarkably resilient doctrinal construct. These interconnected strands, including a particular emphasis on the dangers of producing *too much law*, are repeated in the context of the judiciary, who laboured under similar conditions of institutional and legal constraint.

3.1 Failed Experiments (1800-1826)

The brief period between the publishing of Powell (1790) and the first edition of Chitty (1826) was a period of ‘legacy treatises.’ I consider three representative examples, noting how they either looked back to the 18th century schemes or prefigured later developments. These are: Newland’s *Treatise on Contracts* (1806), Lawes’s *A Practical Treatise on Pleading in Assumpsit* (1810), and Colebrooke’s *A Treatise on Obligations* (1818).⁶⁶¹ The first, Newland’s 1806 *Treatise*, covered almost exclusively equitable material. It began with a reference to Blackstone’s definition of a contract, “a contract is an agreement, upon a sufficient consideration to do or not to do, a particular thing”, after which Newland eschewed any general statements of contract law. Newland’s topics reflected his equitable source material, with the following proportions:

⁶⁶¹ See *Contract Treatises* in the Bibliography Section

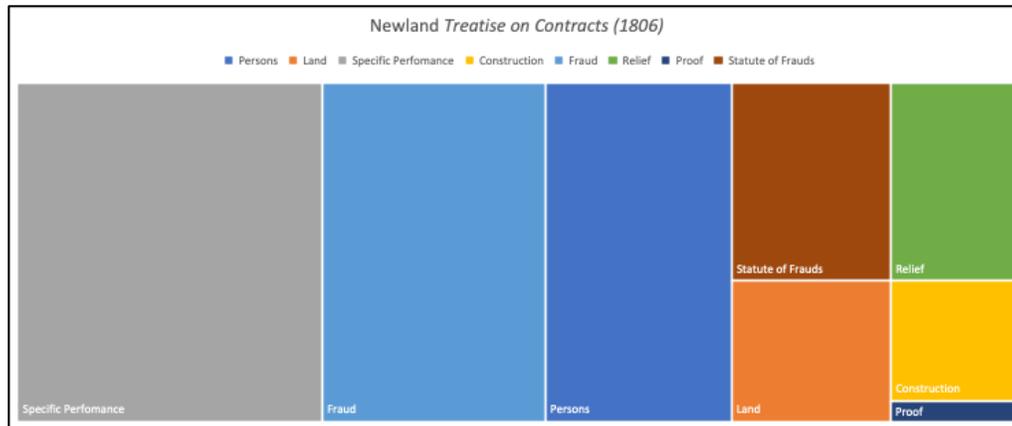


Fig 56. Newland's Topic Breakdown

There was no attempt to orient the reader (or, for that matter, provide a table of contents). Instead, the work seems to be split into rough thematic groups: Personal capacity; Persons with particular real property rights; Specific Performance and its conditions; Fraud and other grounds for rescission; Discrete Party Relationships; and Miscellaneous other grounds for relief. As discussed in detail under 2.2a and 2.2b, the equitable case law often had a flavour of paternalism. Several characteristic examples are: the ground of relief based on an inadequacy of price so large that no 'man of common sense' would assent without first being defrauded or misunderstanding it;⁶⁶² the suggestions that mental infirmity or 'weakness' could be a material factor in finding fraud;⁶⁶³ and, most clearly, the extraordinary protection provided to sailors on the ground they are: "a race of men, remarkable for their inexperience, and deserving highly of their country."⁶⁶⁴ Newland sometimes bristled at these tendencies: in Chapter 18, for example, he doubted the 'propriety' of past equitable authorities where the Chancery re-made the provisions of a contract on general grounds of fairness or equity.⁶⁶⁵ The hodge-podge of topics gives a sense throughout that the work does not entirely cohere. Like Lawes's pleading treatise below, Newland's *Treatise* was atavistic: a work ostensibly about 'contracts' which exclusively considered equity cases. It seems that even in the 19th century, equity was considered as a plausible 'base' to produce a general account of contract. The *Treatise*, in this sense, also confirms the difficulty of using such a base⁶⁶⁶ - possibly because the rules of equity historically presuppose a body of common law to supplement, correct, and ameliorate.

⁶⁶² Newland, 359-360

⁶⁶³ *Ibid.*, 362, noting the court will not 'measure the size of people's understanding, or capacities; there being no such thing as an equitable incapacity, where there is a legal capacity.'

⁶⁶⁴ *Ibid.*, 442

⁶⁶⁵ *Ibid.*, 328; this is consistent with Newland's general view that 'if a person with his eyes open, will make a bad bargain, he must suffer by his own imprudence.'" (357).

⁶⁶⁶ (Birks 2004),

In contrast, Lawes's *Practical Treatise on Pleading in Assumpsit*, written in 1810, limited its scope entirely to pleading. This made it a lonely outlier in the rising tide of substantively-structured legal treatises. As Lawes pointed out, his subject matter did not preclude a 'scientific' method, and he sought to produce general rules⁶⁶⁷ from the increasing mass of reported assumpsit actions.⁶⁶⁸ As with Newland, Lawes adopted a narrow focus at the expense of substantive coherence. He made no attempt to consider "where assumpsit is the proper form of action, or not; or who are, or are not persons to be made parties." Instead, according to Lawes, these were rather 'questions of nisi prius law, or on the action of actions, than pleading.'⁶⁶⁹ The result is a strange creature which disclaims any discussion of substantive law, before going on to discuss various doctrinal questions. For example, in *Chapter 3*: 'Consideration, in special assumpsit', Lawes denied any attempt to enquire 'what is or is not a sufficient consideration to support a promise', before moving on to a section discussing what consideration is sufficient when pleaded.⁶⁷⁰ Another oddity was that Lawes's frequent acknowledgement of the reality of pleading practice rendered much of his complex analysis irrelevant. When discussing pleas in bar, he often stated detailed rules before noting they can, in any case, be given in evidence under the general issue. Similar double-takes can be found when he discusses the principles of duplicity in averment, double pleading, and the immense learning on 'giving colour.' The general sense from Lawes's *Treatise* is one of sclerosis, and it is evident the detailed pleading rules of *assumpsit*, like equity, were an incomplete base for developing the general part of contract law. The last work, Colebrooke's *Treatise of Obligations*, written in 1818, was likely never intended for English lawyers. It has been discussed in detail elsewhere;⁶⁷¹ nonetheless, it does provide several useful examples of the trends discussed here and in Chapter 3. Colebrooke was typically content to copy his structure and theoretical discussion from civilian sources; as a result, he tended to give a highly abstract, *consensus* based account of contract law. An exception can be found in his discussion of executory and executed contracts. There, he reverted to an account of property conveyance, either in possession or in action. The slightly jarring jump can be explained by his sources: Blackstone's *Commentaries*, 2.30; Powell's *Treatise*, 1, 234, and Newland's *Treatise*, 6. Likewise, when he used the civilian sources 'consent' was the first, and most important, condition of a contract; when he followed Comyn, he reverted to an emphasis on persons.⁶⁷² We might say then that Colebrooke was from a third genealogy of contract treatises: neither equitable nor common law-procedural, but civilian. The occasional introduction of 'foreign' English material, and its discordant effect on his focus, provide a useful natural experiment into how the different strains combined.

⁶⁶⁷ viii

⁶⁶⁸ He notes, at (vi), that 'it is impossible to peruse the common cause papers in London and Middlesex, without perceiving that the great majority of actions, which are tried in the courts of law at the present day, are actions of assumpsit.'

⁶⁶⁹ vii

⁶⁷⁰ 50-54.

⁶⁷¹ (McCunn 2022)

⁶⁷² Book 3, Chapter 1, Requisites of a Contract.

3.2 Riding the Wave (1807-1867)

The legacy treatises, typically for reasons related to their underlying organisational schema, managed to exclude the majority of the new, common-law jurisprudence being generated. The first significant treatise to absorb this bulk was Samuel Comyn's⁶⁷³ *Treatise on the Law Relative to Contracts and Agreements, Not Under Seal* (1807). The inverse of Newland, Comyn focused exclusively on common law cases,⁶⁷⁴ writing in response to the 'numerous questions which have arisen in the Courts of Common Law upon Contracts and Agreements', to 'obviate the necessity for a long and laborious research into the vast variety of Detached Reports.'⁶⁷⁵ The emphasis on common law cases was a feature of Comyn's topic-choice: in both the first and second editions he delineated his work using the forms of action,⁶⁷⁶ and thus confined himself to common law literature. To the extent there are meaningful differences in chancery jurisprudence, such as a greater focus on property, or more routes for relieving on the grounds of substantive inequality, they were precluded by this *pleading*-based structure. It also prevented the adoption of Mansfield's partially equitable bi-partite model, instead exclusively retaining the sharper, positivistic half intended primarily for commercial parties.

Beyond its source material, the forms of action had a surprisingly limited influence on the *Treatise's* internal structure. Comyn used forms slightly differently in each edition. In the first, his division was between contracts under seal and those by parole; this division then acted as the basic dichotomy by which contract could be defined. In the second, he moved away from this dichotomy, re-titling his work *The Law of Contracts and Promises upon Various Subjects and With Particular Persons as Settled in the Action of Assumpsit*. Whilst reproducing the division in the first chapter, it was no longer the prime distinction and instead followed the general defining feature of 'agreement or mutual bargain.'⁶⁷⁷ The forms also did very little organising at lower levels of the treatise, with the second edition restating the individual 'common count' chapters as general substantive ones and entirely omitting the section on pleading. Comyn's general movement away from pleading was a crucial break from Blackstone and Gilbert's tripartite division, and prefigured Chitty's work. This seems to give Comyn slightly more space in his definitions. In the first edition, Comyn gave his general definition of a 'contract not under seal' in abstract terms:

⁶⁷³ For Comyn's political and economic views, see RC *First Report* 220, and *Treatise*, 32.

⁶⁷⁴ Samuel Comyn, in the first report, stated he knew little about the equitable jurisdiction of the exchequer. 220.

⁶⁷⁵ Comyn, iii.

⁶⁷⁶ Samuel Comyn was a special pleader and, like many of that profession, opposed the general issue, supported special pleading, and was in favour of the forms of action. nb RC *Second Report*.

⁶⁷⁷ Comyn, 1.

“a bargain or agreement voluntarily made, either verbally, or in writing not under seal, upon a good consideration, between two or more persons capable of contracting, to do or forbear to do some lawful act.”⁶⁷⁸

As examples of these, he gave a mixture of proprietary and non-proprietary transactions, and followed with the abstract definition of an agreement from *Reniger v Fogossa*.⁶⁷⁹ Shortly after, he followed Blackstone’s classification of a contract as conveying an interest in *possession* or *action*, although this was not a central part of either edition.⁶⁸⁰ Comyn relied primarily on *assumpsit* as his organising structure, and this appears to have taken him away from Blackstone’s proprietary framing.⁶⁸¹ In other ways, however, Comyn’s *Treatise* looked backwards. There are hints of Mansfield’s older, equitable use of implied contracts: implied contracts are to be imputed “such as reason and justice dictate,”⁶⁸² a position abandoned by Chitty Jr. Both editions also resembled the 18th century in terms of their subject spread. Whilst Comyn discussed various general topics first, such as express/implied division; consideration; illegality; statute of frauds; and stamp act, the vast bulk of his work was centred on personal capacity,⁶⁸³ specific status-relationships, and specific contracts. This is clear from the following breakdowns from the first edition:

⁶⁷⁸ 2, the second edition omitted the words ‘either verbally or in writing.’

⁶⁷⁹ He provides several citations. The Traditional citation to Plowden 17, supra X; This is also referenced by Sir John Comyn’s in his Digest of the Laws of England (1776), Title ‘Agreement’ A.1; and in *Wain v Warlters* (1804) 5 East 10, 16 which references both Comyn’s use of the definition and his citation of Plowden, of which Ellenborough says ‘better [authority] could not be cited.’ This was all cut in the second edition.

⁶⁸⁰ 3. This is taken from Plowden’s Commentaries, 140, and Serjeant Catline’s argument in *Browning v Beston* in B.R. Trinity Term, 1 Mary.

⁶⁸¹ In many ways, Comyn is more similar to Gilbert than Blackstone.

⁶⁸² Comyn, 1st edition, 5.

⁶⁸³ Comyn’s list of contractual requirements placed personal capacity first and assent last, 1st edition, 1-3.

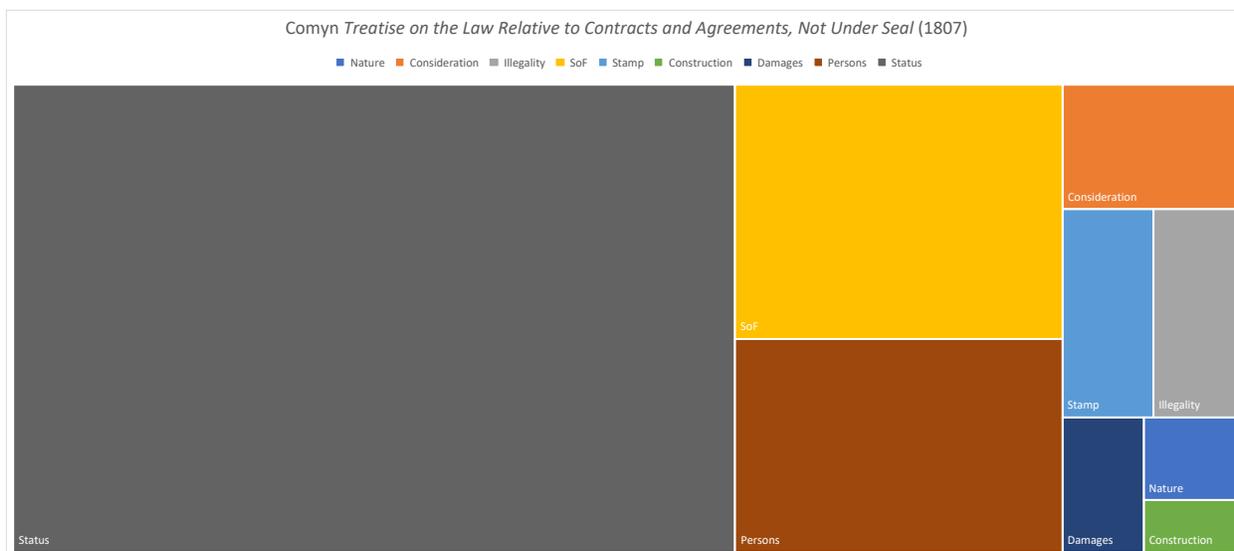


Fig 57. Comyn Topic Breakdown (General)



Fig 58. Comyn Topic Breakdown (Complete)

The preponderance of Comyn’s focus is clear in these graphics: specific transactions; ‘persons’ rules related to contractual capacity and status; and the formality rules respecting the Statute of Frauds. Although the second edition claims to be ‘much enlarged’, it was, in fact, around half the length of the first, and continued a similar spread of topics. On the other hand, his vista of contract rules was significantly broader than Newland’s, covering a far greater range of transactions. This was a reflection of Comyn’s jurisdictional and procedural scope. If Newland was a descendant of Ballow, Comyn was a descendant of Powell. Like Powell, though with the exclusion of Equitable material, Comyn drew on a

wide variety of sources. He cited Bacon and Brooke's abridgments, law dictionaries, other treatises such as Ballow, nisi prius cases, Plowden's Commentaries and John Comyn's Digest, and Coke on Littleton. As we will see with the 'practical treatises', this variety of common law source material was replaced by the mid-19th century with textbooks and cases.

Samuel Comyn's *Treatise* only made it to a second English edition. A new genre of 'practical treatises' aimed explicitly at practitioners emerged in the wake of this failure. The most important were those by Chitty Jr (1st Edition, 1826) and Addison (1st Edition, 1840). Supplementary works were also published, most likely under the impetus of the caseload, such as Smith's *Leading Cases* (1837). The most significant - and successful - of all these works was Joseph Chitty Jr's '*The Practical Treatise on the Law of Contracts, not under seal, and upon the usual defences to actions thereon*' (*Practical Treatise*). The first edition was published in 1826 and was followed by 16 subsequent editions, making it both the oldest continuous textbook from the period, and possibly the oldest extant contract textbook in the world. Chitty Jr's work was clearly and directly aimed at practitioners.⁶⁸⁴ What did it mean for a treatise to be 'practical?' *The Practical Treatise* put forward three ideas. First, that practitioners wanted indexes or digests of cases as a result of the growth of new contract cases. A treatise which cut out too many cases - as, for example, Colebrooke did - was no longer useful.⁶⁸⁵ Second, *principles*, rather than mere factual abridgment, were the most useful tool for the practitioner,⁶⁸⁶ especially for the purposes of 'deduction.' Finally and most importantly, of these general principles, the most useful were those applicable to all contracts.⁶⁸⁷

The origin of Chitty Jr's 'general part' was clearly Volume 3 of *The Law of Commerce and Manufacturing*,⁶⁸⁸ written by his father Joseph Chitty Sr, and brother Thomas Chitty.⁶⁸⁹ To understand *The Law of Commerce* we need to take a brief detour into another, earlier genre of treatise: the *mercantile treatise*. These earlier manuals were aimed explicitly at the merchant, and sought to give a mixture of business and legal advice. The earliest was Beawes's *Lex Mercatoria, or a Complete Code of Commercial Law* (1754) which kickstarted the genre: the *Complete Code*, alongside its 6 editions, was followed by the

⁶⁸⁴ (Richards 1845), 341. 342

⁶⁸⁵ Addison emphasises the number of cases he cites as a selling point - 'nearly four thousand.' 2nd, edition, vii.

⁶⁸⁶ (Anon 1847a), 211, proposes a similar argument that *organisation* would be the most important feature of a work for practitioners.

⁶⁸⁷ That this would encompass all mercantile contracts was not obvious; Smith's *Compendium of Mercantile Law* (1834), for instance, dispensed with a general section.

⁶⁸⁸ Published in 1824, Chitty wrote the preface of the first volume alluding to the completed work in 1820. An early sketch can be found in 1810, *Prospectus of a course of lectures on the commercial law: to be delivered immediately after Michaelmas term, A.D. 1810*. Chitty Jr copied his father's naming convention for 'practical' treatises.

⁶⁸⁹ Chitty Sr notes that his second son, Thomas Chitty, assisted in the preparation of the third and fourth volumes of the publication. See *Advertisement*. In 1838, Edward Chitty, third son of Chitty Sr and Chancery barrister, also wrote a commercial treatise titled *The Commercial and General Lawyer*. Following Blackstone's structure, contracts were sorted under Book II 'Of property and its incidents', Chapter XXII 'Of Contracts', pg 633, though reappeared in Book III under a section on actions. The general discussion under Chapter XXII was mostly taken from the first and second editions of Chitty's *Practical Treatise*, though had a more proprietary flavour. To finish the family portrait, the third edition of the *Practical Treatise* was also edited by the youngest Chitty brother, Tompson.

Points of Law and Equity Regarding Trade and Commerce (1792), Montefiore's *Commercial Dictionary* (1803), and John William's *Laws of Trade and Commerce* (1812). Shortly thereafter, Chitty Sr, having ceased editing the latest editions of *The Complete Code*, released the *Treatise on Commerce and Manufacturers*, thereby combining for the first time the general law of contract and the mercantile treatise. At this point, the General Contract Treatises and Mercantile Treatises were interlinked, the latter usually incorporating a 'general principles' section.⁶⁹⁰ Unlike their 'general treatise' progeny, however, the mercantile treatise authors attempted a far closer fusion of political economy and law.⁶⁹¹ Beawes, for instance, expressed fairly standard 18th century mercantilist principles,⁶⁹² emphasising balance of trade and the vital role of trade protectionism to defeat France.⁶⁹³ By 1803, however, mercantile writers were grappling with a new political economy. Montefiore's *Commercial Dictionary* referenced and attacked Smith's theories,⁶⁹⁴ opposing Smith's views on maximum prices and the forestalling offences, and regarding him as hopelessly contradictory on the loan interest rates.⁶⁹⁵ Slightly later works, such as Williams's *Laws of Trade and Commerce* (1812) were shot through with references to 'Dr. Smith,' and came to wholly support his theories.⁶⁹⁶ The mercantile treatises also diverged from the general, 18th century literature in their subject matter. Naturally, they included more commercial contracts, with an overwhelming maritime dominance in the early treatises,⁶⁹⁷ out of which a variety of other specific contracts emerged and separated. By 1834, with Chitty Sr's and Smith's Treatises acting as turning points, the emphasis began to shift towards more 'classic' commercial topics like partnership, agency, corporations, sale of goods, and negotiable instruments.⁶⁹⁸

The *mercantile treatise* context of Chitty Sr's *Law of Commerce* explains many of its features. Chitty Sr made his intentions behind compiling his work clear in the preface to Volume 1: a 'comprehensive view' of the whole of commercial law is both *interesting* and of *practical* importance. In particular they are *nationally* useful: Chitty Sr argued Great Britain was able to contend with, and defeat, the great European powers partially because of its '*Commercial Constitution*.'⁶⁹⁹ Fitting the wider genre, his work was addressed to merchants and statesmen in addition to the practising lawyer.⁷⁰⁰ Within this scheme, Chitty Sr considered the legal regulations on trade arising from acts of foreign states; the public regulations of

⁶⁹⁰ See the titles under the *Mercantile Treatises* heading of the Bibliography.

⁶⁹¹ This was likely due to the influence of works such as *Cavary* and *Vattel* from the Continent, attempting to provide general accounts of the relations of trade between countries.

⁶⁹² Chitty Sr added a reference to Adam Smith when editing the 6th edition (1813), 98; this mirrors his other work, such as his treatise on *Apprentices*. *supra*.

⁶⁹³ *Complete Code*, 566-8, 592-593; cf Mildmay, 3, 7-12, 53.

⁶⁹⁴ In his *preliminary treatise*, Montefiore, possibly following Beawes, focuses on the balance of trade, regarding it as synonymous with the 'wealth and greatness' of the country, xxvi-xxvii.

⁶⁹⁵ See Entries on *Labour*, *Maximum*, *Interest of Money*, and *Regrating*.

⁶⁹⁶ Most patently in the chapter '*On Commercial Politics*.'

⁶⁹⁷ *Complete Code*, 567, describing trade as 'The Nursery of Sailors'

⁶⁹⁸ For an argument employment was one of the driving subject matters of the new will-oriented contract law, see (Orth 1998), 62-4.

⁶⁹⁹ v-vi.

⁷⁰⁰ *ibid*.

commerce; and, finally, ‘those regulations which relate merely to the *private interests* of trade.’ Chitty Sr’s general law of contract must be seen as embedded in a wider project, delineated by two distinctions: first, between foreign nations and Great Britain, and, second, between the public realm of ‘municipal regulation’ and the ‘more important’,⁷⁰¹ private realm of ‘commerce itself’,⁷⁰² formed “independently of all political purposes.”⁷⁰³ The source for this structure, and the underlying political philosophy, was straightforwardly stated by Chitty Sr in Chapter 1 of Volume 1 and matched that of other early-19th century mercantile treatises. Following Archdeacon Paley,⁷⁰⁴ Adam Smith,⁷⁰⁵ and Thomas Malthus,⁷⁰⁶ he believed ‘the great object of all rational politics is to produce the greatest quantity of happiness in a given tract of country’, of which it is the duty of the legislature to encourage.⁷⁰⁷ When it came to ‘interference by the legislature’, Chitty Sr, citing the political economists above, held that any ‘active interference of the legislature with its subjects, by prohibiting or restraining any particular breach of honest labor...’ would ‘retard[] the advances of public opulence.’⁷⁰⁸ Instead, the public benefit was best served by allowing every individual free choice in how they expend their capital and labour under free competition.⁷⁰⁹ A regulator who attempted to do so on the behalf of others would both secure a despotic power and quickly become overloaded with the required attention.⁷¹⁰ Of course, Chitty Sr was not entirely opposed to public regulation - he allowed that specific exceptions may be desirable to further national defence, develop strategic industries like the fisheries, encourage innovation via patents, or to ‘subordinate the lower class of people’ by preventing combinations.⁷¹¹ Running alongside his political economy, Chitty Sr also argued for the liberalisation of Britain’s international trade,⁷¹² supporting, for example, its ‘colonial trade’,⁷¹³ though emphasised, consistent with his own juristic writing, the special importance of internal domestic trade.⁷¹⁴ Chitty Sr’s political beliefs seem to have influenced the work of his son, albeit mediated by Chitty Jr’s use of multiple sources.

⁷⁰¹ Chitty Sr, *Treatise*, volume 3, 1.

⁷⁰² *ibid.*, for the ‘illusory’ nature of this division, Sugarman and Rubin, *supra* (n74), 11.

⁷⁰³ *ibid.* 1.

⁷⁰⁴ cited also in Chitty Jr, 2nd Edition, 62

⁷⁰⁵ For commentary on the role of Dr Smith in early 19th century caselaw, see (Hay 1999), fn 16, 105.

⁷⁰⁶ He was also clearly influenced by Joseph Child’s *Work on Trade*, though abandons the latter’s acidic distaste for the court system.

⁷⁰⁷ Volume 1, 1. An earlier account of these views can be found in (Chitty Sr 1812)

⁷⁰⁸ *ibid.*, 4.

⁷⁰⁹ *ibid.*, 7.

⁷¹⁰ *ibid.*, 6; for applications, see (Chitty 1919), pg. 527, fn (h), citing *The Wealth of Nations* to justify narrowing the scope of the traditional engrossing offences.

⁷¹¹ *ibid.*, 6-7.

⁷¹² *ibid.*, 73 for his extended discussion on the ‘freedom of trade.’

⁷¹³ The enforced, exclusive trade with its coloniser, incidentally, being excepted from Chitty’s general principle that freedom of trade was to be encouraged, *ibid.* 77.

⁷¹⁴ *ibid.*, 12.

Chitty Jr's *Practical Treatise* drew much of its substance from *The Law of Commerce*;⁷¹⁵ the latter, however, was highly fragmented, with most of the topics being placed more or less randomly.⁷¹⁶ To remedy this defect, Chitty Jr drew from the first edition of Comyn's *Treatise*. Following the apparent treatise convention of referencing all but your most important sources, Chitty Jr did not cite Comyn; nonetheless, Chitty Jr's work was an act of extensive borrowing. The *Practical Treatise* adopted the same subject matter of *contracts not under seal* and, consequently, the same basic division between contracts by *parole* and by *specialty*.⁷¹⁷ The internal structure was almost identical, occasionally even copying the title of the headings,⁷¹⁸ with the most substantial alterations being to shuffle the section on construction to the beginning, and move a few of the sections around within chapters. Even the second edition, which significantly revised the first, did little to alter this influence. The result was a topical breakdown which resembled Comyn's:

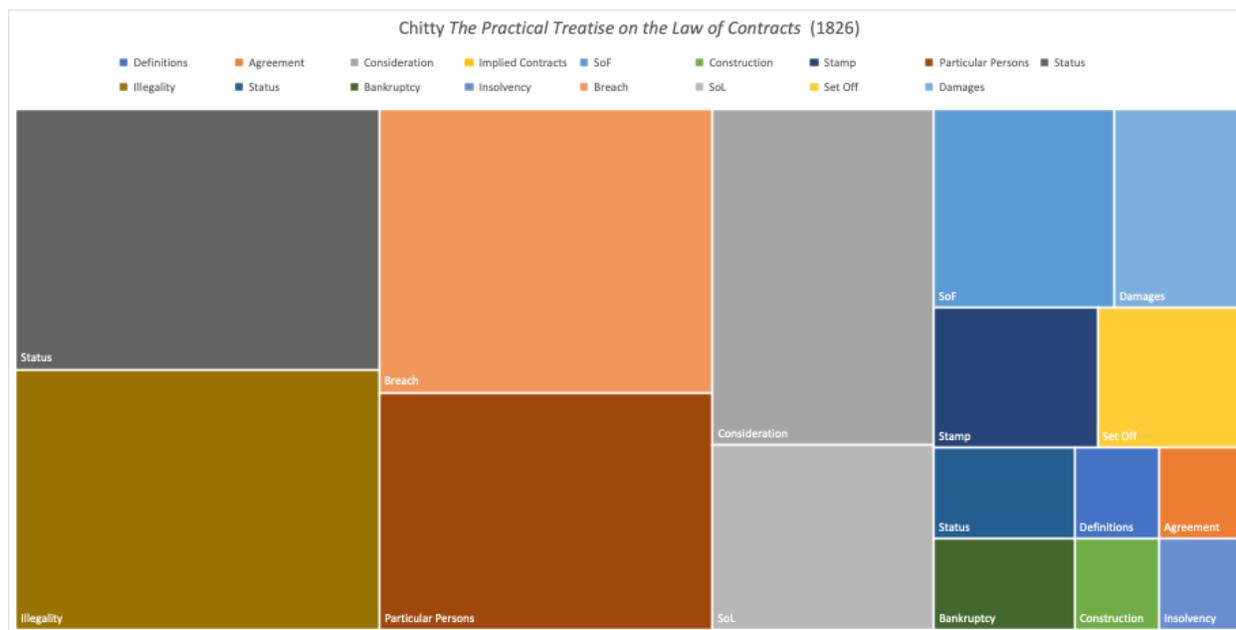


Fig 59. Chitty *The Practical Treatise* (General)

Like Comyn's *Treatise*, Chitty Jr's structure placed special emphasis on Status, Persons, and the Statute of Frauds. Nonetheless, Chitty Jr had a more balanced spread of space for each topic than Comyn and,

⁷¹⁵ The *Practical Treatise* is not identical to the *Treatise on Commerce* and owes more in structure to Comyn's work. Nonetheless, whilst uncited, much of Chitty Jr's discussion, especially in the general part, comes from his father's work.

⁷¹⁶ So much so that its table of contents does not describe the linear order of topics, a trait partially shared in the first and second editions of Chitty Jr's *Practical Treatise* due to the overlapping of status rules and pleading defences.

⁷¹⁷ *Treatise, 1st edition*, 1. Chitty Jr adds a third kind - 'by record', taken from his father's *Treatise on Commerce*, 5 which, in turn, seems to be a borrowing from Blackstone's more narrow discussion of the types of *debt*, Vol II, 465.

⁷¹⁸ Eg. Part the First 'Of the Nature and Requisites of a Contract and Agreement by Parol' is adapted by Chitty Jr as 'The Nature, Requisites, and Construction of a Contract Not Under Seal.'

importantly, was able to extract the law on defences from the rules of pleading.⁷¹⁹ This addition - *Chapter VI* - is probably Chitty Jr's greatest innovation from Comyn's *Treatise*. It came, however, with growing pains. The oddities of Lawes's *Treatise* reappeared, with Chitty Jr emphasising the importance of the rules of special pleading before conceding the wide allowance for giving special pleas in evidence under the general issue. This split allowed him to extract the special pleas as defences, producing substantive sections for areas such as: performance, non-performance, tender, failure of consideration, and the statute of limitations. The result was, however, discordant: Chitty Jr stated his work was intended for nisi prius practitioners, and the resultant inclusion of both substantive and procedural law produced repetition. It would take at least 13 editions to remove some of these 'vestigial' sections, such as the duplicated discussion of coverture, infancy, and insolvency. Nonetheless, Chitty Jr's overall attempt was a success: from the second edition onwards, with a hiatus produced by the Hilary Rules, the pleading dimension of these rules was slowly stripped away. By the 6th edition, it had transformed into a novel, purely substantive discussion of performance and breach. Chitty Jr had succeeded where Comyn had failed: he had fused the procedural with the substantive and filled out the General Part.

There was another important consequence of Chitty Jr's use of Comyn's forms of action structure: he adopted Comyn's limited jurisdictional diet. The result was the total omission of the equitable material previously included in his father's *Treatise on Commerce and Manufactures*.⁷²⁰ Consider, for instance, the discussion of mental incapacity. In the *Treatise on Commerce*, Chitty Sr cited Chancery cases and treatises covering equitable material, such as Fonblanque on Ballou and Powell. Following such material, he suggested any who lose 'their intellects through grief, disease, or sickness', lacked contractual capacity.⁷²¹ The first edition of Chitty Jr's *Practical Treatise* was much sparser, noting that agreement itself 'supposes a free, fair, and serious exercise of the reasoning faculty,'⁷²² and that 'there is no defence 'at law or equity' for one of weak intellect. The second edition gave a much fuller explanation, suggesting 'the law *presumes* that there is a full capacity to contract' and any grounds of relief on mental inability are 'exceptions to the general rule'⁷²³ which must therefore be closely confined. Similarly, whilst Chitty Sr included the equitable rules on presuming fraud from grossly unequal consideration, Chitty Jr's gave the following principle:

⁷¹⁹ This is unsurprising given his strong support for special pleading; he may also have been influenced by his father who wrote an important pleading textbook on the subject.

⁷²⁰ Though note, at 620, the section on specific performance was already marginalised as a result of the Chancery's refusal to specifically perform non-land related contracts.

⁷²¹ Chitty Sr, vol 1, 50

⁷²² 1st edition, 4.

⁷²³ *ibid* 108

*“it would be unwise to interfere... with the free exercise of judgment and will of the parties, by not allowing them to be sole judges of the benefits to be derived from their bargains.”*⁷²⁴

Through these omissions, Chitty Jr effectively foreclosed any possibility of expanding the equitable grounds and an open-textured model of contractual relief. These choices were reflected in his general definition of contract. The first edition of the *Practical Treatise* gave a highly abstract, barely modified version of Comyn’s general definition for a contract not under seal.⁷²⁵ The cited source material was also identical to Comyn’s. The changes Chitty Jr did make were subtle, such as shuffling Comyn’s contractual criteria around to place ‘mutual assent’ at the start and abandoning Blackstone’s *Chose in action* analysis. The second edition’s theoretical discussion was significantly restructured and seems to have drawn material⁷²⁶ from Pothier’s *Traité des Obligations*.⁷²⁷ The changes introduced were not at the macro-level: Chitty Jr continued to use the first edition’s basic division between *parol* and *specialty*; continued to emphasise the will of the parties; and kept the general definition of contract from Comyn. Nonetheless, he significantly expanded the sections on *agreement*, for example, by drawing from Pothier’s material on offer and acceptance, and provided more extended principled explanations for the rules. It would be fair to describe Chitty Jr’s second edition as ‘taking agreement seriously.’⁷²⁸ The first and second edition sharpened up, and filled out, of Comyn’s general model of contract law in detail and principle. They are also a useful reminder that the doctrinal formulations adopted by Chitty were by no means 19th century innovations. Instead, these formulations appear like ‘bricolage’: older rules, sometimes dating to the 16th century, were selected because they were compatible and convenient for the purposes of the work. It is here, however, at the second edition, the story ends: Chitty Jr died four years after its release and his theoretical superstructure - the definition, taxonomy, and chapter structure - were all frozen in place. The 16th edition, the last in the period, is virtually unchanged from the 2nd.

To move past the sluggish path-dependency of *Chitty*, we must turn to Addison’s *Treatise on The Law of Contracts and Rights and Liabilities arising ex contractu*’ (1846). Like Chitty Jr, Addison sought to provide a practical work in response to the growth of case law,⁷²⁹ although one aimed at the suitors in the new County Courts rather than practitioners at nisi prius.⁷³⁰ Interestingly, Addison also partially prefigured the later ‘*Academic Treatises*’ in his intent to provide a work of contract law suitable for a scientific, ‘liberal education.’⁷³¹ Following this more theoretical ambition, and the earlier ideas of Jones,

⁷²⁴ *ibid* 7.

⁷²⁵ *ibid* 3

⁷²⁶ (Lobban 2010c), 302-5 argues this was only limited surface borrowing.

⁷²⁷ His discussion of the English use of the term *obligation* hints at Evans as his source material.

⁷²⁸ In this regard, Simpson, *supra* (n657) 260, describes Comyn and Lawes as the ‘last bastions of the old order’.

⁷²⁹ Addison claimed in the preface to the 2nd edition that over ‘two thousand’ new cases had been adjudged since the first edition, a mere two years prior.

⁷³⁰ Addison, 1st edition, iii.

⁷³¹ *iv*.

Addison argued contract law was founded on the ‘general principles of universal law.’ These were said to emerge from a ‘uniformity of circumstances’,⁷³² and Addison frequently cited Justinian’s Institutes as evidence of the wide permeation of the principles.⁷³³ Whilst this appears to be apolitical, Addison endorsed similar political-economic principles to Chitty Sr and, for that matter, Chitty Jr. We get indications from the second volume of his travel guide to Damascus and Palmyra under Chapter 16, the “Past and Present State of Syria.”⁷³⁴ Addison’s basic model was, first, that national greatness follows from the wealth generated by private commerce,⁷³⁵ and second, that such wealth will only be generated if industrious individuals are secure in their private property and personal freedom.⁷³⁶ In turn, such security is only possible with upright, uncorrupted, independent judges, and a national policy directed towards economic growth rather than military posturing, perhaps only attainable with a stable, legitimate king.⁷³⁷ Addison’s views, insofar as he agreed with extracted testimony from a British merchant, were mostly sceptical of governmental interference: the state’s new, extensive taxes; government contracts; and prohibition on sales of different products would ultimately prevent productive, self-directed individuals from planning for the future and improving their lot.⁷³⁸

Unlike Chitty, however, Addison’s political views did not appear explicitly within the *Treatise on Rights and Liabilities*. The reason is attributable in part to Addison’s unique structure. He adopted two overarching schemes: first, the familiar division of contracts by *specialty* and *parole*, though unlike Chitty Jr and Comyn he included both in the substantive text;⁷³⁹ second, a wholly unique structure based on whether the rules apply to plaintiffs (‘rights’) or defendants (‘liabilities’). The overall bi-partite division of Parts 1 and 2 in the first edition followed the second scheme; as noted in review, there is no explanation for this singular choice. The result was a divided and non-navigable behemoth, with extensive repetition and separation of similar material; Addison’s first edition is therefore also a case study into why the rules of joining parties are not a useful structure for a treatise. Within each section, the structure followed the first scheme and it was the *parole-specialty* division which does most of the theoretical work. Consequently, Addison’s *Treatise* is framed almost entirely in terms of formalities.⁷⁴⁰ The definition of contract, and its leading principles, were essentially the reasons for different formality

⁷³² *ibid*

⁷³³ *ibid*

⁷³⁴ A similar emphasis on ‘security of persons and property, as well as ‘commercial credit’ and its necessity for national success, can be found in the preface to his *Treatise* v-vi.

⁷³⁵ (Addison 1838), vol 2, 246-8, 261-263

⁷³⁶ *ibid*. Interestingly, *pace* Chitty Sr, Addison attributes more responsibility to the administration of justice rather than substantive law itself; this likely followed from his view that the substance of the law was essentially the same globally, and thus to explain national differences another cause was necessary (vii).

⁷³⁷ *ibid* 254, 258

⁷³⁸ *ibid* 255-257

⁷³⁹ (Anon 1847a), 211, regarded this as one of the shortcomings of his structure; indeed, Addison may overuse it, dividing all his sections on the basis of contracts by deed or *parol*.

⁷⁴⁰ Many of the chapters are explicitly bifurcated into ‘Section I: Deeds’ and ‘Section 2: Simple Contracts.’

requirements.⁷⁴¹ The section on simple contracts exclusively contains rules of consideration, taken as a rule of form,⁷⁴² relegating agreement to a discussion of mutual promise contracts.⁷⁴³ The most ‘general’ Chapter, “Of the Authentication, and Establishment in Law, of Contracts Generally”, is absorbed by the rules of when different formalities, such as sealed deeds, stamps, signatures, and writing, are required.⁷⁴⁴ These structural choices left Addison with a very austere menu of contractual principles, and culminated in a highly formal style. Where he did go beyond form, such as in his discussion of consideration, he revealed basic liberal impulses:

*“[I]f parties, therefore, choose to enter into unwise and improvident bargains, they must abide by the consequences of their own rashness and folly; they have contracted for themselves, and the court cannot contract for them.”*⁷⁴⁵

Unlike Chitty Jr’s almost identical discussion, however, Addison did not need to assert these claims baldly and could instead cite various cases to supply the justification.⁷⁴⁶ In addition to this turn to formalism, Addison’s structure brought two other developments: he abandoned the action of *assumpsit* as his organising fulcrum, and therefore could re-include equitable jurisprudence (albeit sparsely).⁷⁴⁷ Further, abandoning *assumpsit* allowed Addison to produce a unified the law of contracts, formal and informal, essential under any will-based model.

Two years, and apparently two thousand cases later,⁷⁴⁸ Addison released the second edition of his treatise. Much like the jump in Chitty Jr’s *Practical Treatise* this edition was substantially larger than its predecessor; in addition, spurred by the first’s ‘defective arrangement’, Addison stated it was what the first would have been ‘at the outset’ had its production not been so disjointed.⁷⁴⁹ He radically reworked the entire structure, re-producing the more standard approach of a general section, containing a theoretical definition, rules of illegality, formalities, and parties, followed by various specific contracts, like land, goods, mortgage, letting and hiring, bailments, and insurance. Addison, much like Comyn and Chitty Jr, placed other transactionally neutral rules at the end, such as stamp duties, specific legal statuses, interpretation, damages, assignment, and the effects of death. The second edition, perhaps under pressure from the reviews, added a general definition: a quote from Pothier based on agreement followed by Chitty

⁷⁴¹ *ibid* 18

⁷⁴² *ibid*

⁷⁴³ *ibid* 36.

⁷⁴⁴ *ibid* 85

⁷⁴⁵ *ibid* 39, this principle clashes somewhat with his earlier discussion of consideration as a paternalistic formality, 18, also citing case law as a justification for this principle in the second edition, 13.

⁷⁴⁶ *ibid* 39

⁷⁴⁷ The 4th edition 1856 added a section on specific performance; it took until the 12th edition (1890) of Chitty to add one, coinciding with Lely’s title alteration.

⁷⁴⁸ *ibid* vi

⁷⁴⁹ *ibid* v

Sr's *Record-Deed-Parole* division.⁷⁵⁰ Further additions were made in the 3rd Edition (1853), bringing it yet closer to Chitty Jr's coverage, and the 4th (1856) removed the last vestiges of the first by substituting 'Section I: Contracts by Records, Deeds, and Simple Contracts' for the previous formalities-based split. Unlike *The Practical Treatise*, Addison and the subsequent editors were willing to alter the treatise extensively throughout the entire period. The subject-matter focus continued shifting, growing larger and more diverse. Consider these diagrams:

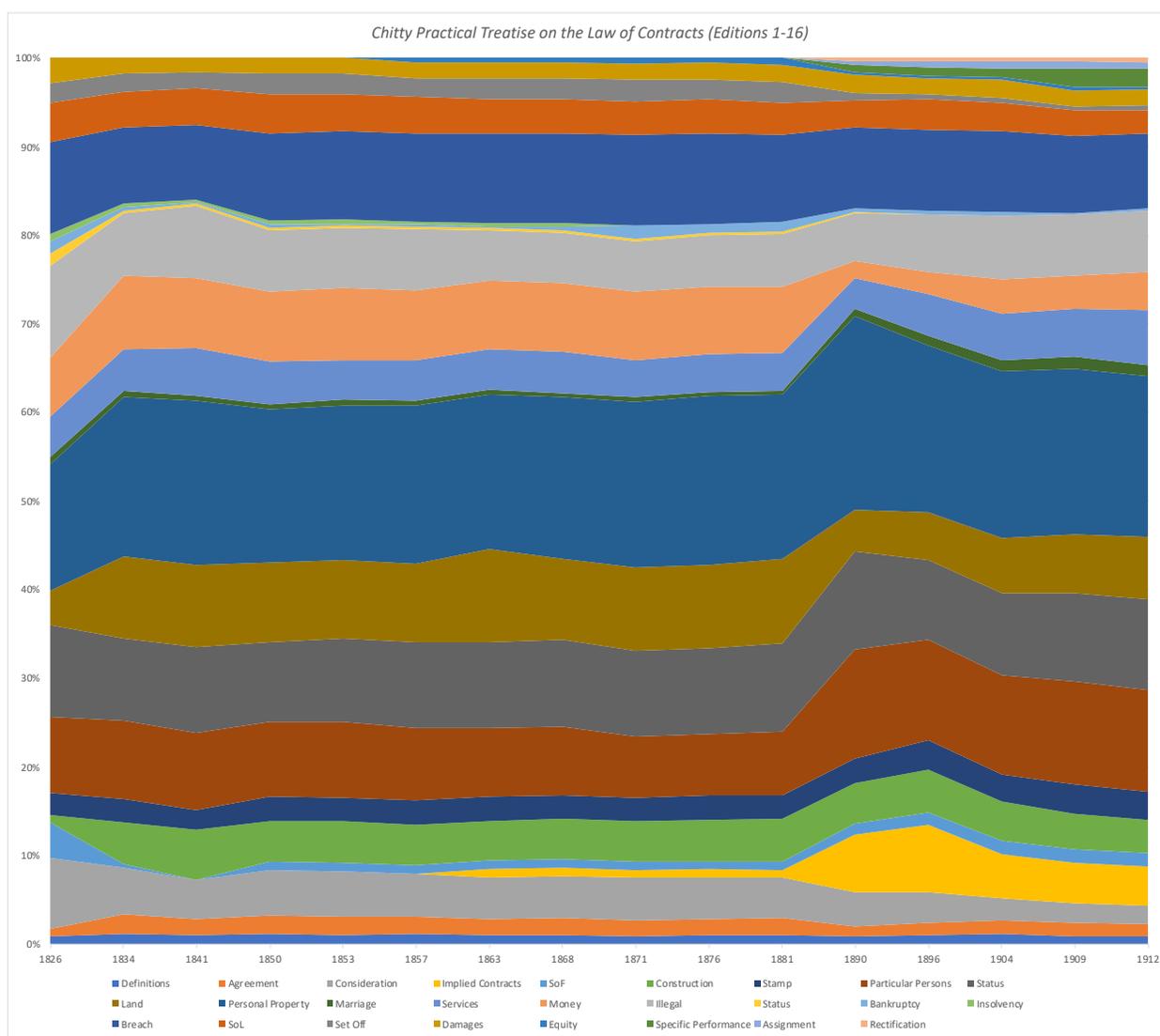


Fig 60. Chitty Practical Treatise (General Part)

⁷⁵⁰ *ibid* page 3.

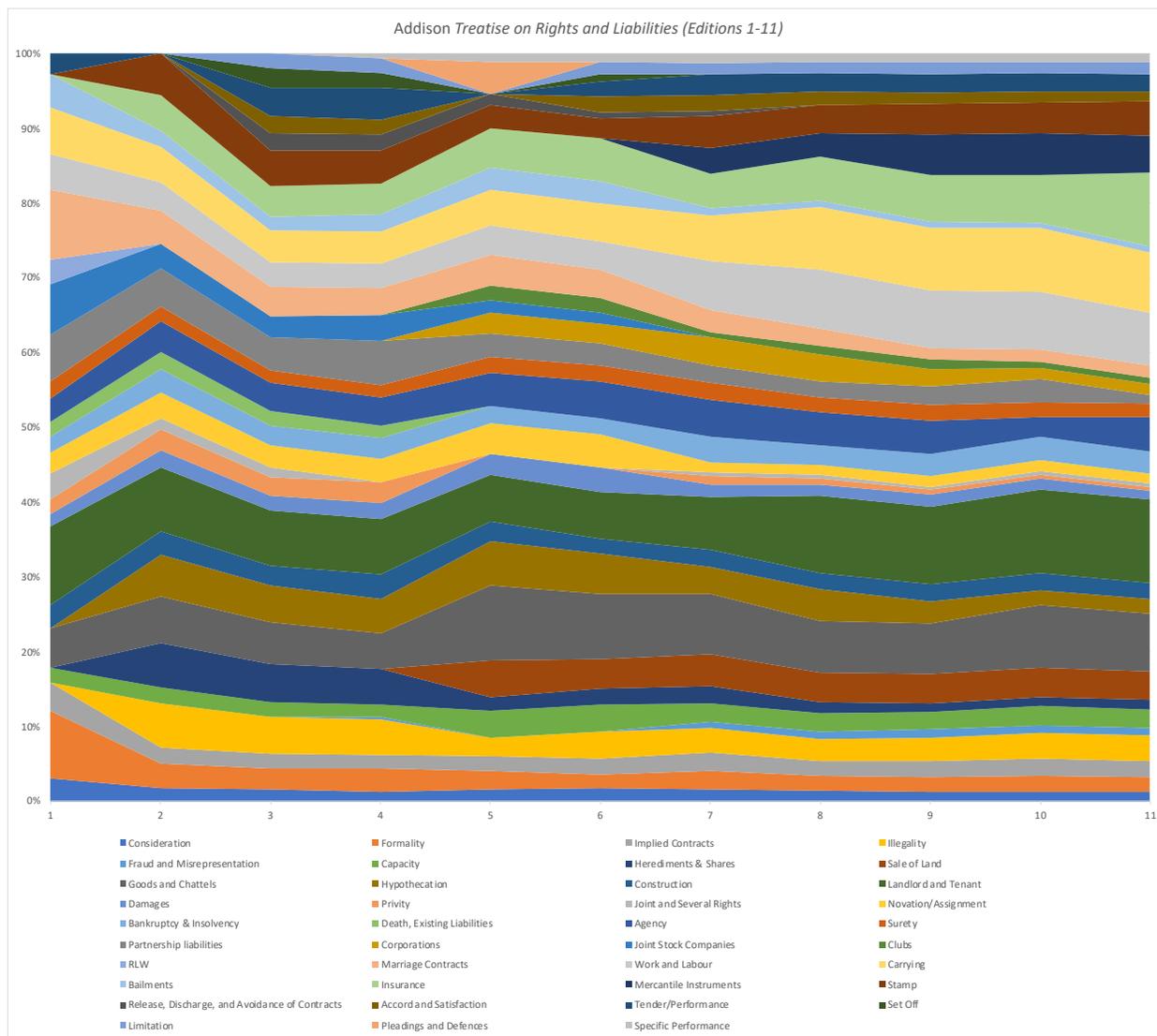


Fig 61. Addison *Treatise on Rights and Liabilities* (General Part)

Addison's *Treatise* also underwent more radical theoretical and organisational changes. The 5th Edition (1862) was retitled '*A Treatise on the Law of Contracts*'⁷⁵¹ and, following this rebrand, Addison replaced the old introduction with one wholly structured by Chitty Sr's tripartite division.⁷⁵² The most important

⁷⁵¹ *A Practical Treatise* was renamed '*A Treatise on the Law of Contracts and Upon The Defences to Actions Thereon*' by the editor of its 6th Edition (1857), John Russell. In the 13th (1896), editor J. M. Lely dropped the latter half, leaving '*A Treatise on the Law of Contracts*.'

⁷⁵² The production of Addison's *Treatise on the Law of Torts* two years earlier exerted its own influence via boundary redefinition: previous contractual material, such as deceit, fraud, and waste, was moved out on the basis it was now 'tortious.'

change came in 7th Edition (1875), reshaping the treatise into the paradigmatic classical structure: a section *exclusively* dealing with general rules followed by a section *exclusively* dealing with specific transactions. Restructuring the previously jumbled table of contents in this way did not take much of a leap, and two obvious precedents already existed: Stephen's Draft Indian Contract Act, and Leake's *Elements of Contract Law*. True to treatise tradition, the editor responsible, Lewis W. Cave, disclaimed any major influence from either work, denying he had read Fitzjames Stephen's Draft Indian Contract Act before creating the structure and omitting mention of Leake's *Elements* entirely. Nonetheless, their influence is obvious, and it is to these more academic works we must turn.

3.3 Textbooks after the Fall (1867-1914)

The English legal system had changed significantly in the forty years following the first edition of Chitty Jr's *Practical Treatise*. A new genre of contract literature was emerging: the 'academic treatise.' These treatises occupy a slightly strange place in the English legal canon: published too late to be placed squarely in the 'laissez-faire' period of contract history,⁷⁵³ but equally taken as the paradigmatic statement of the period's 'classical model'. They also have the distinction of being the most closely studied treatises from the 19th century, possibly because of their academic focus. I consider two 'classic' works in this genre in detail: Leake's *Elements of the Law of Contract* (1867) and Pollock's *Principles of Contract at Law and Equity* (1875). The general quality of all the academic treatises - condensed, didactic, 'scientific' - and their intended audience - students and practitioners - was a response to several important developments. The first was a transition in English legal method. The obvious immediate stimuli to Leake's work, for example, was the tentative mid-19th century movement towards the academic, university-based study of law⁷⁵⁴ and, correlatively, the desire to reform English law to make it more 'scientific.'⁷⁵⁵ The latter may have been encouraged by comparisons with foreign legal systems - such as the Code Civil - and the perceived advantages of 'scientific law' as a legal transplant in the colonies.⁷⁵⁶ These changes, in turn, came alongside a second development: the Common Law Procedure Acts 1852-4 (CLPA). The CLPA's procedural reforms had a two-fold effect: first, they allowed for the creation of new substantive law by loosening the rules of pleading; second, they permitted equitable defences to be plead at common law, increasing pressure to reconcile the jurisdictions in the treatises. As Macmillan argues, it

⁷⁵³ Atiyah, *supra* (n299) dates the 'fall' of freedom of contract from 1870 onwards.

⁷⁵⁴ For a detailed survey, (Lacis 2024). Macmillan suggests this was spurred by the increase in barrister numbers (Macmillan 2022), 108, fn 15; see also Cocks *supra* (n65), Chapters 4, 5. Sugarman, *supra* (n646), 29, argues that the desire to establish professional credibility as professors was an essential reason why Pollock and Anson chose their expository, formal style.

⁷⁵⁵ Attempts to increase the scientific study of law were closely linked to educational reform. Macmillan, *ibid* 113 suggests this process only seriously commenced with Leake (and Sir Edward Fry).

⁷⁵⁶ Macmillan, *ibid* 108. 'Legal science' is also closely related to its role as a colonial tool, see Lacis, *supra* (n754) for the educational context. For a careful analysis in the context of the ICA, see Tofaris, *supra* (n155), Ch 5.

is difficult to imagine how the doctrine of mistake, and, indeed, several of the vitiating factors, could have been integrated into a single treatise before this procedural reform.⁷⁵⁷

With these changes as backdrop, Leake's *Elements of the Law of Contract* was the first step towards producing the general part we are familiar with today.⁷⁵⁸ I will consider three aspects of Leake's work: its purpose, methods, and legacy. Leake was, far more than Chitty or Addison, a product of academic legal teaching. Unlike his predecessors, he explicitly addressed his work to both students and practitioners, framing it as an 'index of reason and principle.'⁷⁵⁹ The second edition (re-titled a 'digest') went further: reflecting the general codification movement at the time, Leake aimed to produce a draft contract Code (connected to a code of property) which could be adopted by the legislature.⁷⁶⁰ It is important to remember that, unlike the modern division of *Law Commission Report*, *Student Textbook*, and *Practitioner Textbook*, Leake believed it was coherent, and indeed necessary, to aspire to all three of these goals in a single work. As noted above, Chitty Jr had already established that there was a real *practical* need for clear, easily-understood principles; that this primarily academic procedure could, in turn, set the scene for a code was also well established. Just a few years prior, the Indian Contract Act 1872 had been drafted. The Act itself was based on an earlier, 1860 digest of 'The Law of Contracts as Administered in the Courts of British India', by William Macpherson.⁷⁶¹ From Leake's perspective, the most practically *convenient* source of law was a code; the ideal code, in turn, would require the use of scientific methods produced in academic context, assimilating the now immense mass of English authorities.⁷⁶²

Despite these ambitions, however, Leake's work failed as a precursor to codification and was pipped, in turn, by Anson as the pre-eminent student textbook.⁷⁶³ From the preface of the third edition,⁷⁶⁴ Leake had reconciled himself to the fact his treatise, despite being aimed at students, was mostly used by practitioners.⁷⁶⁵ This was reflected in Anson's commentary, suggesting that, unlike Pollock, "Leake treats contract as a subject of litigation from the point of view of pleader's chambers... Leake treats the subject from every point of view in which it can interest the litigant."⁷⁶⁶ This is a good reminder, first, that dichotomies between practice/science, and practitioners/students, are fluid; and, second, what constitutes

⁷⁵⁷ Macmillan, *ibid*, 107-8; (MacMillan 2010), 69-71.

⁷⁵⁸ As stated by (Macmillan 2022), *ibid* 114-5 ; though arguably the Indian Contract Act draft 1860 had gone much of this distance in emphasising formation, and conceptualising mistake, fraud, coercion, and undue influence, see Tofaris *supra* (n155), Chapter 4.

⁷⁵⁹ Leake, 1st Edition, *Preface*, (vi); Second Edition, *Preface*, viii-ix.

⁷⁶⁰ Macmillan, *supra* (n754), 120-2.

⁷⁶¹ W Macpherson, *Outlines of the Law of Contracts, as Administered in the Courts of British India, Not Established by Royal Charter* (London, R C Lepage & Co, 1860) vi.

⁷⁶² 2nd edition, viii-ix

⁷⁶³ Macmillan *supra* (n754), 125-6.

⁷⁶⁴ 3rd edition, vi

⁷⁶⁵ In general, 21-23, (Macmillan 2011)

⁷⁶⁶ Anson, 5th Edition, vi

‘science’ is a matter of both degree and perspective. Leake’s work seems to have been a scientific *and* practical success: Jelf, in 1897, listed Leake as a treatise of ‘pre-eminent excellence’;⁷⁶⁷ the 1911-12 edition of the *Juridical review* noted “during that long tract of time [since the first edition] the work has held an unquestioned place amongst the several front-rank treatises”;⁷⁶⁸ even as late as 1921, Leake’s *Elements* was regarded as a ‘*vade mecum*’ of the practitioner who ‘must have his cases.’⁷⁶⁹

Leake’s purpose was straightforwardly reflected in his methodology. The influence of university lecturers, such as John Austin,⁷⁷⁰ was clear: the substance and arrangement of the *Elements* drew extensively from Austin’s Lectures. It is also possible to trace borrowing from civilian sources, such as von Savigny’s *System of Modern Roman Law*, Pothier’s *Traite*, and the pandectists.⁷⁷¹ Accordingly, Leake’s introduction, more than any other contract treatise at the time, commenced with an elaborate *mapping* of the place of contract law, placing it as a subcategory of personal rights alongside, but distinguished from ‘delict.’⁷⁷² The rest of the treatise, as noted under Part 1, followed this method, dividing and then subdividing repeatedly each of his topics, producing a dense web of concepts and sub-concepts. In addition to the density of sub-division, Leake’s categories themselves were novel. His *Elements* was the first work exclusively treating contract law “in its general and abstract form, apart from specific applications.”⁷⁷³ Previous writers who appeared to recognise a general law of contract only did so “in connection with their immediate practical object.”⁷⁷⁴ Leake instead sought to conceptualise the general part as the primary and *exclusive* subject of his treatise, and devoted his efforts to internally organising it. It was here Leake was most original, both in cutting out the specific rules of contract and re-shuffling a large amount of previously scattered material into self-contained, logically ordered sections. These sections were then ordered into the first ‘chronological model’ of contract, which takes the stages of making a contract as its structure. There appear to be no obvious precedents for this structure: Colebrooke, Macpherson, and Pothier all had similar material, but used an essentially different order for their general topics.⁷⁷⁵ Importantly, unlike Chitty Sr, Leake’s highly abstract general part followed a sophisticated philosophical ideology. Leake believed in the primacy of the individual as the fundamental building block of society; these legal entities - all uniform in kind - would benefit society through their

⁷⁶⁷ Jelf *supra* (n38), 22

⁷⁶⁸ (Anon 1911), 217

⁷⁶⁹ (McN 1921)

⁷⁷⁰ Macmillan *supra* (n754), 111

⁷⁷¹ Macmillan, *ibid*,

⁷⁷² Leake also reproduced, surprisingly, Blackstone’s older classification as a ‘chose in action’, thereby incidentally making it a subcategory of personal property, 1st Edition, 6, fn(a).

⁷⁷³ 1st Edition, v

⁷⁷⁴ 1st Edition, (v-vi); Leake’s concept of a ‘practical object’ was similar to that from the first half of the 19th century: long digests of cases, ‘which the practitioner at present is in the habit of referring with more care and confidence than to any other guide.’

⁷⁷⁵ Macmillan *supra* (n765), 11 notes Leake was ‘less prone to construct a civilian structure from English cases’ than Pollock.

performance of their individual agreements and corresponding duties.⁷⁷⁶ Alongside this abstract model of persons, Leake endorsed a theory of absolute property rights vested in individual owners.⁷⁷⁷ Such a tendency “may be detected with much clearness in the laws of those countries where property is most free; and they give the form to which the laws of all countries must tend to assimilate.”⁷⁷⁸ Leake’s abstract general part flowed straightforwardly from this coldly logical philosophy.

Lofty theories notwithstanding, Leake ultimately had to remain close to the accepted body of doctrine and authority if he wanted his treatise to sell. In this respect, Leake’s *Elements of the Law of Contract* (1867) was produced well into the post-generative period. Consequently, the vast majority of substantive contract law had already formed, and the bulk of basic authorities collected. In addition, the strength of precedent and, concurrently, formalisation, were both well progressed.⁷⁷⁹ Leake’s work, like Addison’s, was highly descriptive and formal: he rarely criticised or engaged with the case-law, and any legal proposition was always footnoted with a long list of cases. In these connected ways, Leake was the inheritor of a pre-existing structure constraining the novelty of his scientific organisation. A brief survey of Leake’s topics corroborates this hypothesis. The *Elements* considered little novel compared to the 4th and 5th Editions of Addison.⁷⁸⁰ We can reproduce the map of topics as follows:

⁷⁷⁶ (Leake 1861), 157

⁷⁷⁷ (Leake 1858), 535

⁷⁷⁸ *ibid.*, 539-540, following the liberal German reading of civil law.

⁷⁷⁹ For a link between the treatise genre and legal authority, Simpson *supra* (n387), 667.

⁷⁸⁰ Notable exceptions are Chapter I, Section VI on Mistake, Fraud, and Duress.

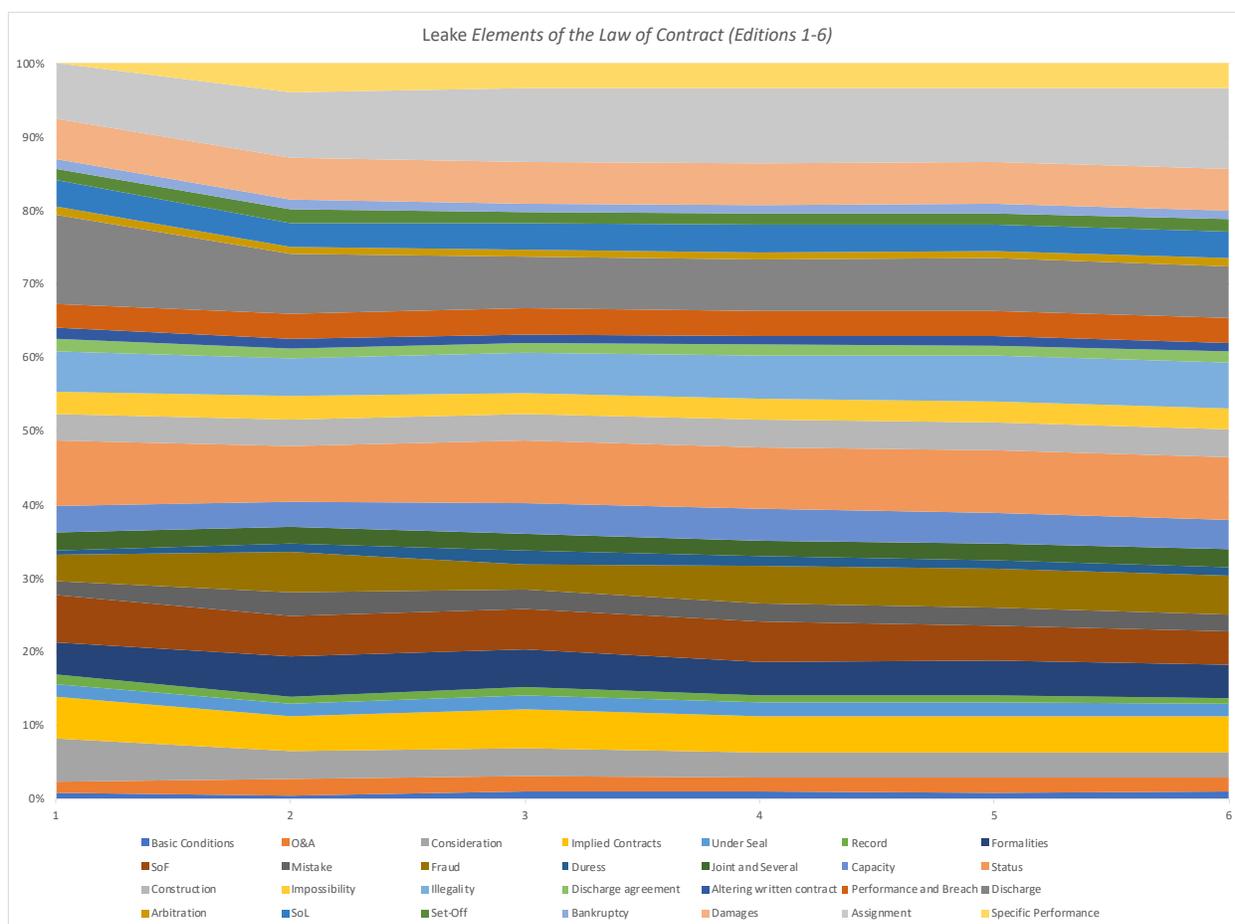


Fig 62. Leake Topic Breakdown (General Part)

Two features of this graph stand out immediately. First, it is highly stable, with virtually no additional topics and little alteration in the proportional space allocated. This linear pattern matches those of Pollock and Anson, and is again indicative of the degree to which contract law had settled by this point. Second, whilst Leake used a highly novel structure, his substantive content reproduced the early 19th century predominance of formality rules,⁷⁸¹ illegality, implied contracts, and status. The legacy of the *Practical Treatise* is clear in Leake’s introductory taxonomy: within formation, he listed Simple Contracts,⁷⁸² Contracts under Seal, and Contracts by Record; his introductory section was followed by a discussion of basic formalities;⁷⁸³ and, in the first edition, though remedied in the second, the exclusion of equitable case-law on the basis of the ‘traditional divide.’ As is evident from the diagram above, little changed in

⁷⁸¹ Eg, the statute of frauds and section ‘formality.’

⁷⁸² Like Chitty Jr, Leake also appended a section on Implied Contracts to his introductory discussion.

⁷⁸³ The introductory section on simple contracts in the first edition, containing consideration and other requirements, is very similar to the 2nd edition of the *Practical Treatise*.

subsequent editions of Leake. Nonetheless, whilst static internally, Leake's *Elements* stimulated changes in other works: clear signs of his arrangement can be detected in later editions of Addison, Chitty and his work directly inspired Anson and Pollock's treatises.⁷⁸⁴

Some, but not all, of the historical motivators of Leake's *Elements* applied to Pollock's work. The latter wrote in the stable, post-generative period stage of English contract law, and clearly intended to produce 'scientific' work. Characteristic of the late-Victorian era, Pollock's aims were far more limited.⁷⁸⁵ He did not intend to produce a code of English law, nor was his work designed to carry out any significant alteration in legal method. Importantly, Pollock wrote in the late-stages of 19th century contract law: the conceptual structure was taken for granted; the need for a 'scientific method' in law already well established; and the possibility of a contract code remote. Accordingly, Pollock's chosen method was typical for his era: he was a strong proponent of treating English law as a 'science'; and, like Leake, he also gave a clear outline of his methodology. To Pollock, legal science meant the identification of important, legally significant upper-appellate precedents which produce uniformity, unlike the laws of nature, through conventional rules.⁷⁸⁶ This consolidation was ostensibly a descriptive project: whilst contract law might "generally favour[] competition wherever free competition is practicable",⁷⁸⁷ this policy was attributable to neither Pollock's own views⁷⁸⁸ nor natural moral principles,⁷⁸⁹ but 'The Common Law' itself.⁷⁹⁰ The Common Law was reified as a distinct body⁷⁹¹ which contained its own immanent policies and purposes. This view reflected first, his empirical view of legal science reliant on a small set of controlling cases,⁷⁹² and second, his confidence, somewhat at odds with the increasing trend towards legal formalism, in the 'common sense' of the common law. Despite this allegiance to custom, and the greater strength of precedent, Pollock had more freedom than Leake in writing his treatise. A further, crucial change had occurred between Leake's *Elements* and Pollock's *Principles*: the Judicature Acts 1873-5, assimilating the jurisdiction of the Chancery and Common Law courts under a single system. These gave Pollock the opportunity to reorganise the rules of equity and the common law: he was the first treatise writer to fully recognise that the Judicature Acts would not only change legal procedure,

⁷⁸⁴ Anson, unusually, directly acknowledged Leake as the source of his work's arrangement. Pollock was more oblique, Macmillan *supra* (n754), 125

⁷⁸⁵ See Duxbury, *supra* (n237) Cocks *supra* (n65), Chapters 8, 9.

⁷⁸⁶ (Pollock 1882), 239-244, 247-8, 257 noting this method is nonetheless *inductive*, deriving general propositions from a mixture of text and memory, rather than purely deductive.

⁷⁸⁷ (Pollock 1912), 95; Pollock, *Principles*, 6th edition, 341

⁷⁸⁸ Pollock to Holmes, 20 January 1910, in PHL i. 158, cited in Duxbury, *supra* (n237), fn 279. Pollock's views are unclear here, though it would seem his wife, Lady Georgina Pollock, was strongly in favour of free trade, fn149. In any event, it is highly unlikely Pollock disagreed with the views attributed to personified Common Law.

⁷⁸⁹ *Supra* (n787), 95; Pollock *supra* (n786), 46, 299, showed some positivist inclinations but never decisively sided with one jurisprudential theory, Duxbury *ibid* ii.

⁷⁹⁰ Although, in Pollock *supra* (n787), 68, Pollock does acknowledge the common law, historically, has been structurally predisposed to competition; in addition, he also notes there are also tendencies of 'socialism' in the common law, 99-100, seemingly following Dicey's chronology.

⁷⁹¹ In the coquettish form of 'our lady the Common Law', a stylistic choice which renders the work almost unreadable.

⁷⁹² For an overview, and critique, see Sugarman *supra* (n646), 26.

but the substance of law itself.⁷⁹³ As we will see in Chapter 5, Pollock engaged frequently with the equitable case law, though his ‘scientific’ approach meant that he typically constrained them with careful definition.

As a matter of structure, Pollock’s *Principles* remained conservative and followed Leake closely. The *Principles* were addressed solely to establishing whether there was a contract or not, and essentially followed Leake’s chronological logic: (1) Agreement; (2) Parties; (3) Form; (4) Consideration; (5) Incidents; (6) Legality; (7) Impossibility; and (8) ‘Vitiating Factors.’ Like Leake, Pollock chose to place ‘parties’ after agreement, and then, in turn, followed with form and consideration. The main innovation was not necessarily in structure but focus:

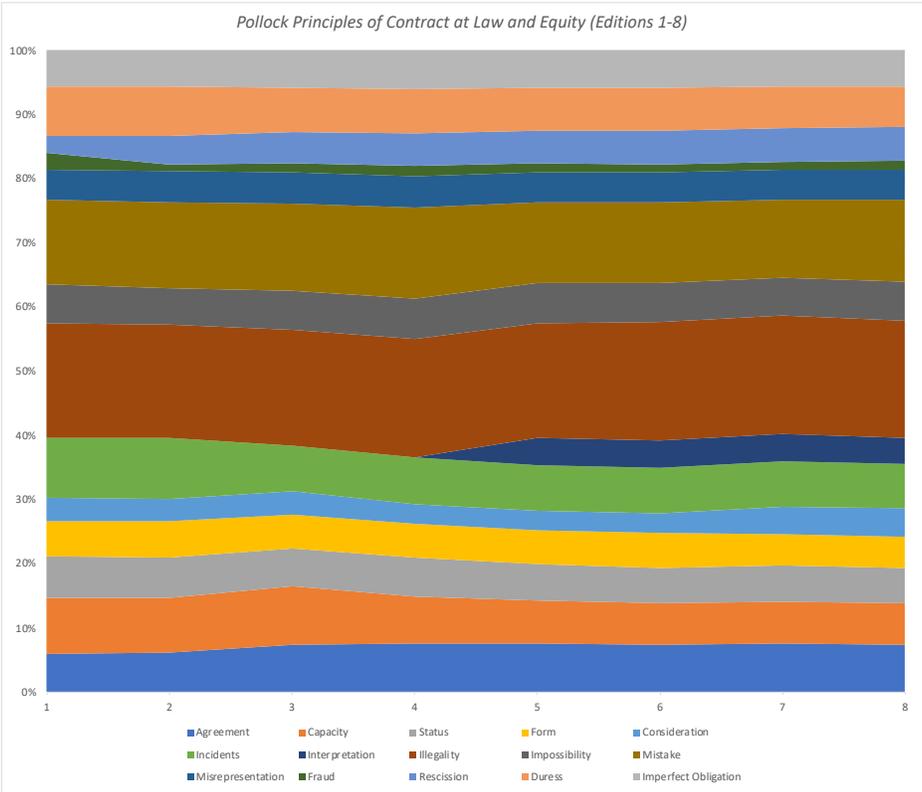


Fig 63. Pollock Principles (General Part)

⁷⁹³ Pollock, 1st Edition, (v-vi); *Law of Torts* (4th Ed), 1895, 2.

As with Leake and, indeed, all treatise writers in the 19th century, Pollock continued devoting a large proportion of his space to illegality. The same stability is reproduced, a fact recognised by contemporary reviewers: “at this time of day (1911) the law of contract is a slow growth, and few of the recent cases have affected any point of principle.”⁷⁹⁴ Yet there were significant changes in *method and content*. Regarding the first, Pollock took the distillation of ‘legal principle’ much further than his peers. His treatise, although comparable in length to Chitty and Leake, contained around half the number of unique citations per page. Instead, he focused on the lengthy analysis of leading cases from upper-tier appellate bodies. This matched his philosophy as the editor of the ICLR reports and his consolidated English Reports. The ensuing ratio is stable, but low. Just as the post-1870s reporting rate was just above that of the 1750s, so too was Pollock’s citation ratio:

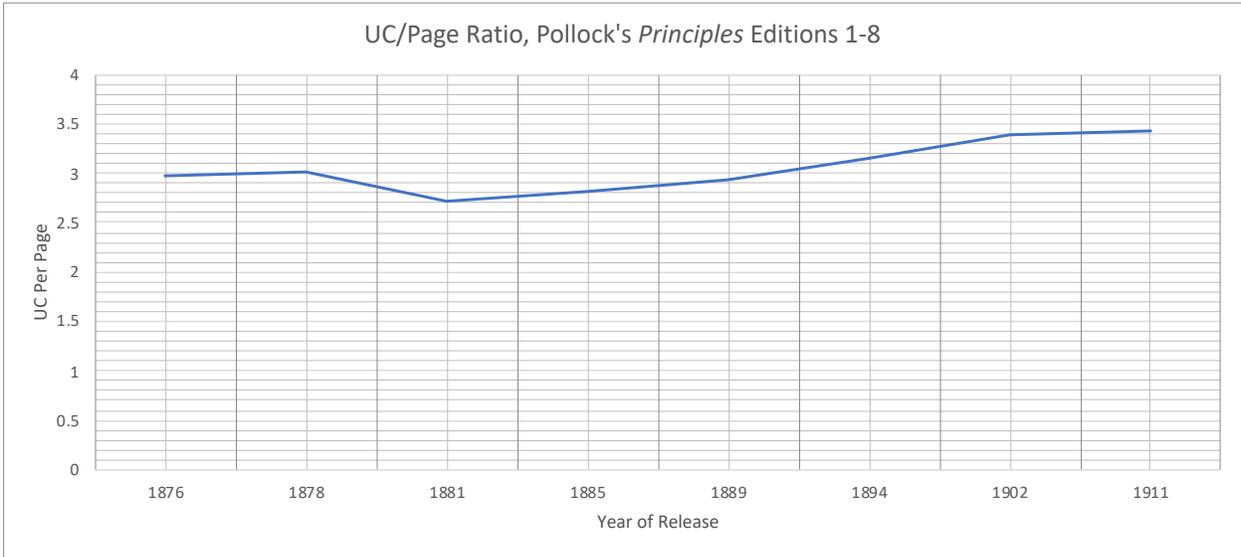


Fig 64. Pollock Principles Unique Citation / Page Ratio

Pollock’s Edwardian legal science is part of this shift, but his change in *content* also played a role. First, Pollock was writing in a period of increasing legislative involvement in the sphere of private law. This was reflected at several points, as it was in the other, later editions of existing treatises: the still-growing and immense sections on illegality; the slow restructuring of sections to follow legislative reforms, such as the Married Women’s Property Acts, and commercial codifications; the emphasis on parliament as chief policy-maker and courts as law-appliers; and, correspondingly, a de-prioritisation of cases as cited authorities. Second, Pollock shifted his theoretical focus and completed the movement started by the second edition of Chitty Jr towards analysing party agreement. This manifested in a strong analytical

⁷⁹⁴ (Anon 1911), 207, 217. There is a similar suggestion in a review of the 11th edition of Anson’s *Principles*, (Anon 1900).

emphasis on the ‘meeting of wills’ of the parties. By the 8th Edition, illegality aside, Pollock was devoting most of his space to a familiar trio of topics: mistake, agreement, and privity:

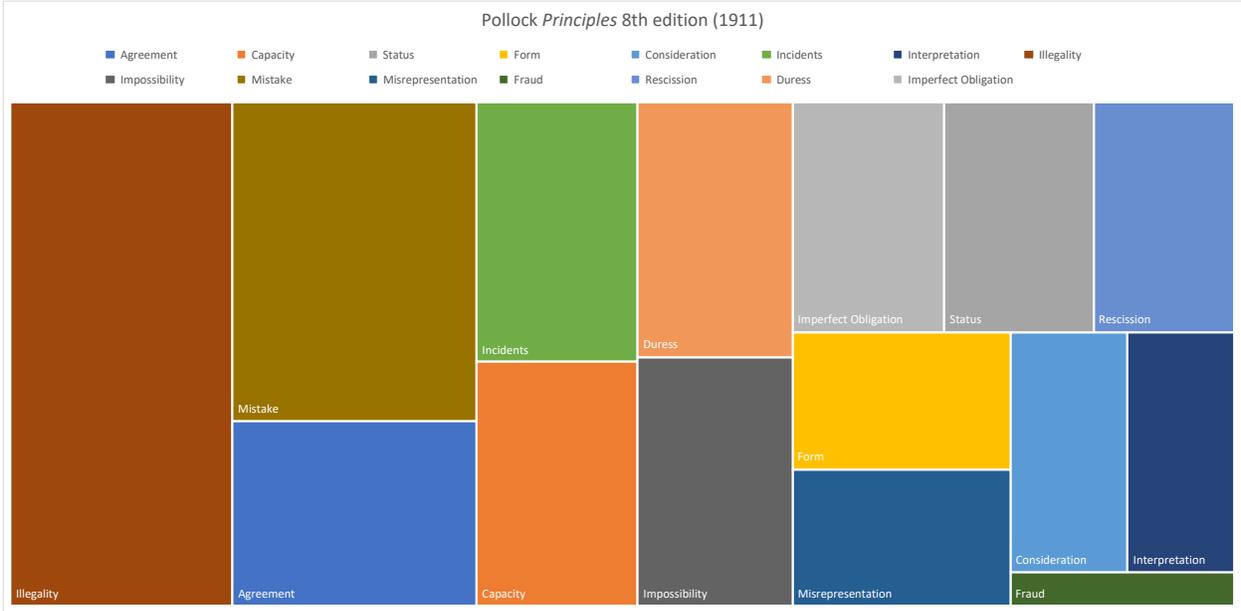


Fig 65. Pollock Principles Topic Breakdown 8th Edition (1911)

Although Chitty Jr and other older writers had emphasised the will of the parties, the *Principles* devoted by far the most space, both in proportional and absolute terms. He ignored some topics until later editions, like performance, and, unlike Chitty and Addison, entirely excluded the specific contracts. This choice may also have contributed to the decline in citation ratio given the high degree of internal coherence attributed to the ‘general part.’ That said, over the successive editions, Pollock prevaricated over the place of the will theory in contract law. Eventually, following Holmes, he drifted towards a more objective theory of party intention. The ‘correct’ high-level abstract formulation had minor practical import: most of the changes occurred in the prefaces and introductions rather than altering the substance of his treatise. Nonetheless, there is no doubt that this was seen as the paramount and first theoretical question from which all else was supposed to follow. Indeed, by 1914, Pollock and all the other treatise writers under the influence of Leake - used the chronological structure oriented around the abstract agreement of two uniform individuals.

Chapter 4: The Old Bones of Contract

The general part was co-authored by the judge and jurist. The dynamics between the two are, however, quite different. With judicial law-making we are primarily concerned with *generation* rather than *generalisation*. To capture this focus, I avoid the traditional agreement-chronological structure of the treatises; nor do I use a content-based structure, such as ‘industry’, ‘land’, and ‘shipping.’ Instead, I take a *lexi-generative* approach and divide the chapters according to the factors producing substantive law under the feedback model. From this perspective, the general part is comprised of at least three lexi-generative nodes: first, rules based on non-voluntary legal status; second, the mandatory regulation of bargains; and third, avoidable default rules. Each of these involve a different tempo and dynamic of legal growth. The mandatory rules grew relentlessly, filling up the treatise and report volumes, whilst status, an 18th century pillar of contract theory, withered away in the late-19th century. Nonetheless, for all three a similar pattern can be detected. The judiciary, and treatise writer, attempted to limit the total amount of law wherever possible. The general part was partially the product of this policy and its very sparseness, abstracting out so much detail, can be seen both as a limiter on legal complexity in contract law and a statement of the court’s role in the economy.

I begin with two 18th century pillars of contract law: the status rules (Part 1) and mandatory regulations (Part 2). In Chapter 5, I then outline four examples of default rules (Part 3). Both of the 18th century ‘old bones’ were liberalised, marginalised, and finally left to be gnawed over awkwardly in the 20th century.⁷⁹⁵ The previously all-important capacity-limiting statuses of insanity, coverture, and infancy were eroded by the judiciary, their scope narrowed or eliminated altogether. This liberalisation was assisted by Parliament – most clearly in the Married Women’s Property Acts of 1870-1893 – and through the strategic de-emphasis by treatise writers. The mandatory regulations took a more difficult path. At a general level, the judges avoided regulating the economy directly, contenting themselves with basic ground-rules forbidding specific market practices. In doing so, they acted in a manner consistent with laissez-faire economics; reduced the administrative burden upon the central courts; and kept within their ever-narrowing, constitutionally subordinate box. Yet at a specific level – driven by the now-supreme Parliament – there was an incessant build-up of economic regulation. Where the courts could not handle the workload these created, Parliament created new tribunals, marking the beginnings of a new phase in the management of regulatory complexity. For the treatise writer, these huge quantities of highly

⁷⁹⁵ E.g. *Chitty on Contracts*, 35th edition lists *Capacity of Parties* and *Illegality and Public Policy* under Volume 1 “General Principles” randomly and incongruously.

particularistic law threatened to unbalance the otherwise elegant general part. The solution here was, as always, to re-define, exclude, and ignore, all so the law of contract could remain pure.

Part 1: Criminals, Idiots, Women, and Minors

“The movement of the progressive societies has hitherto been a movement from Status to Contract.”⁷⁹⁶ Chapter 3 revealed this to be a generally accurate, albeit misleading, summary.⁷⁹⁷ Status is the ‘foundation’ upon which the ‘superstructure’ of contract law is built⁷⁹⁸ and as such cannot be dispensed with. This does not mean, however, that all legal statuses are equivalent. For the purposes of law-generation, I find a division of status between ‘natural’ and ‘civil’ status quite helpful.⁷⁹⁹ The former constitutes capacity-altering legal statuses imposed upon a person regardless of her consent.⁸⁰⁰ Classic instances of ‘natural status’ are infants, the insane, the dead; less obvious examples are drunkards, expectant heirs, sailors, enemy aliens,⁸⁰¹ and, by a kind of negative process, the ‘competent person.’ A slightly more difficult case, under this definition, is the married women who, though ostensibly ‘agrees’ to get married, does not do so *in order to* lose her contractual capacity. This distinguishes her from the other category: ‘artificial status’, which are those explicitly used by individuals or groups to alter their ‘package’ of rights, powers, and obligations. Common examples are factors, agents, partners, and companies; these, although important, are not considered in detail here and are likely subject to their own distinct dynamics.

1.1 Aspects of ‘Natural Status’

“Natural statuses”, whilst obviously not truly natural, often appear so because they are imposed around either ‘natural’ traits, such as infancy, or traditional social statuses, such as marriage. These traits cannot be contracted around, and, following the feedback model, acted as a central generator (or ‘node’) of contract law. As Maine suggests and as indicated by the earlier contract treatises, contractual capacity was one of the largest bodies of substantive contract law prior the early-19th century. Nonetheless, the Victorian era marks a noticeable shift away from natural status as a central organising node of contract law. I study three groups here: infants; those of unsound mind; and married women.⁸⁰² The law of insanity, alongside infancy and coverture, had all been central aspects of contractual agreement in 18th

⁷⁹⁶ (Maine 1885), 170

⁷⁹⁷ For a basic survey, (Kahn-Freund 1967; Lubin 2023; Schmidt 2017)

⁷⁹⁸ *Marshall v Rutton* (1800) 8 T.R. 545, 546 per Lord Kenyon.

⁷⁹⁹ Cf Addison, 3rd Edition, *Table of Contents, Chapter IV*

⁸⁰⁰ This is the sense intended by Maine, *Ancient Law*; O Kahn-Freund, *supra* (n797), 636.

⁸⁰¹ These are referred to as ‘innate identities’ in (Matsumura 2021), 681.

⁸⁰² To which, we could also add nationality and professional status. O Kahn-Freund, *supra* (n797), 636. For criticism of this grouping, (Cobbe 1868)

century treatises. The mid-19th century brought an inversion whereby these specific statuses were replaced by a generic, default status: the citizen of ordinary cognition.⁸⁰³ An editor of Fonblanque's *Treatise of Equity* gave an early hint in 1797 when he contrasted those rendered 'imbeciles' by age or disease to the 'individual of a free constitution.'⁸⁰⁴ The full transition, however, is clearest in the second edition of Chitty Jr's *Practical Treatise*⁸⁰⁵ wherein he suggested legal statuses are exceptions which must be carefully and narrowly defined.⁸⁰⁶ In their place, he developed a new body of rules based on when the communications of a 'competent person' would produce a binding contract. This produced a vacuum: the 'competent person', being definitionally normal, did not receive detailed analysis and only appeared as a negative image between the rules of formation, specific statuses, and vitiating factors.⁸⁰⁷ Importantly, the topical marginalisation of insanity, coverture, and infancy, did not mean they had become completely legally irrelevant. Moderate volumes of status-related law continued to be produced until the late-19th century, although this was slowed by the trend of liberalisation in the 1870s. Such a shift was exaggerated and encouraged by the general contract treatise writers, who carefully delegated the topic of status to specialised treatises and general legal digests away from the pristine general part.⁸⁰⁸

1.1a Infants

Until 1969, contractual capacity in England and Wales, following the older, feudal limit, was set at the surprisingly mature age of 21.⁸⁰⁹ Given the extensive demographic changes in the 18th and 19th centuries, this theoretically left around 40-50% of the population without the ability to make legally binding contracts.⁸¹⁰ Exceptions to this 'illiberal'⁸¹¹ rule were therefore essential as a matter of practical reality. I will give a brief overview here.⁸¹² The English judiciary in the 18th century generally viewed 'infants' as profligate⁸¹³ 'imbeciles',⁸¹⁴ whose interests, and those of their family,⁸¹⁵ needed protection from 'wicked' tradesmen.⁸¹⁶ The justification for their incapacity was their inability to reason, a condition said to be

⁸⁰³ Story, s237 (145), *Blackford v Christian* (1829) 1 Knapp 73, citing the 'man of ordinary prudence'; Pollock, *Principles* 1st; created an entire subset of public policy based on 'freedom of individual action', 336-7; *Albion Steel and Wire Company v Martin* (1875) 1 Ch D 580, 584-5. For an earlier instantiation, see Bacon, *New Abridgment*, Volume 3, 80;

⁸⁰⁴ Fonblanque, 41, fn (c)

⁸⁰⁵ Chitty Jr, 1st edition 108, from, Chitty Sr, *Manufactures*, vol 1, 11, relying on Powell and Fonblanque.

⁸⁰⁶ For echoes of this, see Chitty Sr, 3, 11.

⁸⁰⁷ The equitable version of the competent man was the 'sui generis man with eyes open.' *In re Wragg* (1897) 1 Ch 796.; (Jeremy 1828), 396-7; See also the 'man of ordinary firmness' in *Skeate v Beale* (1840) 11 A. & E. 983, 990.

⁸⁰⁸ See (Bingham 1826); (Chambers 1842); (Macpherson 1842); (Simpson 1875, 1890)

⁸⁰⁹ Bacon's *New Abridgment*, Volume 3, p. 118. (c), citing *Coke's Institutes* 78b. See also *Coke on Littleton*, 2.b and 171.b, see Comyn's *Digest*, Volume 3, 1st Edition, 615, 563.

⁸¹⁰ (Wrigley and Schofield 1989), 217.

⁸¹¹ Per Lord Denman C.J. in *Cripps v Hill* (1844) 5 Q.B. 606, 611.

⁸¹² For prior work on this topic, see (Simpson 1987b), 540ff; additionally, (Hunter 2018); (Austen-Baker and Hunter 2019); Gordon *supra* (n67) 128; and (Cornish 2010), 802-822; many thanks to Sarah Popp for sharing her preliminary research on coverture

⁸¹³ *Ford v Fothergill* (1794) Peake 301

⁸¹⁴ *Zouche v Parsons* (1765) 3 Burr, 1794, 1801

⁸¹⁵ The purpose of the rules was as much for the protection of infants as the wealth of their families. See *Blackburn v Mackey* (1823) 1 Carr & P 1.

⁸¹⁶ *Jennings v Rundall* (1799) 8 Term Report 335.

essential for making binding contracts.⁸¹⁷ The majority of infancy law consisted of exceptions to this rule. The most significant was that an infant was bound by contracts for ‘necessaries’, such as food, clothing, or board, to the extent the price was reasonable, otherwise their agreement would be voidable. Such voidable contracts could not be enforced against the infant unless they ratified the contract after attaining majority.⁸¹⁸ These rules have two underlying features which shaped their development. **First**, there was a persistent conflation between an infant’s contract being ‘void’ or ‘voidable.’ In turn, this ambiguity traced confusion over whether the test for enforceability was solely benefit to the infant, or also ‘necessaries’,⁸¹⁹ which, as several commentators noted, was discontinuous with benefit. The 18th century rule was probably⁸²⁰ that an infant’s contract for something other than necessaries was *voidable unless* it was utterly without benefit to the infant, in which case it would be *void*. Thus, the test of benefit was determinative of whether a contract was *void* or *voidable*, not *voidable* or *absolutely binding*. The source of this confusion was, in part, the special rules for ‘continuing’ contracts, such as holding a lease or shares, which the infant would have to expressly *disaffirm*, rather than ratify upon coming of age.⁸²¹ For these contracts, assuming the infant had not avoided the contract, the contract would be binding so long as it wasn’t absolutely void - i.e. so long as it was of some benefit. **Second**, when all the exceptions are taken into account, the total scope of infantile invalidity was smaller in England than possibly any other country. The voidability of the infant’s contract ensured they could sue the adult counterparty for any of their executed and executory contracts.⁸²² The judges also applied a presumption that any man contracting was of sufficient age until the contrary was shown.⁸²³ Finally, it was established in the early 19th century that if an infant paid or performed and received something in consideration under the contract⁸²⁴ they could not recover its value on the grounds there was a natural obligation,⁸²⁵ even in trading contracts.⁸²⁶

The rules of infancy therefore mattered in two scenarios. First, when an infant living alone⁸²⁷ was being sued for extravagances⁸²⁸ or their traded goods supplied on credit. This was a straightforward reflection of concern over (moneyed) heirs being exploited by tradesmen and lenders. Second, when infants took part

⁸¹⁷ Bacon, Vol 3, 118; Ballow, 6; Fonblanque, 40, who gives the reference as Grotius’s *De Jure Belli et Pacis lib 2.c.II.C5*. Chitty Sr *Mercantile Treatise*, 1st Edition, 11, cites Fonblanque, 45.

⁸¹⁸ Bingham, 51, noting ‘a very slight admission, after he comes of age, will ensure as a confirmation of such act.’

⁸¹⁹ An ambiguity inherited from the 17th century, see Simpson, 544.

⁸²⁰ There was clearly uncertainty, demonstrated by various treatise writers arguing for the voidable position. See Fonblanque, *ibid*, 73, fn (b); Bingham, 5ff. Chitty Sr, Vol 3, 27-28.

⁸²¹ Chitty Jr *Practical Treatise* 1st Edition, 35.

⁸²² *Holt v Clarencieux* (1732-3) Stra 937. See also *Farneham v Atkins* (1657-70) 1 Sid 446; *Forsester’s Case* (1657-70) 1 Sid 41; *Smith v Bowin* (1670) 1 Mod 25; *Warwick v Bruce* (1813) 2 M&S 205.

⁸²³ *Borthwick v Carruthers* (1787) 1 T.R. 648

⁸²⁴ Unlike German law. See BGB 104-110b. Note, a *total* failure of consideration would allow for recovery.

⁸²⁵ See *Corpe v Overton* C.P (1833) 10 Bing 252, followed by *Ex P Taylor* (1861) 8 De G M & G 254. These rules were affirmed after the Infants’ Relief Act in *Valentini v Canali* (1890) 24 Q.B.D. 166.

⁸²⁶ *Ex Parte Jones* (1881) 18 Ch. D. 109, 121.

⁸²⁷ *Bainbridge v Pickering* (1780) 2 Black 1325

⁸²⁸ As the test for ‘necessity’ was relative to the infant’s class, ‘necessaries’ was very wide, including livery for one’s servant, *Hands v Slaney* (1800) 8 TR 578. Only that which was ‘purely ornamental’ would qualify: *Peters v Fleming* (1840) 6 M & W 42, 47.

in emerging areas of the wider economy. The most important doctrinal development related to the latter, and constituted a slow expansion of the legal competency of infants from 1800 onwards.⁸²⁹ The four most significant expansions were allowing infants to (1) declare bankruptcy; (2) purchase stocks and shares; (3) become members in partnerships and companies; and (4) engage in service contracts. I consider (4) in detail because it provides a good example of the classical model's principles infiltrating this otherwise protectionist legal area. In practice, most children were employed as apprentices in the 18th and early 19th centuries.⁸³⁰ Accordingly, although not contractually liable,⁸³¹ they were bound under the relevant indentures which could be enforced before the justices of the peace. Over time, however, an increasing number of children were employed in service contracts and the law started to adjust to match this reality.⁸³² The earliest cases on this point involve the parish laws. *R v Chillesford*, in 1825,⁸³³ established that a father hiring his son under a contract for services was beneficial, and thus only voidable.⁸³⁴ The earliest case I could find deciding such a contract was *absolutely* binding is *Wood v Fenwick* in 1842.⁸³⁵ *Wood* involved an infant coal miner challenging his arrest under the Master and Servant Act 1823 for abandoning his service contract. Counsel for *Wood* argued the service contract was either voidable and that *Wood* had given sufficient notice,⁸³⁶ or without benefit, and thus entirely void.⁸³⁷ In response, Lord Abinger suggested 'there can be no doubt that, generally speaking, a contract by an infant to receive wages for his labour is binding upon him'⁸³⁸ and that, apparently, it could not be avoided.⁸³⁹ No prior cases were cited on this point, a surprising fact given Lord Abinger's confidence. One possibility is that these questions were previously hidden behind jury discretion: counsel for Fenwick noted the jury had found this contract beneficial, who 'are in truth the proper judges of this.'⁸⁴⁰ As we will see below, *Wood* was the beginning of a long series of cases in which the judge, rather than jury, decided these questions.⁸⁴¹ Counsel for Fenwick also deployed a very broad argument,⁸⁴² seemingly at odds with the usual test of necessities:⁸⁴³ "every contract for the benefit of an infant at the time is binding."⁸⁴⁴ The authority for this proposition was cited as '*Maddox v White*',⁸⁴⁵ a 'continuing' case involving a lease, which in turn cited

⁸²⁹ Remarkd at the time, see the comments of counsel in *Maddox v Miller* (1813) 1 M & S 738, 739.

⁸³⁰ (Lane 1996); (Wallis 2012); (George 1931), 117.

⁸³¹ See Chitty Sr, *Apprentice*, 25, 34. *Gylbert v Fletcher* (1628) Cro Car 179.

⁸³² O Kahn-Fruend, *supra* (n797), 638

⁸³³ *R v Chillesford* (1825) 4 B & C 94.

⁸³⁴ *ibid*, 100

⁸³⁵ *Wood v Fenwick* (1842) 10 M & W 195. Chitty Jr adds a section on service contracts in the 5th edition (1853) of his *Practical Treatise*, 138.

⁸³⁶ Noting, as in *Gray v Cookson* (1812) 16 East 13, (204) that merely abandoning the contract is not sufficient to avoid it.

⁸³⁷ *ibid*, 200. Note, it seems that all parties in this case accept service contracts must be avoided, rather than ratified, much like continuing lease and partnership contracts.

⁸³⁸ *ibid*, 203.

⁸³⁹ *ibid*, 204.

⁸⁴⁰ 205. That said, the trial Judge seemed to believe it was a question for the Court, not the jury, but took their verdict nonetheless (200).

⁸⁴¹ The leading case in this period was *Ryder v Wombell* (1868) L.R. 4 Ex 32; See Austen-Baker and Hunter *supra* (n812), 25, for arguments that juries favoured tailors and traders over infants; and Danzig, *supra* (n98), fn 99.

⁸⁴² This test of 'beneficial contracts' was adopted by Trietal and Chitty as a kind of 'third exception' to contracts which bind infants. See Simpson, *A Treatise on the Law of Infancy*, 96, for a broad statement of this argument.

⁸⁴³ For the difference, see Pollock, *Principles of Contract Law*, 1st Edition, p. 46.

⁸⁴⁴ 204

⁸⁴⁵ A mistaken reference to *Maddon v White* (1787) 2 T.R. 159

Drury v Drury.⁸⁴⁶ Such a proposition is entirely absent from *Drury*,⁸⁴⁷ and it is more likely a reference to Lord Mansfield's ruling in *Zouche v Parsons*: "the law therefore...enables [infants] to do binding acts, for their *own benefit*, and, without prejudice to themselves, for the benefit *of others*."⁸⁴⁸ Following the ambiguity of the cited sources, the rules were applied highly flexibly. If the judges wanted to find an infant bound, they could find the contract absolutely binding as a species of necessities⁸⁴⁹ or some kind of distinct exception.⁸⁵⁰ Alternatively, they could find it voidable - but not avoided⁸⁵¹ - by applying the test of 'benefit' in a narrow manner, by looking at its terms alone⁸⁵² and ignoring the wider negative consequences of the transaction - such as being arrested under the Master and Servant Acts.⁸⁵³

Further liberalisation occurred in the post-decline period. In *Leslie v Fitzpatrick* (1877), Lush J decided the test of whether a contract was 'inequitable', and therefore not binding, was whether their terms were 'at the time common to labour contracts', or 'reasonably justified... as a just measure of protection to [the master].' Merely being in employment was considered to be a benefit⁸⁵⁴ unless the wages were 'unreasonably low and inadequate.'⁸⁵⁵ This test, despite some uncertainty, evaluated the contract as a whole,⁸⁵⁶ and thus would allow terms contracting out of the Employers Liability Act⁸⁵⁷ or the inclusion of wide arbitration clauses.⁸⁵⁸ Few terms seemed to meet this threshold,⁸⁵⁹ and judges held that, generally, "persons engaged in the trade know their own business best."⁸⁶⁰ Incredibly, the defence of common employment was also found to apply to infants, it being 'impossible' that a master warrants proper instruction be given to an infant workman but not an adult.⁸⁶¹ These cases coincided with a low-point in jury discretion, with the courts explicitly stating "a court of law would know perhaps better than a jury what advantages the plaintiff obtained under the contract of service."⁸⁶² The only limit to this expansion

⁸⁴⁶ *Ibid*, 161. Providing an alternate citation, 5 Bro. Parl Ca. 570

⁸⁴⁷ As noted in *Martin v Gale* (1876) 4 Ch. D 428 by Jessel M.R.

⁸⁴⁸ *Zouche v Parsons* (1765) 3 Burr 1794, 1801.

⁸⁴⁹ See *Cooper v Simmons* (1863) 8 Jur N.S. 81, 83; *Walter v Everard* (1891) 2 Q.B. 369; *Roberts v Gray* [1913] 1 K.B. 520.

⁸⁵⁰ As implied by Alderson B in *Wood*, *supra* (n833), and as interpreted by counsel Lyon in *Fellows v Wood* (1888) 59 L.T. 513.

⁸⁵¹ The law on avoidance can be seen in the earlier apprenticeship cases involving apprentices voidable under stat. 5 Eliz. c. 4, s26. See *R v Evered* (1777) Cald 26, establishing running away was insufficient notice, confirmed in *Gray v Cookson* (1812) 16 East 13, and *R v Inhabitants of Arundel* (1816) 5 M & S 257. A similarly strict approach, likely following Lord Kenyon's general attitude that an apprentice could not merely throw up his contract when he liked, was followed in *R v Hindringham* (1796) 6 T. R. 557. This was despite the general lax rules for sales of goods which could be avoided merely by pleading the general issue. P. Bingham, 50.

⁸⁵² In *Wood*, *ibid*, for instance, (204) Alderson B. suggests the question is whether 'on the whole he derives a benefit under the contract.'; unusually in *R v Lord* (1850) 12 Q.B. 757 the court found the contract, on its face, was not of any benefit and therefore entirely void.

⁸⁵³ This fact was ignored in *Wood*; *R v Lord* *ibid*; and *Cooper*, *supra* (n849), stating the test of benefit assumes the contract is performed and ignores consequences upon breach (Cooper, 83). The consequence of acquiring a settlement was ignored in *R v Inhabitants of Mountsorrel* (1815) 3 M & S 497; *R v Chillesford*. *Supra*, and *R v The Inhabitants of Great Wigston Leicester* (1824) 3 B & C 484.

⁸⁵⁴ Followed in *De Francesco v Barnum* (1889) 43 Ch D. 166, 439, stating "a contract for labour must be taken to be, prima facie, binding upon an infant."

⁸⁵⁵ *Leslie v Fitzpatrick* (1877) 3 QBD 229, 231.

⁸⁵⁶ *Barnum, Clements v London and North Western Railway Company* (1894) 2 Q.B. 482, C. A.

⁸⁵⁷ *ibid*. cf *Flower v L& N.W. Ry. Co* [1894] 2 Q.B. 65, which held an exclusion for negligence was too extreme.

⁸⁵⁸ *Wood*, *supra* (n835)

⁸⁵⁹ A string of milk sop contracts were all found valid on the basis they were industry standard. e.g. *Fellows v Wood* (1888) 59 L.T. 513; *Evans v Ware* (1892) 3 Ch 502. Cf *Barnum Corn v Matthews* (1893) 1 Q.B. 310; and *Sir W. C. Leng v Andrews* (1909) 1 Ch. 763

⁸⁶⁰ *Evans*, *ibid*

⁸⁶¹ *Young v Hoffman Manufacturing Co* [1907] 2 K.B. 646, C.A.

⁸⁶² *Clements*, *supra* (n855), (490). Kay L.J. seems to apply the broad test in *Maddon*, citing *Smith v Lucas* (1811) 18 Ch. D 531 544, to establish the contract for services was voidable, albeit one the court would elect for him to confirm. This is contradicted in the same case by Lord Esher M.R.'s judgment explicitly stating it was *not* voidable.

was the traditional invalidity of trading contracts, held to be void on the somewhat artificial ground they did not relate to the ‘person’ of the infant.⁸⁶³

1.1b Those of Unsound Mind

Although ostensibly justified in terms of cognition, the restrictions on infants ignored actual mental ability.⁸⁶⁴ Instead, a separate, catch-all body of law governed the contractual capacity of ‘those of unsound mind.’ As with the law of infancy, there was a steady reduction in the focus, content, and scope of the law of insanity within contract treatises,⁸⁶⁵ despite the steady increase in the number of the mad.⁸⁶⁶ This marginalisation occurred both doctrinally and procedurally. The former involved a tightening up of the legal test for contractual incapacity due to unsoundness of mind. Throughout the 18th and early 19th centuries, legislation, treatise writers, and judges took a primarily status-based approach, using a variety of messy categories for the mentally ill⁸⁶⁷ distinct from those used by the medical profession.⁸⁶⁸ The basic 18th century dichotomy was between ‘idiots’ and ‘lunaticks.’ An ‘idiot’, or ‘natural fool’, was ‘a fool or madman from his nativity, and who never has any lucid intervals.’⁸⁶⁹ A lunatick, on the other hand, was intermittently mad and had a prospect of recovery. Determining which category a person fell into had important consequences for the Crown’s custody over them. Otherwise, the contracts made by both lunatics - whilst insane - and “ideots” were voidable.⁸⁷⁰ In addition, it seemed the 18th century test for whether a person was mentally incapable *qua* “ideot” or lunatic was the same: a factual test left to the jury or inquisition.⁸⁷¹ The traditional metrics which were provided - such as whether a person could count to twenty, identify the days of the week, recognise their parents, or know their age - were ultimately matters of ‘evidence.’ This seemingly open-ended definition was developed and narrowed in several ways.

First, a separate category was defined comprising those of ‘merely weak intellect.’⁸⁷² This boundary - between those declared incapable under a commission of lunacy and those merely of weak or feeble intellect - was tested several times throughout the 17th and 18th centuries. An important early case was

⁸⁶³ Kay L.J. in *Clements, ibid.*

⁸⁶⁴ Powell, 33.

⁸⁶⁵ There were numerous lunacy treatises: (Highmore 1807); (Collinson 1812); (Shelford, 1833); (Phillips 1858); (Pope 1877); (Renton 1897)

⁸⁶⁶ (Stebbins 2012), 386; Shelford, iii-vi.

⁸⁶⁷ Renton, 3-5, discussing variously the terms ‘*non compos mentis*’, ‘lunacy’, ‘unsound mind’, ‘idiot’, and ‘imbecility.’ See also Shelford, 3-6; and Pope, 10-21. Further taxonomies can be found in Co. Littleton, 247, reproduced in Bacon New Abridgment, Vol 3, 79.

⁸⁶⁸ The test of legal capacity, as criticised in ‘medical journals, was a matter of law. Renton, 7; Pope, 5-7

⁸⁶⁹ Bacon, *supra* (n866).

⁸⁷⁰ Blackstone, Book 2, 291; Newland, 16. Cf Bacon, New Abridgment, Vol 3, 87-89, noting some acts *in Pais* were void whilst others voidable. For discussion, Pollock, *Principles of Contract Law*, 1st Edition, 79. This incapacity was justified in terms of a lack of consent or will, e.g. Powell, 10.

⁸⁷¹ See Renton, *ibid.*, 3; Shelford, 5; Blackstone Comm, 1, 303; Bacon 3, 79.

⁸⁷² (MacMillan 2014), 20.

Bath and Montague's Case (1693),⁸⁷³ deciding any individual who was not *non compos mentis* could dispose of his property freely, regardless of his wisdom or mental competency. Such freedom was justified on the grounds that to decide otherwise would overwhelm the Chancery with business; that there were no obvious grounds for equity to intervene; and that a man knows his own affairs best.⁸⁷⁴ *Bath* was followed in *Osmond v Fitzroy* (1730),⁸⁷⁵ which explicitly rejected attempts to 'measure the size of people's understandings or capacities.'⁸⁷⁶ Instead, the preferred approach was to deal with weakness of understanding as a material, albeit insufficient, factor in cases involving surprise, undue influence, and fraud.⁸⁷⁷ Chancellors, unsatisfied with this limited protection, pushed on the boundary; in all attempts, however, a narrower approach prevailed. In some cases, it would appear as if mental fragility and an unequal bargain alone could amount to a finding of fraud.⁸⁷⁸ Early treatises reflected this treatment: Bacon and Ballow both allow relief for those of 'weak understanding' when there was, variously, 'imposition', 'unreasonable' or 'extraordinary' terms, 'harassment', and 'uneasiness.'⁸⁷⁹ Traditionally, the common law would only relieve in cases of actual fraud,⁸⁸⁰ and the later 19th century treatises, given their common law focus, adopted this narrower test. By 1857, Chitty's *Practical Treatise* excluded 'weakness of understanding' altogether.⁸⁸¹ Another attempt to increase protection for the mentally unsound was to widen the scope of terms of commissions of lunacy from lunacy or idiocy to a more open-tended test.⁸⁸² In the early 19th century, there were signs Lord Eldon would accept what appeared to merely be 'weak understanding' as sufficient to establish the object of a commission was *non compos mentis*.⁸⁸³ This paternalistic path⁸⁸⁴ was, however, rejected in *Ex P Cranmer* (1806), establishing that the jury under a commission had to return 'unsoundness of mind', not mere mental infirmity.⁸⁸⁵ As noted in *Sherwood v Sanderson*,⁸⁸⁶ this meant the Chancery had to reject a commission finding of mere incapacity, even if the party was thereby 'exposed to ruin at every instant.' The second restriction related to the test of contractual incapacity. Traditionally, the questions of whether the plaintiff was insane, and whether this insanity was sufficient to strip him of contractual capacity, were bundled up in jury discretion. In the late-

⁸⁷³ 3 Ch Ca 107

⁸⁷⁴ *ibid*, 108.

⁸⁷⁵ 3 P. Wms. 130.

⁸⁷⁶ *ibid*,

⁸⁷⁷ *ibid*.

⁸⁷⁸ See *Bennett v Vade* (1742) 2 Atk 324 (1742).

⁸⁷⁹ Bacon, Vol 3, 89. Ballow, 8. Fonbl, p60 (r), on the other hand, restricted relief to whenever "fraud or surprise can be imputed to, or collected from the circumstances." Powell, 31-32, suggests relief is available in any case where there is a possible suspicion of imposition.

⁸⁸⁰ The view of Fonbl, 61,(r) *Bright v Enyon* (1757) 1 Burrows 396.

⁸⁸¹ 6th edition; a similar omission can be found in Addison, *Treatise on Contracts*; and *Leake Principles of Contract*; Pollock, *Principles of Contract*; and Anson *Principles of Contract*. The doctrines were instead moved to 'fraud' or 'undue influence', e.g. Chitty Jr, 1st edition, 224.

⁸⁸² *Lord Donegal's Case* (1751) 2 Vez 407 (Ves Sr), 408.

⁸⁸³ *Ridgeway v Darwin* (1802) 8 Ves 65

⁸⁸⁴ *ibid*, Lord Eldon expresses his desire to expand the law to protect the weak.

⁸⁸⁵ *Ex P Cranmer* (1806) 12 Ves 445, suggesting *Ridgeway* decided nothing, and that the ruling in *Ex P Barnsley* had to be followed. For later consideration, see *Ball v Mannin* (1829) 3 Bligh N.C. 1, 22-23.

⁸⁸⁶ *Sherwood v Sanderson* (1815) 19 Ves 286, 286.

19th century, the judiciary produced a substantive formulation⁸⁸⁷ dividing the two, thereby moving away from a model based on legal status alone.⁸⁸⁸ The criterion itself was taken directly from *M'Naghten's Case*.⁸⁸⁹

“[A]t the time of committing or executing the act the party was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.”

According to this test, merely possessing one of the legal statuses above, such as ‘lunatic’ or ‘*non compos mentis*’, was no longer a sufficient defence;⁸⁹⁰ to succeed, a defendant would have to prove they were not only insane, but *insane* enough.⁸⁹¹

These restrictions on the defence were supported by tightening procedures. Prior to the 19th century, lunatics, in periods of lucidity, could not plead the defence on their own behalf under the maxim ‘no man may stultify himself.’⁸⁹² This harsh rule was justified on several grounds, such as the defendant lacking memory of the period,⁸⁹³ or the danger of fabricated insanity;⁸⁹⁴ the preferred 19th century narrative was that the rules were designed to ease the flow of trade.⁸⁹⁵ This maxim was circumvented by allowing evidence of insanity to be given under the general issue and was regarded as overruled by around 1824.⁸⁹⁶ At the same time, the judiciary created new ways to restrict the defence. The common law presumed, as with the contracting infant, that a person who engaged in bargains was mentally sound.⁸⁹⁷ This presumption was expanded in *Baxter v The Earl of Portsmouth* (1826) by Abbott C.J, who decided that whilst a defendant could plead his own incapacity, for executed contracts lunacy would only be a good defence if it was clear to a reasonable person that the defendant was of unsound mind.⁸⁹⁸ In *Dane v Kirkwall*,⁸⁹⁹ Patteson J restated the requirement as the counterparty both *knowing* and *taking advantage* of

⁸⁸⁷ *Boughton v Knight* (1873) 3 P. & D. 72, applied in *Imperial Loan Company* (1892) 1 QB 599. The question was nonetheless still for the jury. See *Jenkins v Morris* (1880) 14 ChD 674.

⁸⁸⁸ *Boughton* seemed to apply this test broadly to all transactions. See Renton 6-7. Note, English law had also differentiated the acts of the insane on the basis of whether their act was a contract *of record, in pais*, or a mere *simple contract*, Pope, 249-250.

⁸⁸⁹ (1843) 10 C & F 200. Nb (Lacey 2001).

⁸⁹⁰ Renton, 6, citing *Jenkins v Morris* (1880) 14 Ch. D. 674; Leake, 6th edition, 415.

⁸⁹¹ See *Ball v Mannin supra* (n884), 22-23, Leake, 5th Edition, 408. For a defence of this policy, see (Wilson, 1901), 22, criticising also (Goudy 1901)’s suggestion there is ‘no absolute test’ for lunacy.

⁸⁹² The traditional authorities are Littl 405; *Stroud v Marshall* (1595) Cro Eliz 398; *Cross v Andrews* (1598) Cro Eliz 622; and *Beverly’s Case* (1598) 4 Rep 123. For a brief history, see Renton, 9-10; Powell (14-28); and the note appended to *Gore v Gibson*, Jurist, vol 9, 142. The maxim seems firmly established in mid-18th century treatises, Bacon Vol 3, 89, Ballow, 6.

⁸⁹³ Renton, 9-10.

⁸⁹⁴ Powell, 20.

⁸⁹⁵ Renton, 10, likely referencing Bacon’s *New Abridgment*. For similar interpretations, see Brown, 605; Green, 428; and Pope 244.

⁸⁹⁶ Chitty Sr, *Commerce*, 54, citing *Boen*. Similarly, Chitty Jr, 2nd Edition 109 decisively rejected the maxim based on *Baxter v Portsmouth* (1826) 5 B & C 170 which casually allowed evidence of insanity under the general issue in *assumpsit*.

⁸⁹⁷ See Bacon, Vol 3, 80, citing Hale, Hist P.C. 33, Collinson, *Treatise*, 51; Shelford, 50; Phillips, 4. For a clear statement of this principle, see Leake, 1st edition, 247.

⁸⁹⁸ *Baxter v Portsmouth* (1826) 5 B & C 170, 172, suggesting this would be a case of ‘imposition.’

⁸⁹⁹ 8 Car & P 679

the insanity of the insane party.⁹⁰⁰ This was followed in the leading case *Molton v Camroux* (1848), establishing that executed contracts, where the insanity of one party was unknown to the other; the contract was fair and bona fide; and the parties could not be restored to *statu quo*, were binding.⁹⁰¹ A justification for this rule is given *Elliott v Ince*:⁹⁰² the alternative would render all dealings unsafe - how could a shopkeeper know whether his customer was of unsound mind? The high point of this policy came in 1892 when the rule in *Molton* was extended to also include executory contracts.⁹⁰³ By this stage, a plea of insanity would only excuse a defendant if they could show (1) they were so mentally unsound at the time of making the contract that they did not understand it, and could not evaluate it; (2) it was not for necessities, as defined above in the law of infancy;⁹⁰⁴ and (3) the plaintiff actually knew of the insanity, and, potentially, also perpetrated fraud upon the defendant. These rules were criticised for their perceived incompatibility with will theory - what did it matter that the plaintiff thought the defendant could consent if they were, in truth, incapable of doing so?⁹⁰⁵ On the other hand, those in favour gave straightforward arguments of commercial convenience. The most direct was that of Gardner:

“It is not to be presumed that ordinary business men are experts on insanity. In these days of commercial war, when the nervous tension is at the highest and sane men are driving mad bargains, it must be confessed that it is a harsh law that would hold the business world to know whether man be sane or insane...”⁹⁰⁶

Arguments of commercial convenience prevailed and, by the late 19th century, the unique extent of the ‘freedom’ given to the insane in England⁹⁰⁷ was such that the Commissioners of Lunacy distributed circulars advising those running insane asylums to deny their patients access to any form of signed paper.⁹⁰⁸

1.1c Married Women

The law governing married women’s contracts is one the most significant areas of contract law in the 19th century. This is so quantitatively, with around 90% of women being married by age 40 throughout the

⁹⁰⁰ Per *Niell v Morley* (1804) 9 Ves Jun 478, a casual warning is insufficient.

⁹⁰¹(1848) 2 Ex 487, 501.

⁹⁰² (1857) 26 L Journal Ch 821, 824-5.

⁹⁰³ *Imperial Loan Co v Stone* [1892] 1 Q.B. 599.

⁹⁰⁴ Phillips, 17-18. Bacon, 3, 83; *Williams v Wentworth*, (1842) 5 Beav 325; *Baxter v Earl of Portsmouth* supra (n895) and *Gore v Gibson* (1845) 13 M & W 623 (drunkenness). Nb. Chitty Jr, *Practical Treatise* 112, citing *Manby v Scott* (1659) 1 Sid 112. The sale also had to take place outside a market overt, *Blackbeard v Lindigren* (1786) 1 Cox 205.

⁹⁰⁵ Cook, 424, (Brown 1933), 613; Goudy, *supra* (n891), 150, and 151 for the hardship to the families of the insane party.

⁹⁰⁶ (Gardner 1894), 225-226. For this justification in caselaw, see *Ince*, *supra* (n901)

⁹⁰⁷ Cf The German Code, s104. For a survey of other countries, see Cook 427-428.

⁹⁰⁸ *Circular of Commissioners in Lunacy as to Property of Patients*, 20th February 1880. See Renton, *Appendix*, 1022. For a general defence of making the lunatic’s estate pay for contracts so made by them, see Pollock’s note to Wilson’s article, *supra*, 30.

period,⁹⁰⁹ and practically, given the extensive involvement of women in commerce.⁹¹⁰ It is also so doctrinally: prior to the 19th century, the contracts of married women occupied a sizable fraction of contract treatises. Much of the extensive literature⁹¹¹ on this topic covers the socioeconomic and political history of coverture; here, I focus on the particular intersection of the emerging contractual general part with the status-oriented rules governing married women. The arc of coverture's development from 1760-1914 can be broken into three periods: first, an early liberalising period from approximately 1780 to the 1800, corresponding to a general shift towards legal conservatism;⁹¹² second, a static period between 1800 and 1870 with a sharp bifurcation between narrow common law rules and a relatively more liberal equitable position; third, the forced, statutory assimilation of the common law to the equitable system of married women's 'separate property' from 1870-1903,⁹¹³ followed by a series of growing pains and doctrinal oddities.

The basic law of coverture, as carried into the 19th century, was simple: a married woman lost all her personalty to her husband upon marriage, and control of her realty was limited.⁹¹⁴ Following the earlier proprietary framing of contract, this inability to own property was regarded by 18th century writers as the source of the wife's contractual incapacity⁹¹⁵ - although later writers, following Blackstone, treated the fiction of spousal unity as the underlying principle.⁹¹⁶ The Chancery had already developed workarounds to the rigid common law doctrine by the 18th century. The most prominent was the development of the 'separate estate.'⁹¹⁷ The married women's estate seems to have grown out of the practice of providing a married woman property under a trust (or in use) in the marriage settlement. Nonetheless, over time it was extended to a more general form of beneficial interest: in the 18th century, it was recognised, for example, that a married woman could be granted separate property, as 'pin-money', in a contract with her husband,⁹¹⁸ and, further, the separate property could subsist without named trustees.⁹¹⁹ There was also a mid-18th century movement in the common law towards reducing the effects of coverture.⁹²⁰ Lord Mansfield, in *Ringstead v Lady Lanesborough* (1783), decided that, to do justice to creditors, a deed of separation could allow an estranged wife to be sued as if a *feme sole*. In *Corbett v Poelnitz*⁹²¹ Mansfield

⁹⁰⁹ Wrigley *supra* (n810), 260-2

⁹¹⁰ Of which, in 1851, E.g., see (Ireland 2022), 187; likewise, (Muldrew 2003), 48-49, citing the Tradesman's Lawyer.

⁹¹¹ Gordon, *supra* (n67) 112 for a survey.

⁹¹² (Staves 1990), 175.

⁹¹³ (Shanley 2020), 123, suggests this was one of the dominant motivators for the 1881 bill; see also (Holcombe 1983), 181, 202-5.

⁹¹⁴ Ireland *supra* (n910), 187. Baker *supra* (n196), 523

⁹¹⁵ (Stretton 2009), 113; Gordon *supra* (n67), 113, citing Baker, *ibid* 526. Whether a married woman's contracts would be void, as argued by Comyn, 172, Chitty Sr vol 1, 35, or voidable, as suggested by Chitty Jr, 2, 130-131, was never resolved.

⁹¹⁶ See, Newland, 21; Chitty Jr, *1st edition*, following his father's discussion, 32, likely inspired by Blackstone. Nb. Law Revision Committee Fourth Interim Report, 4. For discussion of the origin and history of this justification, see Stretton, *supra* (n915).

⁹¹⁷ *Interim Report, ibid* 5.

⁹¹⁸ Staves, *supra* (n912), 131-133; for the various ways a married woman could be given separate property, see later *Tullett v Armstrong* (1838) 1 Beav 21,

⁹¹⁹ Staves, *ibid, Interim Report*, 5

⁹²⁰ Staves, *ibid* 178-9

⁹²¹ See Staves, *ibid*, 179; see also, (Pearlston 2009), 267, for the relevance for bankruptcy, 281; and Oldham, *supra* (n281), 1265,

declared a ‘new mode of proceeding’ had been introduced in ‘modern days.’⁹²² Staves characterises these decisions as part of a general trend in this period whereby ‘contract ideology’ challenged the older, status-based conception of marriage.⁹²³ Nonetheless, by the late 18th and early 19th century judges had reasserted traditional methods of status-based control.⁹²⁴ In the Chancery, a wife’s control of her separate estate could be limited via an ‘restraint on anticipation’,⁹²⁵ and, at common law, Lord Mansfield’s experiment was overruled in *Marshall v Rutton*⁹²⁶ by Lord Kenyon.⁹²⁷ Any potential for synthesis between the two rules was prevented by the 19th century treatise bifurcation between common law and equitable case-law.⁹²⁸

The following ~70 years represents a mostly static phase⁹²⁹ in which common law-focused contract treatises describe a narrow law of coverture whilst ignoring the extensive equitable exceptions.⁹³⁰ The practical importance of coverture, given its numerous qualifications at law and equity, is complex, to the extent some authors have been led to describing it as primarily ideological and in a state of ‘suspended animation.’⁹³¹ Nonetheless, the rules of coverture had some purchase, and a clear adjustment in light of economic conditions can be seen in the changing liability of husbands for ‘necessaries’ purchased by his wife. Such liability was structured, like the liability of infants and their suppliers, according to a purposive logic about how married couples ought to behave. Amongst her other duties, the wife was supposed to give herself to her husband, both in the sense of her body, affections, and time, and her total material reliance on him for support; the husband, in turn, was expected to control his wife and provide for her at a level suitable to his class.⁹³² This gender dynamic, alongside concerns over creditors being defrauded, the influence of contract ideology, and absolute nature of the wife’s contractual incapacity, complicated the wife’s ability to pledge her husband’s credit for ‘necessaries.’ Such liability was different from that of lunatics and infants. The latter two were justified on the grounds of reimbursement for reasonable expenditure; conversely, when a wife made contracts for reasonable household expenditures, she was regarded as the agent of her husband.⁹³³ The question of whether or not a wife could pledge her

⁹²² *ibid*

⁹²³ Staves *ibid*, 4, 30. Staves notes that, given the material and cultural conditions of England, few women had the ability to bargain on their own behalf under this paradigm, 116.

⁹²⁴ Staves, *ibid*, Stretton, *supra* (n915) 127.

⁹²⁵ Gordon, *supra* (n67), 115, Law Revision Committee, *Fourth Interim Report*, 10. Staves, *ibid*, 151ff.

⁹²⁶ (1800) 8 T.R. 545

⁹²⁷ *ibid*, 547, establishing creditors had to sue the wife’s trustees for her separate estate at equity. Comyn, *Contract*, 175.

⁹²⁸ Which may have been a legacy of Blackstone’s own scepticism of the equitable workarounds, Stretton, *supra* (n915) 126; for a clear example in case-law, see *Clayton v Adams* (1796) 6 Term Rep 604. This changed over the century, with the equity section in *The Practical Treatise* and *The Elements* slowly growing.

⁹²⁹ Staves, *supra* (n912), 228-9.

⁹³⁰ *Marshall v Rutton supra* (n798) gives the quintessential position; the common law judges were nonetheless aware of the Chancery’s delays, see *Nurse v Craig* (1806) 2 New Rep CB 148; for a stark difference, compare Chitty Sr, 39-41 with Chitty Sr *First Edition*.

⁹³¹ (Finn 1996), 707; (Stretton and Kesselring 2013), 6-10. Cf Pearlston, 294.

⁹³² Comyn, 186; *Manby v Scott supra* (n904), 129; Finn *ibid*, 709;

⁹³³ Chitty Sr, Vol 3, 43

husband's credit⁹³⁴ was therefore mediated through elaborate presumptions of agency. These presumptions depended on the couple's state of cohabitation;⁹³⁵ their performance of marital duties; the content of the contracts;⁹³⁶ and the knowledge of the trader(s) involved.⁹³⁷ Together, these were taken both as a reflection of when the average husband would believe himself to be liable and the judge's belief about when he *ought* to be liable.⁹³⁸ The presumption during cohabitation was that the wife acted as her husband's general agent for the purchase of 'necessaries.' Nonetheless, though cohabitation was 'strong evidence', the presumption could be displaced by counterevidence, such as the husband giving general or specific notice about his revocation of his wife's agency to local traders,⁹³⁹ or evidence suggesting credit had been solely extended to the wife.⁹⁴⁰ Where the couple was *not* cohabiting, the husband's liability depended on the degree of support he actually provided his wife and the reason for estrangement. If the husband's support was 'adequate,'⁹⁴¹ he could not be charged for goods, even necessities, purchased by his wife so long as he gave notice to the trader involved. In addition, a cruel husband who forced his wife away would be liable for necessities regardless of his intentions or actions,⁹⁴² whilst an adulterous, estranged wife,⁹⁴³ or one who merely left ('wandered'), would be denied any credit, even if the husband was adulterous himself.⁹⁴⁴ These irrebuttable presumptions⁹⁴⁵ were straightforwardly justified as a social policy to prevent deserving, estranged married women from 'starving'⁹⁴⁶ whilst punishing wives who 'wandered.' As noted above, the balance of spousal obligations changed over time. The mid-19th century saw a reduction in the husband's liability, likely reflecting changing judicial beliefs about the fairness of making husbands liable for their increasingly independent wives.⁹⁴⁷ First, judges removed the husband's obligation to give notice to traders that his estranged wife had maintenance to remove her credit - it would, instead, be at the trader's risk.⁹⁴⁸ Second, judges, with help from treatise writers, widened the rule

⁹³⁴ According to Comyn, citing Comyn's Digest, a husband could recover goods paid by his wife on an *executed* contract, 172. This is also suggested by Chitty Jr, *supra*; but cf. *Marshall, supra* (n798); most of the cases seem to assume of the wife paid ready money under contract the husband could not recover it.

⁹³⁵ See Chitty Sr's taxonomy; followed by Chitty Jr. Summarised in *Emmett v Norton* (1838) 8 C & P 506, 510.

⁹³⁶ The definition of necessities was complicated by its framing as a presumption of agency, allowing a husband to possibly 'ratify' a purchase, necessary or otherwise, by the nonuse of his 'marital rights.'

⁹³⁷ The typical tool used to mediate the responsibilities of creditors, see *Waithman v Wakefield* (1807) 1 Camb 120, 122, noting a trader is bound to make enquiries; likewise, *Montague v Benedict* (1825) 3 B & C 631, 636, 637. *Dennys v Sargeant* (1834) 6 C & P 419, 421-2 gives a summary of all the relevant factors; Chitty 9th, 168, notes the inconsistency behind making the existence of agency depend on, say, 'notice to the tradesman.'

⁹³⁸ For a similar (patriarchal) tension between contractual freedom and female autonomy, see *Staves supra* (n912), 140-141, discussing pin money.

⁹³⁹ *Manby supra* (n904) 127; *Etherington v Parrott* (1795) 2 Ld Raym 1005; See (Bailey 2002), for a detailed study of how this notice was typically given in local newspapers, 357. For notice to the wife alone being sufficient, even if unknown to the trader, see *Jolly v Rees* (1863) 15 CBNS 628, 638.

⁹⁴⁰ *Montague v Benedict* (1825) 3 B & C 631, 636; *Bentley v Griffin* (1814) 5 Taunt 356; *Metcalf v. Shaw* (1811) 3 Camp. 22

⁹⁴¹ *Todd v Stokes* (1700) Salk 116; *Ewers v Hutton* (1799) 3 Esp Rep 255 (where adequacy is possibly measured by circumstances of the husband). Finn, *supra* (n928) 710.

⁹⁴² Comyn, 186, *Bolton v Prentice* (1745) 2 Stra 1214, cf *Manby v Scott* 1 Sid 109.

⁹⁴³ *Harris v Morris* (1803) 4 Esp 41; *Morris v Martin* (1726) 1 Stra 647. Nb. *Norton v Fazan* (1798) 1 Bos & Pul 226, 227 requiring the tradesman to either know or for it to be 'notorious'/known to the reasonable man when the adulterous wife cohabited with her husband.

⁹⁴⁴ *Govier v Hancock* (1796) 6 Term Rep 603

⁹⁴⁵ E.g. see *Bolton supra* (n939), 241

⁹⁴⁶ Chitty Jr, *Ist*, 40, noting the exceptions when a married woman would be regarded as a *feme sole*; likely taken from *Nurse v Craig* (1806) 2 New Rep. 148, 156; cf Sir Mansfield's dissent, 161ff, regarding the undesirability of using the doctrine necessities for this purpose.

⁹⁴⁷ Chitty Jr's presentation in particular was written from the perspective of the anxious husband concerned about his liability. *Ist Ed.* 39; likewise *6th Ed.*, 160, noting there was no liability '*ex necessitate*' when the wife had sufficient funds.

⁹⁴⁸ *Mizen v Pick* (1838) 3 M & W 481

that a wife with a significant income could not pledge her husband's credit.⁹⁴⁹ The new rule was that in all mutually agreed separations, if the husband did not explicitly agree to pledge credit then the wife would be denied it.⁹⁵⁰ This trend towards straightforwardly adopting whatever the husband intended was strengthened by the ruling that all maintenance agreements were presumed sufficient to support the wife.⁹⁵¹ These changes recognised a new reality in which more women had separate estates but, following the overruling of *Corbett*, placed the burden of their contractual incapacity increasingly on traders.

As this occurred, the Chancery had been steadily widened the circumstances in which a married woman could deal with her separate estate,⁹⁵² and, equally importantly, when her husband could not. Whilst these rules were often used to protect wives from the 'profligacy'⁹⁵³ of their husbands, they also enabled wives and their husbands to protect assets from creditors during bankruptcy.⁹⁵⁴ Combs persuasively argues such use of coverture as insurance against bankruptcy amongst the middle class⁹⁵⁵ was a major factor behind the 1870s-1900s reforms.⁹⁵⁶ The two major Acts of Parliament were the Married Women's Property Act 1870 and the Married Women's Property Act 1882, to which we can add the Amendment Act of 1874, and the Married Women's Property Act 1893. Altogether, this legislation gave every married woman a separate estate she could contract with at law, following the old rules established at equity with a few statutory modifications to protect creditors. Consequently, though the rules were significantly more liberal than those which came before at common law, they only gave women a limited contractual capacity. A married woman was only liable to the extent of her estate⁹⁵⁷ and could not be found personally liable until 1934.⁹⁵⁸ As a result, following the 1870 Act judges asked whether a wife had any property in her separate estate at the time of her contract before it could find it binding.⁹⁵⁹ Further, although there was a strong presumption a married woman contracted using her separate estate, it was still possible to rebut and claim she was the agent of her husband.⁹⁶⁰ These inconveniences were slowly ameliorated, with the 1893 Act establishing a married woman's separate property, for the purposes of her contract, included future or past assets. Within the contract treatise, the impact of the reforms was initially muted: most authors kept their

⁹⁴⁹ *Liddlow v. Wilmot* (1817) 2 Stark. 86, with *dicta* in *Johnston v. Sumner* (1858) 3 H. & N. 261, 266 that if a working man turn out his wife, a working woman capable of earning as much as the man, or she have a settlement double his income, he might not be liable for necessaries.

⁹⁵⁰ *Biffin v Bignell* (1862) 7 H. & N. 877, 80

⁹⁵¹ Previous cases had suggested the husband had to maintain the wife to the degree suitable to his own station in life, Leake 1st edition, 246.

⁹⁵² *Johnson v Gallagher* (1861) 3 D F & J 494, 508-521; Pollock, 1st edition,, 64-65; Smith (1856) *A Treatise on the Principles of Equity*, 749-751.

⁹⁵³ (Combs 2013), 220

⁹⁵⁴ Combs, *ibid*, 218; Interim Report, 10; Pearlston, 292, noting the bankruptcy rules pre-1870 'completed contradicts Mansfield's commercial rationality.'

⁹⁵⁵ Combs, *ibid* 224, noting in the latter decades of 1850-1880 a third of all male shopkeepers left their property to their daughters and wives in trust. For the political context, see Shanley, *supra* (n913), 67-68; and Holcombe *supra* (n913). For a summary of factors, Combs, *ibid*, 217. Lewis, *Women in England, 1870-1950*, 47, cited in Gordon *supra* (n67), 115, suggests that the 1870 act was primarily to protect working class women.

⁹⁵⁶ Gordon, *ibid*, 112ff provides a good summary of the post-1870 reforms.

⁹⁵⁷ Gordon, *ibid*, 116; 1882 Act, s. 19, notes the restraint on anticipation also persisted.

⁹⁵⁸ See *Palliser v Gurney* (1887) 19 QBD 519.

⁹⁵⁹ *Re Shakespear* (1885) 30 Ch D 169, Gordon, *supra* (n67), 117; Shanley *supra* (n910), 126.

⁹⁶⁰ Gordon, *ibid* 119, citing *Paquin v Beauclerk* [1906] AC 148; this enabled treatise writers to retain the old learning on necessaries.

structure unchanged and left the legislative alterations as a brief exception.⁹⁶¹ A notable example was the 12th edition of *The Practical Treatise*, in which editors J.M. Lely and N. Geary attempted to narrow the 1870 Act by maintaining married women, for all ‘personal contracts,’⁹⁶² had to get the consent of her husband;⁹⁶³ the alternative, they argued, would be a danger that a wife’s employment might prevent her carrying out her ‘conjugal duties.’⁹⁶⁴ Nonetheless, by 1890 all the major contract treatises, *The Practical Treatise* included, had restructured their topics on coverture⁹⁶⁵ to foreground the new default position of extensive contractual capacity. Whilst the mass of law on when a wife would, or wouldn’t, be liable for her contracts continued to accrete, the treatise writer could now safely minimise it as a ‘historical’⁹⁶⁶ area of law.

1.2 One May Be Taken as the Type of All

The patterns above show a slow marginalisation of the old 18th century legal statuses, driven by Parliament, the judiciary, and the treatise writer. Nor should we forget the numerous features of social life which *could* have been made legally relevant but were not. For example, ignoring relative differences in wealth,⁹⁶⁷ commercial sophistication, or organisational structure; kinship structures, such as being a father, cousin, or sister;⁹⁶⁸ religious affiliation,⁹⁶⁹ and one’s physical location, such as London or India.⁹⁷⁰ Their definition as legally irrelevant was a political choice. The exclusion of locality followed from the belief local differences ought to be ignored for a *national* contract law. The exclusion of kinship structures followed the liberal principle that neither the court, nor anyone else, should make one’s contracts, and the related principle one should not be bound without one’s consent. Other differences, such as bargaining power, were excluded following an ideal vision of the market composed of uniform individuals, even if those ‘individuals’ were primarily companies. These views appear fairly straightforwardly in the writing of Chitty Jr and his father, but are hidden behind the positivism of Leake and Addison.⁹⁷¹ Nonetheless, as with Addison and Chitty Jr, Leake’s underlying philosophy is apparent in his other writing. In his essay

⁹⁶¹ Chitty, 9 158; Leake 2nd edition, 564; Anson 1, 106; Pollock, 1, 61; cf Griffith, J. (1873) *The Married Women's Property Act, 1870*, 1871, First Edition, 1-2

⁹⁶² 12 ed, 239-40. Gely and Neary could not deny, following the Employers and Workmen Act’s 1875 explicit recognition of married women as capable of entering service contracts, the legal rectitude of a wife being employed.

⁹⁶³ Citing *Symonds v Hallett* (1883) 53 L.J. Ch. 60; *Ashworth v Outram* (1877) 5 Ch. D. 923; and *In Re Whittaker* (1882) 51 L.J., A. 737, though provide no case of a wife actually being prevented from exercising these rights. Leake, Pollock, Anson, MacGregor, and Roper all omitted this requirement.

⁹⁶⁴ Chitty Jr, *ibid*, 241. Fn (c) & (d) reference the husband’s right to ‘all his wife’s time.’

⁹⁶⁵ ‘The Contracts of Married Women’ was eventually taken out of the section on ‘Particular Persons.’ in Chitty Jr, 12 (1890), 222; n.b. the movement into the past tense in Anson, 3, 116; Leake, 3 1892, 478; Pollock, 4th Edition, 78.

⁹⁶⁶ Chitty Jr, 12th edition, 230; Pollock 78-79

⁹⁶⁷ The married woman’s separate estate being the closest to creating artificial legal persons around a person’s assets, see Pollock, 1, 66, discussing the married woman’s separate estate as a “*quasi* artificial person.”

⁹⁶⁸ See the genealogical identification of ‘nasab’ described in (Bishara 2017).

⁹⁶⁹ Cf Ottoman law, (Kuran and Lustig 2012), 631; religion continued to play a relevant role in evidence law until the 1860s, (Allen 2011).

⁹⁷⁰ E.g., Chitty Sr, 3, 105-6, considering the Sunday trading rules and the relevance of market, city, and country.

⁹⁷¹ They can also be identified in the writers of specialised treatises. For example, Pope, 4, suggests society is an ‘aggregation of rational beings.’

On the Formal Science of Law,⁹⁷² Leake argued “duty is essentially an incident of the individual moral being. An association of men, however numerous, and whatever its object - even an organised state - is only a collection of individuals.”⁹⁷³ Going on, he is more explicit: “The individual constituent members of the State are precisely identical in kind; therefore one may be taken as the type of all, and the duties of one as the possible duties of all.”⁹⁷⁴ This process of exclusion is similar to generalisation and abstraction themselves, and it unsurprising Leake considered his model to be natural and scientific rather than political and contestable. For those personal traits which could not be denied legal relevance, treatise writers could exclude them on grounds of topical irrelevance. In addition to an affinity with liberal political philosophy, this was also a matter of convenience. As noted above, status-based rules were unavoidable, and their resultant, burgeoning complexity would have dominated the content and focus of any contract treatise considering them in detail. The choice to exclude status therefore had the additional sheen of ‘elegance’ which simple solutions to difficult organisational problems often possess.

Part 2: The Regulation of Bargains

No modern state in history has refrained from regulating the bargains of its citizens. Such rules police ‘free’ bargains and are therefore inherently impossible to contract around (although not to avoid). Consistent with the feedback model, ‘illegality’ made up a consistently large contract topic. Before engaging in a history of this mode of law-making, two important features of the regulatory landscape must be considered. First, such ‘interference’ occurred in a highly fragmented way under many different headings and framings. A court might interrogate the enforceability of a bargain on the basis of the adequacy of consideration; the (un)desirable consequences of the contract, such as restraint of trade; its effects on third parties, such as bankrupts, heirs, the dead, or general ‘strangers to the consideration’; public policy and immorality; frauds on marriage and bankruptcy; champerty and maintenance; relief for bonds; and the denial of specific performance. Second, the vast majority of contract regulation governed specific contracts. This is unsurprising given the ‘general part’, by its nature, abstracts out detail, whilst specific contracts deal with the particulars a state may wish to control. Nonetheless, general regulations did exist and are of some interest. To make this immense topic more manageable, I use a tri-partite taxonomy of regulation: (i) Regulating the substance of agreements (‘you cannot agree to X or Y’); (ii)

⁹⁷² (Leake 1861)

⁹⁷³ Leake, *ibid*, 156

⁹⁷⁴ Leake, *ibid*, 156, cf Savigny’s similar concept of private law. (Ribeiro 2012), 138.

Regulating their consequences ('you can agree to X or Y, but not if it causes Z'); and (iii) Regulating the making of agreements ('you can agree to X or Y, even it causes Z, but not if it was reached via M').

2.1 Three Kinds of Interference

2.1a Regulating the Content of Agreements

I consider two aspects of substantive regulation here. First, 'unfair deals', involving the regulation, or non-regulation, of the substantive equality of the contract; second, 'Wicked Deals', involving the regulation of the motives and purposes of the contract parties. Both are capable of generating large volumes of case-law. Unlike status, however, the general trend across the 19th century did not involve their minimisation. Judges at common law and equity remained concerned about contractual fairness throughout this period. The most important shift with the regulation of *unfair deals* was to strategically re-categorise interference as policing consent:⁹⁷⁵ with unfairness either appearing as a vitiating factor (*qua* undue influence or fraud) or as an element of constructing what the parties 'really intended.' Conversely, when it came to the *motives* of the parties, contract and criminal law were necessarily interlinked: whilst the judges might narrow review on the basis of morality or public policy, they could not avoid their role as watchmen for the state. As such, 'illegality' remained an ever-growing, staggeringly immense, body of law throughout the 19th century.

Unfair Deals

"Parties have the right to make a bad bargain." According to the treatise writers, this right was both a central component of market efficiency and constitutive of the 'liberty' English law (uniquely) provided. Yet whilst it may be economically efficient to part fools⁹⁷⁶ from their money, the social consequences are not always so desirable. The 19th century judiciary adopted a characteristic 'pen-knife' approach to temper the ruthlessness of the commercial world.⁹⁷⁷ I consider the rule relating to 'inadequacy of consideration' in detail here; below, in Chapter 5, I consider contractual construction as a form of 'soft' contractual review. The former was a (partially) general doctrine invalidating contracts, or at least rendering them unenforceable, when one side of the bargain was excessively disproportionate to the other.⁹⁷⁸ Given the historical controversy over this point, careful definition is useful. The existence of rules governing highly unequal contracts involving *specific* parties, or specific transactions, is

⁹⁷⁵ (Swain 2014)140-142; (Gordley 1981), 1587, 1637.

⁹⁷⁶ *Taylor v Rochfort* (1751) 2 Ves Sen 281, 284.

⁹⁷⁷ (Lobban 2010); Lobban *supra* (n78).

⁹⁷⁸ Lobban *supra* (n78); (J. Barton 1987); (Swain 2015); Simpson *supra* (n462); (Kennefick 2018); Atiyah *supra* (n148); (Horwitz 1979); (Gordley 1981); (MacMillan 2014); Waddams *supra* (n48), 87; (Waddams 1976);

uncontroversial and numerous examples can be found. To give a few: the protection provided by the Chancery to expectant heirs who burdened their inheritance with excessive debts;⁹⁷⁹ sellers of reversions for below their value;⁹⁸⁰; the remarkably paternalistic protection given to sailors dealing with their wages and prize money;⁹⁸¹ the improvident contracts of the insane and underage; agreements for marriage settlements; and bargains in restraint of trade. The more vexed question is whether any *general* rules existed. To this, it is again agreed upon that inadequacy of consideration could be an *effective*, though insufficient, factor justifying the denial of specific performance or rescission of an agreement⁹⁸² on the basis it suggested fraud.⁹⁸³ Upon this ground of relief, Chancellors would typically look at the overall pattern of the transaction,⁹⁸⁴ considering possible reliance or pressure,⁹⁸⁵ inequality in the bargain; the position of the parties; and the weakness of the party seeking relief, physically,⁹⁸⁶ mentally,⁹⁸⁷ or economically.⁹⁸⁸ Whilst the position regarding the denial of specific performance was unclear, it was settled by the 19th century that inadequacy of price alone was *not* a ground for rescission.⁹⁸⁹ Nonetheless, in practice, the Chancery could secure this result by finding that a sale at a ‘shocking’ undervalue would create a presumption of fraud by itself.⁹⁹⁰

These grounds of relief were virtually absent from the common law.⁹⁹¹ At law, judges had at least three general tools to ameliorate a bargain for inadequacy: (1) allow the jury to alter the award of damages,⁹⁹² (2) expand the narrow grounds of common law fraud; and (3) interrogate the ‘adequacy’ of the consideration provided.⁹⁹³ Of these, (1), if it ever existed, was reduced through judicial control of jury discretion, whilst (2) was expanded, albeit in the will-theory direction described below in Part 2.1C. Finally, (3) depended entirely on the flexibility and purpose of the ‘consideration’ doctrine. The requirement to give something in exchange for a promise seems to have initially been treated as either evidence of a strong intention to be bound (thus, a species of formality),⁹⁹⁴ or as the general ‘cause’ or

⁹⁷⁹ Kennefick, *ibid*, 311-313. For a very detailed investigation, see (Saunders 2020)

⁹⁸⁰ Kennefick, *ibid*

⁹⁸¹ E.g. *Baldwin v. Rochford* (1748) 1 Wils. K. B. 229, 230

⁹⁸² For the difference, see Simpson, 562-565, *supra* (n975).

⁹⁸³ The classic case on fraud is *Chesterfield v Janssen* (1750-1) 2 Ves Sen 146. On the ‘evidentiary theory of inadequacy’, see Powell, 157-8, Simpson *supra* (n462), 367, fn 363. Cf *Treatise of Equity* (1737), cited in Barton, *supra* (n978) 124.

⁹⁸⁴ See *Fry v Lane* (1889) LR 40 Ch D 312 for a summary of relevant factors, 1089; likewise, Macmillan, *supra* (n975).

⁹⁸⁵ Consider the equitable factor of ‘surprise.’ Lobban, *supra* (n78) 451. *Evans v Llewellyn* (1787) 1 Cox 339, 340. For whether this is itself fraud, or something ‘like fraud’, see Pollock, 1st edition, 536-9

⁹⁸⁶ *Clark v Malpas* (1862) 31 Beav 8

⁹⁸⁷ E.g. *Longmate v Ledger* (1860) 2 Giff 157, 163; *Evans v Llewellyn* (1787) 29 Eng. Rep. 1191; *Clarkson v Hanway* (1723) 2 P. Wms 203.

⁹⁸⁸ *Wood v Abrey* (1818) 3 Madd 423, referring to the ground of ‘distressed circumstances; Macmillan *supra* (n975) 22.

⁹⁸⁹ See *Heathcote v Paignon* (1787) 2 Bro. C. C. 167, 175

⁹⁹⁰ For a *general* suggestion that shocking inequality could produce a finding of fraud sufficient to set aside the contract: *Coles v Trecothick* (1805) 9 Ves 234

⁹⁹¹ Lobban, *supra* (n78), 444; for a suggestion that inadequacy of price, alongside ‘other circumstances’ could establish fraud at nisi prius, see *Solomon v. Turner* (1815) 1 Stark. 51.

⁹⁹² Suggested by Horwitz, *supra* (n978) see Barton *supra* (n978), 120-1.

⁹⁹³ Consideration could also be justified as a tool for protecting ‘hasty’ parties, see Waddams *supra* (n48) 88-89, Gilbert, 39-40, Addison 2nd, 18

⁹⁹⁴ Baker *supra* (n196), 362, dates the notion in its earliest formulation to the 16th century.

‘reason’ for the contract to be enforced.⁹⁹⁵ Under these grounds, judges and legal writers from at least the 16th century onwards recognised a consideration would be valid provided *some* value had been provided,⁹⁹⁶ regardless of its adequacy.⁹⁹⁷ In the late 18th and early 19th centuries, two new justifications for this doctrine were emphasised. One was methodological: the court had no way of ascertaining the ‘fair value’ of a bargain,⁹⁹⁸ especially when prices were highly volatile.⁹⁹⁹ This is not particularly persuasive given the court did, in fact, measure the value of a lost bargain when calculating damages; further in the case of interests in land, the Chancery demonstrated it was possible to ascertain the ‘fair value’ of even highly uncertain reversions.¹⁰⁰⁰ The other was political: parties *ought* to have the freedom to make their own bargains¹⁰⁰¹ - essentially, that even if one could work out a ‘fair value’, the *correct* value was that given by the parties.¹⁰⁰² This freedom was in turn justified by deference to market outcomes and a judicial unwillingness to evaluate party motives. In addition to ideology, the common law’s resistant position on (2) and (3) above also followed from the inability to defer questions to the jury, (1). Governing the substance of (all?) contracts on the basis of fairness had the potential to vastly increase judicial business,¹⁰⁰³ and, consequently, legal doctrine, provided judicial determinations made binding law. The Chancery also followed precedent,¹⁰⁰⁴ but in the sphere of fraud it was willing to tolerate a far greater degree of untextured, fact-dependent adjudication than its common law neighbour.¹⁰⁰⁵ By far the most substantial body of law which did form - that relating to sales of reversions - was unique in the sharp, automatic nature of its rules.¹⁰⁰⁶ The rest could exist as essentially unstructured, non-legal ‘facts’ potentially establishing fraud, thereby preventing them from calcifying and slowly producing a doctrinal edifice.

The contract treatises, as usual, favoured the common law position. The early architects of the general part would either ignore the law entirely or mention the relevant doctrines as off-hand remarks,¹⁰⁰⁷ or in obscure footnotes.¹⁰⁰⁸ This followed from their jurisdictional framing: Powell,¹⁰⁰⁹ Newland, Bacon,¹⁰¹⁰ and Chitty Sr¹⁰¹¹ all considered inadequacy of consideration (or ‘unreasonable agreements’), whilst

⁹⁹⁵ See (Simpson, 1987a), 416-52

⁹⁹⁶ (Lobban 2010a), 376.

⁹⁹⁷ See Lobban, *ibid*, Powell, *Contracts* (1790), i, 343, citing *Sturlyn v. Albany* (1587) Cro. El. 67.

⁹⁹⁸ E.g. Chitty Jr, 1st edition, (7); Chitty Jr, 2nd edition 1834, 26, Comyn, 1, 8, 17.

⁹⁹⁹ See Story, *Commentaries* S237 (145); *Griffith v Spratley* (1787) 1 Cox 383, 388.

¹⁰⁰⁰ Gordley *supra* (n975) 1599.

¹⁰⁰¹ Chitty Jr, 1st Edition, 7, 2nd edition, 26.

¹⁰⁰² See Pollock’s citation of Hobbes, 5th edition, 171-2

¹⁰⁰³ A fact judges were aware of intuitively, see *Heathcote v. Paignon* (1787) 2 Bro. C. C. 167, 175.

¹⁰⁰⁴ Kennefick, *supra* (n978) 334

¹⁰⁰⁵ E.g., Lobban, *supra* (n78), 448; Swain, *supra* (n978), 153; Bacon, Vol 1, 70, *New Abridgment*.

¹⁰⁰⁶ Kennefick, *supra* (n975), 322-325.

¹⁰⁰⁷ Such as those found in Leake, 1st Edition, 209, and Chitty Jr, 9th edition, 21.

¹⁰⁰⁸ E.g. Addison, 11th Edition, 12, gn (h). See Waddams, *supra* (n78) 101-102.

¹⁰⁰⁹ Powell, 78, 151-158

¹⁰¹⁰ Bacon, Vol 1, 69-70 citing *Abr Eq* 17.

¹⁰¹¹ Vol 3, 158-160 relying primarily on Newland.

Comyn,¹⁰¹² Chitty Jr,¹⁰¹³ and Addison¹⁰¹⁴ either entirely omitted it, or considered it as a brief aside. Leake is a useful bridging point in this regard. In the first edition, he gave highly sketchy off-hand references to the equitable jurisdiction;¹⁰¹⁵ in the second, following the post-Judicature acts, Leake added a section under ‘undue influence’;¹⁰¹⁶ and in the third (1892), he finally expanded it to include the general grounds of relief for the weak and ignorant.¹⁰¹⁷ Although hidden by the contract treatises, the Chancery remained active across this whole 19th century.¹⁰¹⁸ It is difficult to draw firm conclusions given the casuistic nature of the grounds of relief, but two trends can be identified. One was an assertion, in the teeth of legislative liberalisation in 1867,¹⁰¹⁹ of the traditional protection awarded to heirs and reversioners dealing with their future estates.¹⁰²⁰ This paternalistic policy was accompanied by widening the circumstances in which the burden of proof would be shifted against a party enforcing a hard bargain. The other was a slow transformation of the relief for ‘fraud’ into a more general heading of ‘undue influence.’¹⁰²¹ We see this clearly in the first serious attempt by a treatise writer to reconcile the equitable and common law strands, Pollock's *Principles of the Law of Contract*. The ‘adequacy of consideration’ cases, as noted above, were messy;¹⁰²² Pollock, however, was able to consolidate them under a single section entitled ‘*Undue Influence*.’¹⁰²³ The process of assimilation provides us with a nice example of the tension between the positivistic, substantive treatise and traditional equitable fluidity.¹⁰²⁴ On the question of specific performance for example, he found the equitable case-law so jumbled he initially listed the authorities and simply allowed the reader to determine the result. By the 8th edition, however, this ambiguity was tidied up with a reference to *Fry On Specific Performance*, decisively stating that the ground for refusing specific performance was, as elsewhere, fraud, and inadequacy was therefore merely a ‘material fact.’ In this, and in the other later equity treatises,¹⁰²⁵ we see the characteristic post-decline treatise-writer urge to consolidate and reduce the total number of authorities into neat, organised principles.¹⁰²⁶ The final product did not deny the equitable ground of relief; rather, ‘inadequacy of consideration’ was comfortably

¹⁰¹² See Comyn, Vol 1, 8, 17.

¹⁰¹³ Chitty Jr, 1st Edition 224

¹⁰¹⁴ Addison, *Contracts*, 4th edn, 1856, 17, 11th edition, 12 fn(h).

¹⁰¹⁵ Leake, 1st, 205,

¹⁰¹⁶ 2nd edition, 390

¹⁰¹⁷ 3rd Edition, 360. See also 6th Edition, 290.

¹⁰¹⁸ See the cases cited in *Fry v Lane* (1888) 40 Ch D 312, 322-3

¹⁰¹⁹ *Sale of Reversions Act 1867*.

¹⁰²⁰ *Earl of Aylesford v. Morris* (1873) LR 8 Ch App 484 at 490–1.

¹⁰²¹ See (Macmillan 2014), 30. The variety of overlapping headings in (Hirst 1883), 2645 (‘extravagant contracts’); 2647-2650 (‘undue influence’); 2651 (‘inadequacy of consideration’), suggest there was persistent uncertainty over taxonomy throughout the 19th century. (Swain 2014), 340-342, and 15, fn 157 argued *Fry v Lane* (1889) LR 40 Ch D 312, 322, was a turning point away from unconscionable bargain analysis towards the precedent and will-theory friendly notion of ‘undue influence.’ An earlier trend can be seen in *Tennent v Tennent's Trustees* (1870) SC 10 and Snell on Equity, 378 towards conceptualising inadequacy in terms of influence.

¹⁰²² (Smith 1837), 144, placed the cases in a subheading under fraud: ‘Inequitable and unconscientious Transactions’, to which he noted, “this is necessarily a very wide and somewhat indeterminate class, which is scarcely susceptible of systematic analysis...”

¹⁰²³ Pollock 1st edition, 503; likewise, Leake, 2nd edition, 390.

¹⁰²⁴ (Swain 2014), 141; Swain, *supra* (n978), 167; (Swain 2022); Cornish and Clark, *supra* (n249), 211-2; Cranston *supra* (n106), 43-47; (Polden 2002); (Waddams 2012), 188–92

¹⁰²⁵ For example, Snell's Equity, (1872) 2nd edition.

¹⁰²⁶ Waddams *supra* (n48), 100-101.

contained as an unanalysed fact indicating undue influence, itself slotted in neatly alongside the other (consent-based) vitiating factors (see 2.1C). The potential for a general ground of ‘unconscionable contracts’ had been killed off.¹⁰²⁷

Wicked Deals

For all their talk about not inquiring into the ‘adequacy of consideration’, the English judiciary nonetheless did concern themselves with the motives and purposes of contracts. The late-19th century taxonomized these grounds of invalidity as: (1) illegality; (2) immorality; and (3) public policy.¹⁰²⁸ The first followed straightforwardly from the structural interlinkage between statutory regulation and contract law. Given most regulations addressed themselves to specific transactions or commercial sectors¹⁰²⁹ the ensuing growth of doctrinal law was staggeringly enormous. They included, *inter alia*,¹⁰³⁰ the regulation of factories; mines; chimney sweeps; shops; warehouses; shipping; usury; gambling; and the immensely detailed regulations of markets; manufacturers; and professionals. The list goes on, and continues growing incessantly until and beyond 1914. To these multifarious statutes, we can add various intra-systemic rules, such as ‘fraud’ related to rights arising from other legal institutions, such insolvency, composition, and marriage;¹⁰³¹ agreements contrary to civil injuries and criminal law;¹⁰³² and illegal corporations.¹⁰³³ The contractual textbook writer found their volumes increasingly filled with questions of illegality, despite ostensibly writing in a period of ‘freedom of contract.’ Chitty Sr had solved this problem through a separate volume covering ‘*public and general regulations*’,¹⁰³⁴ whilst his son simply omitted most of the new regulations.¹⁰³⁵ Addison and Leake, on the other hand, reverted to something closer to a legal digest and listed a large assemblage of random regulations with little internal structure.¹⁰³⁶ Even Pollock, arch-classifier, abandoned hope, noting ‘the authorities and dicta are too numerous to admit of any detailed review. Nor indeed would this be very desirable if it were possible.’¹⁰³⁷ Simultaneously, the adjudicative burden of these statutes was partially ameliorated by the centralising tendencies of the Victorian state.¹⁰³⁸ Parliament created specialised tribunals and commissions, such as

¹⁰²⁷ Swain *supra* (n978); Macmillan *supra* (n978), 28-31; for the influence of Pollock on the equity treatises, 33.

¹⁰²⁸ See Pollock, *1st Edition*, 218-219.

¹⁰²⁹ For a summary of the causes behind the statutory regulation, see (Stebbins 2006), 10-22.

¹⁰³⁰ See *Statutes* section in *Bibliography*. (Cornish 2010), *Part II: Statutes, Social Reform, and Social Control*.

¹⁰³¹ Referred to typically as ‘fraud on third persons’, see Chitty, 2nd edition, 531; Addison 2nd Edition, 136; Leake, 2nd edition, 400.

¹⁰³² Pollock, 222-4

¹⁰³³ Pollock, 235; see also, Chitty Jr.

¹⁰³⁴ Volume I, xiii.

¹⁰³⁵ Following his adaptation of *Volume III* alone; later editors resorted to catch-all headings like “miscellaneous cases in which “ ‘Freedom of Contract’ interfered with.” Chitty Jr was also able to relegate some of the regulation to the specific contracts, e.g. see Chitty 9th Edition, 516-547.

¹⁰³⁶ E.g. Addison, 11th edition, Chapter III, 75-117; Leake 6th Edition, Chapter IV, 516-572.

¹⁰³⁷ Pollock, *1st Edition*, 221, see his Appendix A, 317. In the 8th Edition, 315, fn(i) he removed the appendix, on the basis they were better covered with monographs.

¹⁰³⁸ (Stebbins 2006), 28.

the Factory Commission, Poor Law Commission, and Railway Commission, to absorb the new, highly detailed regulatory work ill-suited for the central courts.¹⁰³⁹ This helped manage the logistical burden of these statutes; many of the new entities were primarily *administrative* and thus effected a movement of complexity from the legal to bureaucratic system. Those which were more adjudicative in nature,¹⁰⁴⁰ limited the creation of legal doctrine by structurally disconnecting with the central courts;¹⁰⁴¹ declining to develop their own precedents;¹⁰⁴² or, where these were unavailable, managed the cognitive load by increasing legal specialisation.¹⁰⁴³

The more interesting, open-ended grounds for interference were ‘immorality’ and ‘public policy.’ The 18th century judiciary were confident in the use of public policy and could use it to progressively to extend the scope of illegality,¹⁰⁴⁴ apparently even in the face of Parliamentary activity. Consider Lord Kenyon’s judgment in *R v Rusby* (1800)¹⁰⁴⁵ railing against the practice of ‘regrating’ - the crime of buying goods in a market and then reselling them in the same market, thereby raising their value:

“I wish Dr. Adam Smith had lived to hear the evidence of to-day, and then he would have seen whether such an offence exists, and whether it is to be dreaded... it is the nature of the human mind, it is the perfection of the human heart, to serve a friend in distress, but in doing so, a man should not transgress the higher calls of religion and morality.”¹⁰⁴⁶

This was despite the fact that, in 1776, the statutory version of those offences had been abolished. Similarly broad statements, inherited from the 18th century, can be found in Chitty Sr’s *Law of Commerce* (1824): “At common law any contract is invalid which violates the precepts of religion or morality, or the rules of public decency.”¹⁰⁴⁷ Accordingly, Chitty Sr notes, the sale of any ‘blasphemous, obscene, or libellous’ prints would be void. In addition, any ‘agreement contrary to public policy, and injurious to the community at large’ would also be void.¹⁰⁴⁸ Whilst seemingly at odds with Chitty Sr’s stated political economy, these phrases are attributable to Chitty’s extensive reliance on Comyn’s *Treatise* (1807) when drafting his section on illegality.¹⁰⁴⁹ Chitty Jr, unsurprisingly given his source material, followed a similar line in the first edition of the *Practical Treatise* (1826). Nonetheless, in successive

¹⁰³⁹ Stebbings, *ibid.*, 41-2, noting the difficulty produced by the law of precedent.

¹⁰⁴⁰ Stebbings *ibid.* 7-8

¹⁰⁴¹ Stebbings *ibid.* 313.

¹⁰⁴² Such as the fiscal tribunals, *ibid.*, 210.

¹⁰⁴³ Producing distinct doctrinal bodies with their own (‘non-contractual’) case-law and treatise literature.

¹⁰⁴⁴ For the contrary, see Swain *supra* (n978), 245 and (Winfield 1928), 84.

¹⁰⁴⁵ Peake Add Cases 189, 192; see also *Haycraft v Creasy* (1801) 2 East. 92, 102-3; and *Lorymer v Smith* (1822) 1 B & C 1, 2.

¹⁰⁴⁶ See also Lord Kenyon’s judgment in *R v Waddington* (1800) 1 East 143, noting (155) engrossing was an ‘evil of the greatest magnitude’, and the ‘most heinous offence against religion and morality, and against the established law of the country.’ For more detail, see (Hay 1999), 102, and a persuasive argument, 129ff that Lord Kenyon was a strong believer in a ‘moral economy.’

¹⁰⁴⁷ Pg 78-9. Chitty Sr follows Bacon and Newland in characterising illegality and public policy as species of the consideration doctrine. See Bacon’s Abridgment, Assumpsit E; Newland, Chapter 33, 469.

¹⁰⁴⁸ 79

¹⁰⁴⁹ For Comyn’s (broad) formulation, see pg. 30.

editions, we can detect a turn away from this 18th century paradigm. This was particularly clear in the second edition.¹⁰⁵⁰ Chitty stated the basic presumption was in favour of validity,¹⁰⁵¹ and the burden - emphatically high - was on the party attempting to prove the 'negative.'¹⁰⁵² This approach continued in later treatises, most clearly Pollock, who also stated the basic default was enforceability. As with the rules of particular status, the treatise writers sought to convert illegality into a narrowly described exception to the norm.

The text writers' attitude represented one view in a slowly unfolding debate over the role of public policy in a crystallising precedent-based system. Judges came to view public policy with scepticism.¹⁰⁵³ An early statement canvassing the basic concerns was *Richardson v Mellish* (1824).¹⁰⁵⁴ There, Burrough J outlined several points indicative of the century: public policy was an 'unruly horse' to be used sparingly; it was a ground only used as a 'last resort'; there was no public law invalidating the contract, and, as the legislature deemed it acceptable, such agreements would not be against public policy; and general expressions, as opposed to specific points of law, ought to be avoided.¹⁰⁵⁵ Best C.J likewise suggested the courts only adjudicated between specific parties, and thus ought to leave public policy to Parliament given its greater power to consider the whole picture.¹⁰⁵⁶ The debate came to a head in the 'great case' of *Egerton v Brownlow* (1853).¹⁰⁵⁷ *Egerton* involved a condition stating a particular heir could only inherit if he attained the title of the Duke or Marquis of Bridgewater which, despite the condition being 30 years old, was argued to encourage manipulation of the Crown's policy. This question split the judiciary and revealed the prevailing attitudes towards public policy. Crompton J and Talfourd J noted its uncertainty;¹⁰⁵⁸ Alderson B argued it would 'destroy the distinction between judicial and legislative functions';¹⁰⁵⁹ and Parke B suggested only heads of public policy well-established by precedent could be accepted.¹⁰⁶⁰ Conversely, Pollock C.B, Lord Lyndhurst, Lord Truro, and Lord St Leonards were sanguine. Their view was that judges were capable of considering public policy,¹⁰⁶¹ in any case, inevitably would do

¹⁰⁵⁰ See also, Chitty 4th, removed the line 'the object of all laws is to repress vice, and promote the general welfare of the state, and of society.'" cf Chitty 3rd Edition 657

¹⁰⁵¹ *ibid* 515

¹⁰⁵² *ibid*

¹⁰⁵³ Although there are still several cases using public policy, *Vauxhall Bridge Co. v. Spencer* (1817) 2 Madd. 356, 365; *Card v. Hope* (1824) 2 B. & C. 661, 670 ('national policy'); *Fletcher v. Soudes* (1826) 3 Bing. 501, 590; *Gifford v. Yarborough* (1828) 5 Bing. 163, 165 (1828) ('beneficial to the public'); *Homer v. Graves* (1831) 7 Bing. 735 p. 743; *Grenfell v. Dean and Canons of Windsor* (1840) 2 Beav. 544 p. 549.

¹⁰⁵⁴ *Richardson v Mellish* (1824) 2 Bing 229

¹⁰⁵⁵ *ibid*, 252-253; cf Park J discussing 'wickedness', 251

¹⁰⁵⁶ 238. See also Swain *supra* (n978), 247

¹⁰⁵⁷ (1853) 4 H.L.C 1

¹⁰⁵⁸ Crompton at 70-71; Talfourd, 96; Alderson also at 106-7; Parke B, 122-3.

¹⁰⁵⁹ 106, see also Parke B, 123.

¹⁰⁶⁰ Parke B, 123, 126. Taken by Lord Wright as the 'classical statement', 72-3. Alderson B, 107. For the judicial view public policy exceptions should be 'limited', 'precise', and 'knowable.' Waddams *supra* (n48), 153; see also Anson 1st edition, 248.

¹⁰⁶¹ Pollock C.B. 151, Truro, 198

so;¹⁰⁶² and could apply public policy predictably,¹⁰⁶³ even if done on a case by case basis.¹⁰⁶⁴ Although tempting to read questions of high-constitutional import into this split, the core of the disagreement was the role of precedent.¹⁰⁶⁵ As noted in Chapter 2, precedential-style reasoning had been strengthening since the late 18th century; by 1850 it was almost qualitatively different in binding power.¹⁰⁶⁶ The question therefore arose: what was the role of open-texture, broad grounds like public policy in such a system? The sceptical judges believed it was Hobson's choice: either public policy would be totally uncertain and applied on a case-by-case basis by different judges,¹⁰⁶⁷ or it would be contained in precedent, thereby producing uncontrolled quantities of law in areas properly left to Parliament.¹⁰⁶⁸ Only those heads already crystallised into precedent, such a marriage brocage, wagers, and restraint of trade, could (and indeed must)¹⁰⁶⁹ be followed.

The other perspective was that, much like Chancery, the judiciary could sensibly make new law, applying it either in a manner both particularistic and stable,¹⁰⁷⁰ or by simply creating new case-lines.¹⁰⁷¹ *Egerton* was followed by a period of relative silence,¹⁰⁷² but from the 1870s onwards it was clear the conservative perspective was ascendant.¹⁰⁷³ The various grounds of scepticism were repeated and judges acknowledged a new justification: public policy virtually always worked to *deny* the enforcement contracts, the denial to extend or create new heads of public policy therefore had the effect also of protecting "freedom of contract."¹⁰⁷⁴ In their most candid statements, the judiciary recognised this was, itself, a policy¹⁰⁷⁵ - in fact, the most important of all:

"If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting."¹⁰⁷⁶

¹⁰⁶² *ibid*, 149, Lord St Leonards, 237

¹⁰⁶³ Lord Truro, 197.

¹⁰⁶⁴ Lord Lyndhurst, 161; Truro, 200-201.

¹⁰⁶⁵ This is Winfield's explanation for the shrinking of public policy, (Winfield, 1928), 84-6.

¹⁰⁶⁶ Waddams argues the mid-19th century's turn to formalism restricted public policy, *supra* (n48), 152-3. For indications of the conversion of public policy into precedent, see Park J in *Fletcher v Soudes*, *supra* (n1053)

¹⁰⁶⁷ For a direct statement of this view, see Jessel M.R. in *Besant v. Wood* (1879) 12 Ch. D. 605, 620

¹⁰⁶⁸ Alderson B, 107 'it is impossible to foresee where such a principle will stop.'

¹⁰⁶⁹ Even with regret, *Hilton v. Eckersley* (1856) 6 E. & B. 47, 64

¹⁰⁷⁰ Seemingly Lord Truro's view, 197, 200-201.

¹⁰⁷¹ Lord St Leonard's view, 239.

¹⁰⁷² Knight suggests *Egerton* was conservatively received, see (Knight 1922), 212-214. Cf Winfield, *supra* (1065), 88. Pollock, writing sometime after, read *Egerton* down as one example of a contract 'tending to the prejudice of good government and the administration of public affairs.' nb Waddams *supra* (n48), 157.

¹⁰⁷³ The most explicit cases being, *Janson v. Driefontein Mines, Ltd.*, [1902] A. C. 484, 490, 491-2; 500. See also *In re Beard*, [1908] 1 Ch 383, 386; *In re Bowman*, [1915] 2 Ch. 447, 466-7; *In re Mirams* [1891] 1 Q. B. 594, 595.

¹⁰⁷⁴ Lord Wright, 68.

¹⁰⁷⁵ For earlier recognition of the connection between public policy and free trade, see *Cooke v Turner* (1846) 15 M. & W. 727, 735; *Egerton*, Alderson B, 107, Parke B, 124, 128-9. Cf Lord St Leonard's, 241.

¹⁰⁷⁶ *Printing and Numerical Registering Co v Sampson* (1875) 19 E1 462, 465, taken by Pollock to be the 'prevailing modern view', 157.

The existing heads were also winnowed down: by the mid-19th century, stock-jobbing, engrossing offences,¹⁰⁷⁷ and the unenforceability of futures contracts (surprisingly, remaining law until 1838)¹⁰⁷⁸ had all been repealed. It was only following the Great War that the judicial approach softened to a more ‘flexible’ approach to public policy.¹⁰⁷⁹ The judicial containment of policy before this time, produced by calcifying precedent and a liberal economic ideology, was assisted by the treatise writers. This is clearest in the slow evolution of the heads of policy and immorality. The conventional list was established early by Chitty Jr and remained mostly unchanged until Pollock. First, the ground of ‘immorality’ was exclusively restricted to matters of *sexual* morality, such as agreements related to cohabitation and prostitution short of criminality.¹⁰⁸⁰ As Pollock notes, it seems fairly clear this followed from their regulation under ecclesiastical law and the category appears to have been closed - as a matter of formal law - from the early 19th century onwards. Second, for the ground of ‘public policy’, the basic headings were: restraint of trade; restraint of marriage; marriage brocage; maintenance; sales of offices; contracts affecting the operation of the justice system; contracts for fighting; trading with the enemy; and wagers.¹⁰⁸¹ Thanks to the use of miscellaneous catch-all categories, the basic list was barely expanded across the editions, leaving the 16th edition of *Chitty* little different from the 2nd. Such stasis was unsurprising: the early treatise writers were economically liberal themselves and, especially in the case of the later writers, received a mostly-fixed body of formal case-law. Further, and most importantly, the ‘scientific’ method of the treatise writers inevitably restricted open-textured grounds of relief. As legal concepts, public policy and immorality had to be defined and carefully delineated.¹⁰⁸² Whilst this methodology may have been partially a matter of legal fashion, it was also logistical and political. Consider what would have happened if the grounds of public policy and immorality had been taken seriously whilst simultaneously accepting that any decision made under them would make new law?¹⁰⁸³ The volume of substantive law produced would be unmanageable, unsortable, and essentially legislative; in this sense, the compartmentalisation of public policy and immorality was crucial in a system of ‘hide-bound’¹⁰⁸⁴ precedent and judicial deference.

2.1b Regulating the Effects of Agreements

¹⁰⁷⁷ The statutory offences had already been repealed in 1772; the common law offences were eventually removed in 1842. In the interim, however, Edward Law, the counsel for the middleman in *R v Waddington* who had lectured and argued strongly as to the robustness of Smith’s theories, became Lord Ellenborough and all ongoing prosecutions for the offences were dropped. See Hay, *supra* (n1046), 151ff; Long 101.

¹⁰⁷⁸ *Hibblewhite v. M’Morine* (1839) 5 M. & W. 462, overruling *Bryan v Lewis* (1826) Ry & M 386 and *Lorymer v Smith* (1822) 1 B & C 1.

¹⁰⁷⁹ See Lord Haldane in *Rodriguez v. Speyer Bros.* [1919] A. C. 59, 77-81, giving a taxonomy of public policy case ranging in their flexibility; cf Lord Atkinson at 90.

¹⁰⁸⁰ (Swain 2022), 4-8

¹⁰⁸¹ For more detail, see Swain *supra* (n978), 233ff.

¹⁰⁸² See Pollock’s treatment of restraint of trade, *infra* 2.1b; cf Halbury’s approach, Vol 22, 6,(2)(ii)(a)(222), 2019, ‘Miscellaneous agreement contrary to public policy.’

¹⁰⁸³ Cf the more flexible, 17th century equitable approach in the *Duke of Norfolk’s Case* (1681) 3 Ch. Cas. I, 20, 49: when asked “Where will you stop, if you do not stop here?” Lord Nottingham retorted, “I will tell you where I will stop: I will stop wherever any visible inconvenience doth appear.”

¹⁰⁸⁴ (Hampstead 1953), 115.

A contract can be classified as unequal, illegal, or immoral in two, temporally-distinct ways: first, from its written terms alone, taken at the moment of agreement; and second, through a survey and analysis of the outcomes it produces when performed over time. The former was the preferred approach of the common law courts for two straightforward reasons. First, the judiciary were hesitant towards the possible workload involved in monitoring ongoing contracts, seen also in their comparatively restrictive approach towards awarding specific performance and injunctions. Second, both structurally and as a matter of the rules of evidence, the common law courts rarely heard the kind of detailed evidence needed to determine the actual consequences of different contractual terms.¹⁰⁸⁵ This hesitancy aside, there were a few discrete areas in which the judiciary took a diachronic approach. First, *illegal* or *impolitic* contracts which had a tendency towards causing illegality, or producing results, such as avoiding tax or defrauding creditors, against the common good.¹⁰⁸⁶ A fluid, outcome based approach was especially important when the literal interpretation of the agreement was set up to disguise its legal effects. Second, contracts involving administrative agencies might be monitored insofar as the rights and duties of the parties were regulated by statute. Third, there were several grounds which appeared to take into account changing circumstances. One possible ground was ‘hardship’ in granting specific performance, a factor which would depend on the state of the parties at the time of enforcement, rather than formation.¹⁰⁸⁷ Another, the focus of this section, was the ‘restraint of trade’ doctrine.¹⁰⁸⁸ I explore why, despite its apparent framing around the effect of the contract’s enforcement, restraint of trade was treated atemporally.

In basic outline, ‘restraint of trade’ was a head of public policy which rendered unenforceable contractual terms preventing or restricting one of the parties in making contracts.¹⁰⁸⁹ Such a term could only be enforced if it was ‘reasonable’ for the protection of the counterparty's interests. For present purposes, the most startling feature of the ‘restraint of trade’ doctrine was the sheer volume of law it generated. There are numerous indicators of this immense generative potential. By 1854, for instance, the bulk of case-law had gotten so great that reporters started creating tabulated surveys of the cases.¹⁰⁹⁰ Within the contract treatises,¹⁰⁹¹ and Smith’s *Leading Cases*, the sections on ‘restraint of trade’ grew steadily and were increasingly filled with masses of single instances. In the late 19th and early 20th centuries, several

¹⁰⁸⁵ See *Proctor v Sargent* (1840) 2 Man & G 20, 35, suggesting the lack of judicial knowledge meant the contract should be regarded by default as reasonable.

¹⁰⁸⁶ Pollock, 1st edition, 299, citing *Collins v Blantern*, 1 Smith *Leading Cases* 325 and *Reynell v Sprute* 1 D.M.G 660, 672.

¹⁰⁸⁷ See *Kimberley v Jennings* (1836) 6 Sim 340, 350, 352) and its restriction in *Jacoby v Whitmore* (1883) 49 LT 335, 337-9; and *Cornwall v Hawkins* (1872) 41 LJ(Ch) 435, 435-6.

¹⁰⁸⁸ From judicial citations, the *Mitchel v Reynolds* entry in Smith’s *Leading Cases* appears to have been the most influential, pre-20th century source; (Dempster 1997) provides the most detailed and meticulous survey of the cases.

¹⁰⁸⁹ Probably - as with minors contracts, it was unclear if the clauses were void or voidable. Dempster *supra* (n1084), 2-3,

¹⁰⁹⁰ *Avery v Langford* (1854) Kay 663, 666.

¹⁰⁹¹ For a basic progression, compare Comyn’s *Treatise*, 32, Chitty Sr, 80, and Chitty Jr, 218 (largely copying Comyn) to Chitty Jr’s 3rd, 664 and 4th Edition, 575. By the 12th edition, a wide variety of cases were being included, see 680-682. Similarly, see Leake, 1st edition 390ff, cf 4th Edition, 515ff, and Pollock, 289, who ends up reproducing the *Avery* table and delegates to *Smith’s Leading Cases*.

specialised treatises dedicated exclusively to ‘restraint of trade’ running to multiple editions were released.¹⁰⁹² What was behind this lexi-genesis? Three basic factors were at play. First, the test of ‘reasonableness’ was unusually a matter of *law* not *fact*.¹⁰⁹³ As such, every decision on whether a restraint was reasonable was a formal *legal* precedent, and thus theoretically worthy both of reporting and including in a treatise. In Scotland, where reasonableness was treated as a matter of pure construction, there was no equivalent bulk of ‘single instances.’¹⁰⁹⁴ Second, the terms themselves occurred across a wide variety of economic sectors, and ranged in their geographical and temporal scope.¹⁰⁹⁵ This was evident in the treatises of Chitty Jr, Pollock, and Leake, which struggled to digest the wide plethora of examples. Each contract could occur with any array of these features, producing a swirling, combinatorial variety.¹⁰⁹⁶ Third, as Denk notes, it would appear that restraint of trade cases were rarely settled and the reports showcase an unusually wide variety of litigants rich and poor.¹⁰⁹⁷ At least two features explain this feature. First, the operation of *restraint* terms was typically zero-sum, such as in cases of selling goodwill or becoming a competing professional. There was little scope for settlement or compromise. Second, restraint clauses were unusual in their imposition of a broad negative duty (e.g., to not carry out a particular trade), ensuring the contractual terms could be breached continuously, frequently, and with little non-legal recourse for the counterparty. As such, cases would inevitably be pushed into litigation; this, combined with the legal status of reasonableness, produced sufficient law to provoke judicial regret over the head ever being established in the first place.¹⁰⁹⁸

Restraint of trade had an additional feature with the potential to vastly increase the business of courts. The abstract framing of the rule ostensibly looked to the *consequences* of the contract (specifically, a restraint of trade), and as such could hypothetically be litigated multiple times if it became apparent a previously enforced clause was now unreasonably restricting trade. The courts avoided this administratively burdensome result via various strategies, First, and most importantly, they treated the question of whether a term was a restraint of trade, and reasonable, using the same methods as construction.¹⁰⁹⁹ Accordingly, like other matters of public policy - but not statutory illegality - the courts looked exclusively at the terms

¹⁰⁹² See (Jolly 1900), (Matthews and Adler, 1893, 1907)

¹⁰⁹³ *Mallan v. May* (1843) 11 M. & W. 653, 665, 668; *Tallis v Tallis* (1853) 1 El & Bl 391, 413.

¹⁰⁹⁴ (Christie 1900), 294. Stair’s *Principles of the Law of Scotland*, cite almost exclusively English cases when discussing restraint of trade. E.g. 6th edition, pg. 24, (h), (i). Per *Watson v Neuffert* (1863), *The Scottish Jurist*, Issue 40, 633, 634, the entire question was regarded as one of context-dependent ‘construction.’

¹⁰⁹⁵ *Wickens v Evans* (1829) 3 Y & J 318, 328

¹⁰⁹⁶ Jolly, *supra* (n1092), 101. Likewise, even Pollock’s somewhat basic table, 289ff, included: trade/business; extent of restriction in time; extent of restriction in space. To this, we can also add a fourth factor - intra-systemic complexity, see Dempster *supra* (n1088), Chapter 12.

¹⁰⁹⁷ (Dent 2015), 343.

¹⁰⁹⁸ *Proctor v Sargent* (1840) 2 Man & G 20, 38, on the basis it would be better not to interfere with the ‘rights of individuals.’

¹⁰⁹⁹ Whilst distinguishing - albeit not always clearly - questions of construing party intention from the reasonableness of the terms. For the blurring, see *Gale v. Reed* (1806) 8 East 80, 89-90. For a clearer division, see *Ward v Byrne* (1839) 5 M & W 548, 551-3; *Mills v Dunham* [1891] 1 Ch 576, 587; and *Rogers v Maddocks* [1892] 3 Ch 346, 356

of the contract at the moment of agreement, whilst ignoring any subsequent effects.¹¹⁰⁰ Second, although treated like construction, ‘reasonableness’ was not ceded to common commercial practice. Courts would accept trade usage and economic theory as evidence establishing factors relevant to reasonableness - such as the ‘nature of the business,’ the opinion of mercantile men,¹¹⁰¹ or its effects in encouraging trade. Indeed, as we will see below, these trade usage came to be a decisive component of reasonableness. Nonetheless, when it came to the assessment of *reasonableness itself*, the courts would deny such evidence, and ‘reasonableness’ was regarded as fixed at the moment of decision.¹¹⁰² In addition to these technical methods, the courts also progressively loosened their standard of review. Prior to the 18th century, the courts had looked on terms in restraint of trade highly restrictively.¹¹⁰³ Following *Mitchel v Reynolds* in 1711,¹¹⁰⁴ a new, more flexible approach was taken: provided the restriction was not ‘general’, covering, for instance, the whole country, such a term would be valid if ‘reasonable’ and bargained for with *adequate* consideration.¹¹⁰⁵ This standard appears to have been quite low.¹¹⁰⁶ Prior to the *Nordenfelt* case, only ~24% of all decisions were considered to be unlawful restraints of trade.¹¹⁰⁷ The tests themselves were also loosened: the requirement for an ‘adequate’ consideration was removed in 1837 for reasons described in 2.1A; the burden of proof in showing unreasonableness was shifted onto the restrained party;¹¹⁰⁸ and the *Nordenfelt* decision in 1893 established there would be no category of contracts *automatically* in restraint of trade.¹¹⁰⁹ Instead, every case would have to be analysed as a matter of ‘reasonableness’, whether general or otherwise.

That liberalisation occurred is undeniable - *Nordenfelt* and numerous other cases provide a judicial (albeit not empirical) endorsement of this trend.¹¹¹⁰ Characterising the *causes* of this trend is, however, tricky. One undeniable change was the growth of global business: the world was now smaller, and clauses restraining trade across the United Kingdom - or the entire planet - were now seen as defensible. Some judges suggested the new loosening was merely a case of the old test applied to new circumstances, and that judges in the past would, if faced with modern conditions of competition, have decided the same

¹¹⁰⁰ *Rannie v Irvine* (1844) 7 Man & G 969, 976; *Rogers v Maddocks* [1892] 3 Ch 346, 355, on analogy with interpretation; *Benwell v Inns* (1857) 24 Beav 307, 311.

¹¹⁰¹ *Badische Anilin v Schott* [1892] 3 Ch 447, 453; *Rogers v Maddocks* [1892] 3 Ch 346, 355 referencing ‘business principle.’

¹¹⁰² *Haynes v Doman* [1899] 2 Ch 13, 26, 1473.

¹¹⁰³ See Matthews and Adler *supra* (n1092), 6 ‘four periods of development.’

¹¹⁰⁴ *Mitchell v. Reynolds* (1711) 1 P Wms 181, for the basic policies underlying the doctrine, see [191]-[192]

¹¹⁰⁵ *ibid*, 187

¹¹⁰⁶ *Dent supra* (1093), 343-5. Judges typically expressed difficulty in drawing sharp lines, see *Davis v. Mason* (1793) 5 T.R. 118 at 120. This was taken as an indication the law should be wary of upsetting bargains, *Whittaker v Howe* (1841) 3 Beav 383, 394.

¹¹⁰⁷ *Matthews & Adler supra* (n1092), 224-5.

¹¹⁰⁸ Previously, per *Mitchel*, at 192, 197 terms in restraint of trade were *prima facie* bad until shown reasonable. In *Tallis v Tallis* (1853) 1 El & Bl 391, 411, it was judicially recognised that the ‘tenor of the later decisions’ was in favour of *prima facie* validity based on the interest of the covenantee, an interest said to ‘extend very widely.’

¹¹⁰⁹ *Maxim Nordenfelt Guns & Ammunition Co Ltd v Nordenfelt* [1893] 1 Ch 630.

¹¹¹⁰ *Nordenfelt*, 12, *Tallis v Tallis*; *Leather Cloth v Lorsant* (1869) LR 9 Eq 345, 344; *Allsopp v Wheatcroft* (1872) L.R. 15 Eq 59, 63; *Parsons v Cotterill* (1887) 56 LT 839, 841. See also *Christie, supra* (n1094), 295.

way.¹¹¹¹ This may be so; what is clear is that cases after 1835 were peppered with language referencing free trade,¹¹¹² liberty,¹¹¹³ competition,¹¹¹⁴ market facilitation,¹¹¹⁵ and the judicial policy of non-interference. Alongside the loosened tests, judges were also increasingly willing to defer to whatever the default trade practice was when determining ‘reasonableness.’¹¹¹⁶ This interpretation was supported by the treatise writers, who took the policy and emphasised it through a particularly liberal reading of *Nordenfelt*. The clearest instances are the later *Chitty* editors and Pollock’s treatise. The former, following a general trend in the treatise, reversed the default status of a term in restraint of trade. Rather than being void until proved reasonable, the statement in the 13th edition, post-*Nordenfelt*, argued such terms would be enforceable and good until shown otherwise unreasonable.¹¹¹⁷ Whether this was what *Nordenfelt* established was - at best - ambiguous; nonetheless, reversing the default suited Gely’s overall narrative of a doctrine in terminal decline.¹¹¹⁸ As he noted in a quasi-descriptive passage: “it is submitted that the inclination of the Courts will lean more and more towards upholding any exceptions which parties fully comprehending to contract choose to introduce.” Pollock also emphasised the liberalisation of the restraint of trade doctrine. In the 6th edition of his *Principles* he extended the 1854 table mentioned above but, characteristically, the table was significantly edited and suggested (misleadingly) that there had only been one case in which a restraint of trade was found unreasonable.¹¹¹⁹ By 1910, Leake had also followed suit and reversed his statement of rule,¹¹²⁰ suggesting terms in restraint of trade would be valid (provided they fell into several wide classes¹¹²¹) unless unreasonable. Yet despite this assistance from the treatise writers, looser standards of review could not overcome the fundamental lexi-generative dynamics. Restraint of Trade continued to steadily produce more precedents as England changed: by its 16th edition, *Chitty*’s editors were listing, in addition to the now growing mass of combination-related ‘restraint of trade’ cases,¹¹²² assorted miscellaneous subheadings ranging from contracts involving theatrical managers and trader’s wives to those of dentists and bankrupts.

2.1c Regulating the Making of Agreements

¹¹¹¹ *Nordenfelt*, *ibid*, 14;

¹¹¹² For judicial recognition, see *Rannie v Irvine* (1844) 7 Man & G 969, 977-8; and *Roussillon v Roussillon* (1880) LR 14 Ch D 351

¹¹¹³ *Ward v Byrne* (1839) 5 M & W 548, 560; *Leather Cloth v Lorsant* (1869) LR 9 Eq 345, 353-4; *Mumford v Gething* (1859) 7 CB(NS) 305, 320; *Elliman Sons & Co v Carrington & Son Ltd* [1901] Ch 275, 278. *Mumford* at 325-6 also provides a useful counterexample stressing the importance of regulating the bargains of the ignorant.

¹¹¹⁴ *Ward*, *ibid*, noting the ‘struggle’ for survival in employment; *Maxim Nordenfelt Gun*, 8

¹¹¹⁵ E.g. *Mallan v. May* (1843) 11 M. & W. 653, 666; and the suggestion in *Roussillon* that Britain as a nation had a particular policy of furthering trade.

¹¹¹⁶ *Sir W C Leng & Co Ltd v Andrews* [1909] 1 Ch 763, 767-8, noting it was ‘conclusive’ and ‘very strong evidence’

¹¹¹⁷ *Chitty*, 13, 567, cf *Chitty* 12 678.

¹¹¹⁸ E.g. *Chitty*, 13, 566.

¹¹¹⁹ Pollock, 6th edition, 345-347

¹¹²⁰ E.g. Leake 1, 387; Leake 5, 516,

¹¹²¹ Leake, 6, 527. See also Dempster, *supra* (n1088), 41-3.

¹¹²² Dempster, *ibid*, 233 treats this as a new head of public policy.

Any model of contract law organised around ‘free agreement’ requires rules determining what constitutes ‘freedom.’ Such rules, often referred to as ‘vitiating factors’, were at the nexus of the trends described above in 1.1 and 2.1a and 2.1b: they structured the free activity of ‘the competent individual’ and created the conditions of formal opportunity justifying otherwise colourable outcomes. The ‘vitiating factors’, encompassing fraud, undue influence, misrepresentation, mistake, and duress, are too detailed and multifarious to explore in-depth here. Instead, I will look at their role in structuring the general part and the source of their intricate doctrinal detail. By the turn of the 19th century there was already a long tradition of regulating sharp practice at both equity and the common law.¹¹²³ Nonetheless, within the common law literature, fraud had a muted position.¹¹²⁴ In Blackstone’s *Commentaries*, fraud was relegated to an aspect of sale of goods and the action of deceit; in Comyn’s *Principles*, it could be found a marginal sub-species of illegality, packed alongside ‘wagers’, and ‘usury.’¹¹²⁵ Comyn’s approach was adopted by Chitty Jr, who also sorted fraud under illegality; nonetheless, he was able to expand the section through references taken from his father’s work.¹¹²⁶ In this early stage, the majority of common law rules relating to misrepresentation and fraud were treated as adjunctive to specific contracts, such as insurance, agency, companies, and sales of goods.¹¹²⁷ Over time the vitiating factors were imperfectly digested from their particular transactional context and treated as a general facet of contractual validity. The most important conceptual leap was in Leake’s treatise, where fraud, misrepresentation, duress, and mistake were either created afresh or rescued from ‘illegality’ and generalised as ‘factors vitiating consent.’¹¹²⁸ As noted in Chapter 4, the plausibility of this move depends on whether there is a general mode of dealing and making contracts across the economy, and thus a general mode of engaging in fraud. Leake insisted there was and used the ‘vitiating factors’ to negatively constitute what a ‘free’ exercise of will was. Following this purpose, the vitiating factors were directly connected to the ascendancy of party-agreement and the rules of contractual formation;¹¹²⁹ indeed, the basic distinction between contractual terms and mere representations requires a set of rules dividing pre-contractual negotiation from legal offer.¹¹³⁰ This parallel can also help explain the pattern of development behind the eventually substantial body of case-law governing fraud.¹¹³¹

¹¹²³ Lobban, *supra* (n78), (Lobban 2010d), 409.

¹¹²⁴ The early treatises devoted exclusively to misrepresentation and fraud were framed as a guide to *Chancery* practice. E.g. (Kerr 1868)

¹¹²⁵ See Ibbetson *supra* (n1), 234.

¹¹²⁶ Chitty Jr, 2nd, 222, followed by Addison 2, 126. Powell and Chitty Sr had much more substantial discussions of fraud as a result of their wider jurisdictional diet. Chitty Jr’s reliance on his father led to him citing more Chancery materials, such as the basic *suppressio veri* and *suggestio falsi* dichotomy in *Broderick v Broderick* (1713) (1713) 1 P Wms 238, 240.

¹¹²⁷ Addison, 2nd edition, whose examples are overwhelmingly from the sale of goods, 127ff, and lapses into various specific contracts at 135. See also Pollock, 1st, 449–470, and Leake, 1st, 198ff, who struggled to abstract general rules fully away from their transactional context.

¹¹²⁸ Ibbetson *supra* (n1), suggests the progenitor for this was Macpherson’s Treatise, *Contracts*, 5–6, (235) and later the Indian Contract Act 1872, ss 14–19.

¹¹²⁹ See Leake’s organisation of the vitiating factors as a subset of ‘formation.’ 168.

¹¹³⁰ E.g. *Ormrod v. Hutth* (1845) 14 M. & W. 651, 664 and *De Sewhanberg v Buchanan* (1832) 5 C. & P. 343, 345.

¹¹³¹ Indicated most clearly by the production of treatises specialising in fraud and misrepresentation. See (Kerr 1868); and the subsequent cross-jurisdictional editions in 1883 (2nd), and 1902 (3rd); (Bower 1911, 1915); (Moncrieff 1891); (Hastings 1888)

The expansion of fraud lay in the slow unpacking of the parties' subjective mental states. If the rules in 1.1 attracted around persons, and those in 2.1A and 2.1B around the content of transactions, here the basic attractor was the interplay of mental states, objective and subjective, in relation to a plethora of factual and legal circumstances. There were three factors behind fraud's law-making fertility: first, a refusal to delegate the broad decisions to the jury thereby guaranteeing the law-making process of precedent would grind on;¹¹³² second, the heterogeneity of both fraud itself and its tendency to differ depending on the transaction involved;¹¹³³ and, third, the fact that fraud, and the vitiating factors generally, typically preceded the formation of contracts, and thus precluded the parties from contracting around them.¹¹³⁴ Within this growing doctrinal structure, two interrelated trends can be detected. The first is the changing formulation of the principle of '*caveat emptor*' which, abstracted more generally, could be described as 'look out for yourself.'¹¹³⁵ Whether there was a 19th century move to a more austere, individualistic model of protection from a previously paternalistic 18th century is extremely difficult to assess in terms of concrete outcomes.

The principle clearly predates the 19th century, as Lobban and Simpson demonstrate, but the rules were typically vague.¹¹³⁶ Furthermore, the doctrinal rules of fraud at common law and equity were highly fragmented across transactions and subjects, including, *inter alia*, regulations on specific trades or contractual subjects, whether in statutes regulating the packaging, storage, or weighing of miscellaneous produce,¹¹³⁷ equitable rules governing fraudulent sales of land,¹¹³⁸ or implied and constructed terms at common law,¹¹³⁹ and the equitable discretion of the jury.¹¹⁴⁰ As such, without a full survey of the full web of rules and adjudicative practices, it is impossible to determine if legal outcomes changed. Nonetheless, at a higher-level of formulation, the principle of *caveat emptor* was clearly adapted for 19th century purposes. Within the treatise, and some case-law, the 19th century framing of these rules became individualistic, premised on the notion of lone, adversarial individuals weighing and considering contracts before creating them.¹¹⁴¹ This is particularly evident in Chitty Jr's characterisation of fraud: "There can be no fraud if the bargain be a mere and fair contest, or trial, of judgment. In all contracts, each party naturally and fairly attempts to obtain an advantage."¹¹⁴² In later editions, this basic understanding of

¹¹³² *Pasley v. Freeman* (1789) 3 T. R. 51, 55

¹¹³³ E.g. Lord Hardwicke's letter to Lord Kames in 1759 stating "fraud is infinite", cited in (Holdsworth 1934), XII, 262.

¹¹³⁴ Cf Lobban, who notes that some of the rules governing sharp practice, such as implied terms, could be contracted out of, (Lobban 2012b), 123

¹¹³⁵ See Atiyah *supra* (n148), 464-5.

¹¹³⁶ Lobban, *supra* (n1130), 116. Simpson, *supra* (n975), 585; see also 580-583, discussing the 'sound-price' doctrine and its potential existence in the 18th century.

¹¹³⁷ See Chitty Sr, *Treatise on the Law of Commerce and Manufacturers*, Volume 2, Chapters 9-13, covering a truly fantastic variety of regulations on various foodstuffs.

¹¹³⁸ see Lobban *supra* (n1134), 454-5

¹¹³⁹ *ibid.*, 466-468

¹¹⁴⁰ See Gilbert, f 94a, suggesting a general principle that a term of merchantable quality could be assumed under the general issue, cited in Simpson *supra* (n462), 581-2. Cf Lobban, *ibid.*, 458.

¹¹⁴¹ E.g., *Vernon v. Keyes* (1812) 4 Taunt. 488 at 491 & 493, 'the buyer and seller always try to outwit each other'

¹¹⁴² Chitty Jr, 1 223

market competition was replaced with a section on the principle of *caveat emptor*;¹¹⁴³ in doing so, the treatise framed fraud as an exception to the default conditions assumed otherwise to create unimpeachable contracts.¹¹⁴⁴ As is often the case however, this high-level formulation did not always accord with the specific rules it was ostensibly generalised from.¹¹⁴⁵ Indeed, if it had, and the English courts had allowed a perfect free-for-all in the commercial sphere, no law whatsoever would have been generated. The second trend therefore is towards the continuation¹¹⁴⁶ and expansion of doctrines designed to prevent cheating, thereby stimulating a body of law. These were, as Lobban notes, moralistic, individualistic, and passive.¹¹⁴⁷ The courts had little interest in the creation of generalised duties of ‘fair play’ or positive duties to make men act morally. Instead, they contented themselves with basic rules to prevent deception, supplemented with particular duties in specific contexts where this was regarded as necessary. These basic default rules focused primarily on the parties’ intention, knowledge, and behaviour.

The law of fraudulent misrepresentations gives a good indication of the lexi-generative potential of these features. A party could commit fraud, *inter alia*, by deliberately stating that which was untrue to deceive;¹¹⁴⁸ by concealing a material, true fact;¹¹⁴⁹ by encouraging a misconception which was left uncorrected¹¹⁵⁰ (though not if the knowing party passively allowed a party to be mistaken);¹¹⁵¹ by leaving uncorrected misrepresentations one later discovered false;¹¹⁵² by making statements to deceive without knowing if the statement was true;¹¹⁵³ stating that which one ought to have remembered was false;¹¹⁵⁴ and through ‘reckless assertions’ of fact.¹¹⁵⁵ To these, we can add the mental state of the other party - such as when he knew the falsity of the misrepresenter’s statements¹¹⁵⁶ and where he acted not on the misrepresentation, but upon his own knowledge or upon grounds which he could reasonably have been expected to discover.¹¹⁵⁷ Finally, these mental states could relate to a further variety of different subject

¹¹⁴³ Chitty Jr, 4, 588. For a more formal description, see Addison, 2, 130, 133; Pollock 1st, gives a more theoretical account. Via the presumption of knowing the law, he is able to argue that in all cases of passive acquiescence, the other party is aware this is allowed and that the other is under no duty to correct his misapprehension, 474.

¹¹⁴⁴ Chitty Jr; see also Leake’s framing, 1st, at 168, 2nd edition, 350. The burden of proof was on the party alleging fraud, see *Davies v National Fire and Marine Insurance* (1891) A.C. 485, 495.

¹¹⁴⁵ Kerr, 3rd edition, 69, Lord Campbell is said to have regarded *caveat emptor* as ‘nearly eaten up with exceptions.’; Mitchell, *supra* (n138), 205-6

¹¹⁴⁶ See Simpson, *supra* (n462), 582-3.

¹¹⁴⁷ Lobban, *supra* (n1134) 117, *supra* (n78), 122; see also the influence of Christian morality (Searle 1998)

¹¹⁴⁸ Chitty Jr, 2, 528, e.g., *Dobell v Stevens* (1825) 3 B & C 623,

¹¹⁴⁹ Pollock, 1, 472-3; Chitty Jr, *ibid*. For an example, see *Schneider v Heath* 3 Camp 506, 508.

¹¹⁵⁰ *Hill v Gray* (1816) 1 Stark 434, in slight conflict with *Smith v Hughes* [1871] All ER Rep, 632, 635-6

¹¹⁵¹ *Smith ibid*,

¹¹⁵² *Reynell v Sprye* (1849) 1 De G. M & G. 660, 709.

¹¹⁵³ *Taylor v Ashton* (1843) 11 M & W 401, 415; *Evans v Edmonds* (1853) 13 C. B. 777, 786-787. *Reese River Mining Co v Smith* (1869) L.R. 4 H.L. 64, 79, framing the rule more broadly.

¹¹⁵⁴ *Burroughs v Lock* (1805) 10 Ves 470, 475-6 ‘gross negligence’; *Slim v Croucher*, (1860) 29 L.J. C. 273, 276 noting that if a plaintiff stated ‘what he ought to have known or did at one time know, he must make it good.’

¹¹⁵⁵ Pollock, 8, 594, *Evans v Edmonds*, *supra* (n1149)

¹¹⁵⁶ *Cowen v Simpson* (1793) 1 Esp R 290, 291.

¹¹⁵⁷ Pollock, 480, citing *Horsfall v Thomas* 1 H & C 90. C.f Pollock 8th Edition, 602-607, a highly unsatisfying mix of generatives, specific examples, exceptions, sub-exceptions ‘not perfectly free from doubt.’

matters, such as specific categories like ‘fact’,¹¹⁵⁸ ‘law’,¹¹⁵⁹ ‘intention’,¹¹⁶⁰ ‘puffs’,¹¹⁶¹ and ‘the future’,¹¹⁶² and the general question of ‘materiality.’¹¹⁶³ A highly important crossroads as a matter of both judicial activism and legal detail was whether a *negligent* misrepresentation would be generally sufficient to invalidate a contract. Equity had maintained flexible grounds for negligent misrepresentation throughout the 19th century,¹¹⁶⁴ the common law, on the other hand, reckoned with this possibility at two points. First, following Lord Tenterden’s Act, the possibility emerged of expanding the old common law requirement to actual, reckless, or *constructed* knowledge of the falsity of one’s statement.¹¹⁶⁵ This possibility, however, was decisively rejected in 1845.¹¹⁶⁶ The second was following the Judicature acts, in which the courts had no choice but to account for the divergent equitable and common law approaches.¹¹⁶⁷ As is well known, this possibility was also abandoned in *Derry v Peek*,¹¹⁶⁸ wherein the courts found a company director could not be found liable for a misleading prospectus if he honestly believed it to be true.¹¹⁶⁹ Lobban provides the most detailed account suggesting the decision was primarily attributable to the perception of director liability, rather than a particular position on the greater development of misrepresentation.¹¹⁷⁰ This matches the general disjunct between courts and treatise writers: whilst the latter such as Pollock, were thinking in general ‘scientific terms’,¹¹⁷¹ the former preferred to take a contextual, transactional approach.¹¹⁷² Overall, the common law avoided both a quasi-anarchic state of unregulated free dealing and one of general, active duties to be honest; instead, they settled on a basic default presumption of ‘ordinary’ dealing, bordered and given shape by an incidental and exceptional law of fraud.

2.2 The Land of Do-As-You-Please

¹¹⁵⁸ Leake, 1, 182.

¹¹⁵⁹ See *Lewis v Jones* (1825) 4 B & C 506, 512.

¹¹⁶⁰ *Vernon v Keys supra* (n1141) but cf the rule in equity about ‘making representations good’ (Pollock, 1st, 478). See also, ‘motive’ *Feret v Hill* (1854) 15 C.B. 207, 224; and ‘opinion’, *Anderson v Pacific Fire and Marine Insurance* (1872) LR 7 CP 65, 70.

¹¹⁶¹ Leake 1, 182, classified as ‘Exaggerated commendations’; in Addison 2, 129, treated as ‘puffs.’ See *Scott v Hanson* (1826) 1 Sim 13, 14; *Jennings v Broughton* (1853) 17 Beav, 234, 244 and *Kisch v Central Railway Co of Venezuela* (1865) 3 De GJ & Sm 122, 135.

¹¹⁶² Leake 6, 234, *Ex P Burrell* (1876) 1 Ch D 537, 552.

¹¹⁶³ E.g. *Huguenin v Rayley* (1815) 6 Taunt. 186; Addison 5, 558; Chitty Jr 2, 530, citing *Lindenau v Desborough* (1828) 8 B. & C. 586, 592 and *Maynard v Rhode* (1824) 1 C & P 360.

¹¹⁶⁴ Lobban, *supra* (n78), 471; (Reed 1987), 71-72; though, as argued in (Lobban 1996), 333, the equitable approach of ‘making representations good’ was carefully circumscribed.

¹¹⁶⁵ See Reed, *ibid*, 68-69, referring to the Statute of Frauds Amendment Act 1828, s6. See *Cornfoot v Fowke* (1840) 6 M. & W. 358; *Wilson v Fuller* (1843) 3 Q. B. 68;

¹¹⁶⁶ *Taylor v Ashton* (1843) 11 M. & W. 401

¹¹⁶⁷ Reed, *supra* (n1164), 70; Cf (Lobban 1996), 288.

¹¹⁶⁸ *Derry v Peek* [1889] UKHL 1

¹¹⁶⁹ Reed, *supra* (n1165) argues that the trend initially was towards allowing negligent misrepresentations due to the dominance of equity judges in the Court of Appeal.

¹¹⁷⁰ Lobban, *supra* (n1167), 459

¹¹⁷¹ Reasonableness was considered by Pollock to be both more ‘scientific’ and ‘wholesome’ (1888) 4 LQR 369, cited in Lobban, *ibid* 432. For criticism of the House of Lords case, see *Derry v. Peek in the House of Lords* (Pollock 1889)

¹¹⁷² *Derry* itself was ‘reversed’ by the Directors’ Liability Act of 1890, (Lobban, *supra* (n1163), 331) thereby confining the rule to directors and prospectuses.

It would be incredible if the extent of contractual regulation did not change between 1720 and 1890, not least because of the (partial) abandonment of mercantilism in British trade policy.¹¹⁷³ To a significant degree the classical model of contract does conform to the *laissez faire* philosophy described by Atiyah.¹¹⁷⁴ This is unsurprising given the ideological commitments of the treatise writers and judiciary and the structural limits of the courts. The court ignored the motive and purposes of the parties, provided they were not illegal with a few discrete exceptions.¹¹⁷⁵ As stated time and time again, one was free to make whatever bargain one wanted, for whatever reason, and the court would not adjudicate on it. In doing so, as Gordley notes, they precluded a contract law based on the *ends* of the parties' bargain, rather than merely their expression of will. The justification was overtly political: that it was for the individual to make his bargain, not the court. Besides, following classical liberal philosophy, on what grounds could the court legitimately re-make a freely chosen bargain? The classical model also *excluded* the outcome of the contract, again, with a few discrete exceptions. The reason here was a two-fold refusal to interfere with bargains - which were supposed to produce social welfare provided conditions of competition exist - and a difficulty, again, of finding a legitimate metric for 'fairness' outside mere party consent. These choices precluded the Benthamite model of contract law emphasising specific societal outcomes of contracts rather than merely their formation and breach.¹¹⁷⁶ Finally, the courts assumed, for similar reasons, a somewhat passive model of the 'ground rules' and eschewed, outside of discrete contexts, the creation of a positive duty to deal fairly. This exclusion severely curtailed the potential for a *reliance* model and, under the domestically and personally uniform approach of contract law, precluded Mansfield's division between sophisticated/unsophisticated parties,¹¹⁷⁷ or commercial/non-commercial contracts.¹¹⁷⁸

¹¹⁷³ For a careful examination of 18th century trade and contract thinking, (Lieberman 1989)

¹¹⁷⁴ Atiyah *supra* (n148), 65-69 on prior mercantilism;

¹¹⁷⁵ E.g., whilst motive was usually irrelevant in calculating remedies, *Mayne*, 1st edition, 10-12, it could be considered as part of the law of penalties.

¹¹⁷⁶ See (Bentham 1998) for a survey of Bentham's codification proposals. See Chapter XVI, (Bentham 1838).

¹¹⁷⁷ Also prevented by the common law's basic position that 'the law is presumed to be equally within the knowledge of all', Leake, 1st, 182. See *Lewis v Jones* (1825) 4 B. & C. 506, 512.

¹¹⁷⁸ (Dagan and Heller 2017), 11 suggest the 'general part' is designed primarily for sophisticated commercial parties; likewise (Mitchell 2022), 16, and 176 for a different, pro-active 'educative' role for contract law.

Chapter 5: The Classical Model

We have explored the inelegant bones of the 18th century contractual world. It is now time to consider the ostensibly flawless default rules which structured the general part of the late-19th century. Quantitatively, the default rules were late-comers to the contractual canon: they generated far less law than the mandatory and status rules and in some cases – such as the law of mistake – appeared to have little practical relevance. Nonetheless, despite these inconveniences they were taken by treatise writers to be the unifying rules of the general part. Unlike the vagaries of discrete contracts, sordidness of old status rules, and arbitrary proliferation of increasingly statutory regulation, the basic default rules could be presented conceptually pure and unified. It is these which produced the classic model of the contract, from agreement to remedy, and which inspire the most academic research to the present day. In Part 3, I will consider four examples of default rules - Contract Formation (3.1), Interpretation (3.2), Performance (3.3), and Remedies (3.4), to observe what lay behind their emergence and development.

Part 3: Filling in The Gaps

The 19th century jurist could give a clear account of the general part's origin: the rules exist because they are natural, and would form just so in any place, in any country. Yet if asked to provide a *specific* genealogy of the general default rules they would be quite stuck. It was virtually guaranteed that if a new legal status was created, or if a new sector of the economy was regulated, more legal doctrine would be generated. Further, as explored in Chapters 1 and 6, the default terms of *specific contracts* are clearly driven by commercial demand in different sectors and – potentially – proactive development by the judiciary. What, however, produced the *general* default rules? Unfortunately, like the 19th century jurist, I cannot provide a coherent account. Instead, I resort to a multi-causal approach, emphasising in particular 'derivative' processes whereby defaults grew from non-default origins. First, there are the possibly-inevitable 'ground rules.' At their core, the 'default' topics were made up by extremely thin, non-optional definitional rules: what constituted an offer in the first place; the principles of contract interpretation; and the matrix of performance and contractual remedies. These are the minimal basic modules required to give parties the ability to contract out of true default terms. Many of the rules in the topics of formation, construction, performance, and remedies can be explained as the elaboration of this basic framework.

Second, many of the defaults were stimulated by familiar lexi-generative forces: the requirements of strict form; a desire for the courts to tip the scales in their use of 'defaults';¹¹⁷⁹ and the mandatory nature of legal procedures. Third, for the remaining 'organic defaults' I provide an account emphasising contingency and artificiality. In theory, general defaults form when parties across many different sectors of the economy fail to specify the conditions or effects of their contracts. As explored in the four case studies however, this failure-to-specify was frequently temporary and, as the 19th century progressed, became increasingly rare as a bank of standard form contracts emerged. Those which were left 'on the books' have an unsettling air of contingency about them. Further, as generalisations of specific defaults, there were always duplicate variants for random transactions,¹¹⁸⁰ and it is not always obvious they can be made to produce a single template for all. The kaleidoscope of these lexi-generative sources was matched in turn by the cross-purposes of their architects. Within the court, different judges simultaneously pursued commercial facilitation, fair outcomes, and efficient gap-filling. Within the library, practice be damned, the jurist pursued elegance and desired above all to assimilate the law to an ideal 'will theory' whereby obligations were exclusively the product of party-intent.

¹¹⁷⁹ Also present for contract formation, see (Gardner 1992) regarding company cases, 184-189.

¹¹⁸⁰ Such that many specific treatises, like Benjamin on Sale, and Babington on Auctions, had introductions with their own 'general principles.'

3.1 Formation

Contract law will always need to answer the question: ‘at what point are agreements legally binding?’¹¹⁸¹ The English solution prior to the 18th century was to rely heavily on formalities, such as those set out by the Statute of Frauds and the common sense of the jury. In the early 19th century, the rules of formalities were side-lined and an *agreement*-based test was adopted: a contract became binding when one party’s offer was met by the other’s acceptance.¹¹⁸² These rules were partially defaults:¹¹⁸³ an offeror could modify the requirements of acceptance, for instance by accepting performance being tendered by anyone (the ‘unilateral contract’),¹¹⁸⁴ or by altering the acceptable modes of communication (e.g. ‘by return of post’).¹¹⁸⁵ Nonetheless, even if the offeror specified in immaculate detail the conditions under which she could be bound, there would remain a need for what constituted a legally sufficient offer. This boundary produced several basic contract divisions: between negotiation and contract, and between a binding contract and mere reliance on a promise. As noted above, these boundaries could not be contracted around - they determined the space for private ordering itself - but that does not mean they were static. One of the largest pre-19th century bodies of law related to formation had been *formalities*. From the early 19th century onwards, these strict requirements were slowly attenuated, leaving minimal conditions of ‘party agreement’ (defined by offer and acceptance) and, in the 20th century, intent to create legal relations. Increasingly, provided the Offeror had made a valid offer then a contract could be validly formed, either under the default or offeror-modified rules of acceptance. The change in conceptual focus is especially clear when comparing Comyn’s *Treatise* to Pollock’s *Principles*: whilst the former was preoccupied with questions of form, dividing the entire work by *parole* or *specialty*, the latter defined contract by abstract agreement and its conditions.¹¹⁸⁶

In this section, I will limit my discussion to the doctrine of offer and acceptance. The rules are traditionally dated to the leading case *Adams v Lindsell* in 1818¹¹⁸⁷ and have been much discussed by historians.¹¹⁸⁸ Two basic features of this doctrine are incontrovertible. First, the rules of offer and acceptance pre-date their hazy emergence in England around 1818.¹¹⁸⁹ They can be found in continental

¹¹⁸¹ For the distinction between *bindingness* and *actionability*. (Simpson 1987b), 466.

¹¹⁸² Likely inspired by Civilian sources. (Simpson 1975), 257ff, identifies early vectors of influence in Powell, Evans’s translation of Pothier, and the early editions of Chitty.

¹¹⁸³ Gardner, *supra* (n1179), 176-178, see also *Duncan v Topham* (1849) 8 C.B. 225; Lord Cottenham in *Dunlop v Higgins* (1848) 1 H.L.C. 381, 400, and *Tinn v Hoffman* (1873) 29 LT 271, 279, cited in (Lobban 2010f), 341.

¹¹⁸⁴ For the complex development of unilateral contracts, Lobban, *ibid*, 348-357.

¹¹⁸⁵ E.g. *Adams v Lindsell* (1818) 1 B. & Ald. 681, 681, cf *Johnson v. King* (1824) 2 Bing. 270.

¹¹⁸⁶ Pollock 1, 1-32; Pollock 8, 1-54; see especially, 1, 27, and 8, 52 for the cursory analysis of implied contract formation.

¹¹⁸⁷ 1 B & Ald 681, for later development, see Lobban *supra* (n1183), 336ff.

¹¹⁸⁸ (Hamburger 1989); (Perillo 2004); Lobban, *ibid*; Gardner, *supra* (n1179)

¹¹⁸⁹ Numerous cases on contracts by correspondence arose around 1813-1818. *Humphries v Carvalho* (1812) 16 East 45 (bought and sold notes); *M’lver v. Richardson* (1813) 1 M. & S. 557; *Western v Russell* (1814) 3 V & B, 187, *Dunkin v Wilford* (1814) at Guildhall, cited at 5 M & W 535, 538; *Symmons v Want* (1818) 2 Stark 371; *Gaunt v Hill* (1815) 1 Stark 10; *Kennedy v Lee* (1817) 3 Mer 441.

discussions from at least the 13th century,¹¹⁹⁰ and hints can be detected within England itself in the 18th century.¹¹⁹¹ For this reason, it is impossible to argue their canonical ‘invention’ in 1818 is related to the unique conditions of the 19th century; instead, these rules seem to be another instance of the ‘legal overhang’ mentioned in Chapter 2.¹¹⁹² Second, the *delay* in the explicit formulation of these rules was likely overdetermined by multiple, sufficient causes. One of these was the *procedural* blocking produced by the delegation of contract-formation questions to the jury, and by the tendency to plead *indebitatus assumpsit* in the 18th century, thereby hiding formation behind the question of part-performance.¹¹⁹³ The comparatively late emergence in the 19th century can therefore partially be explained by the extraction of issues from the jury and, from 1760 onwards, by a shift towards *special assumpsit*. Another blocking force was almost certainly the extensive and dominant rules of formalities. This has to do with what Fuller terms the *channelling* function of formalities:¹¹⁹⁴ providing ‘channels for the legally effective expression of intention,’¹¹⁹⁵ such as signed writing,¹¹⁹⁶ a stamp,¹¹⁹⁷ or a deed, which allows parties to know the legal effect of their actions. Further, Fuller argues that in some cases intention is ‘naturally canalized’, such as where there has been a delivery or part-performance,¹¹⁹⁸ and we can identify the party intent clearly without the need for special forms. The presence of strict legal formalities or natural canalisation both indicate, to varying degrees of strength, serious party intention to be bound.¹¹⁹⁹ Their presence, whether as a matter of strict legal necessity¹²⁰⁰ or practical frequency, therefore obviates the need for additional intention tests: once they exist, we know there is intention. In addition to procedure, we can therefore also attribute the belated emergence of offer and acceptance to a mixture of loosening in formalities and, potentially, higher-value business being carried out at a distance without legal specialty.¹²⁰¹

The painful extraction of doctrine from obscure procedure and the overpowering effects of formalities help explain two strange features of the law. The first is that the majority of rules tended to arise regarding new forms of communication, such as letters, telegraphs, and telephones. I suspect the cause -

¹¹⁹⁰ See (Gordley 1993) 46, noting Accursius’s consideration of letter cases and consensus; see also Ibbetson *supra* (n1), 222

¹¹⁹¹ As (Simpson 1975), 257, notes prior to O&A, the question was analysed primarily in terms of promises and their consideration.

¹¹⁹² Surprise at the delay is remarked on in *Dunlop v Higgins* (1848) 1 H.L.C. 381, 388.

¹¹⁹³ Supported by (Lubbe 2000) p 2-3, 7-8, 44-45 who suggests the breakdown of the *briefe* system allowed a ‘scientific’ general notion of contract, and rules of contract formation, to emerge in Scotland by the 17th century. In addition, he emphasises their origin in mandatory form.

¹¹⁹⁴ (Fuller 1941)

¹¹⁹⁵ The following is adapted from Dan Ward’s draft article *Express Dispositions and Transactional Consent* which the author kindly shared with me. Ward argues that, until recently, the requirement for strict formalities in the creation of property rights prevented the need for doctrines about agreement in express dispositions.

¹¹⁹⁶ E.g., bought and sold notes, and the book of sale of a broker, *Heyman v Neale* (1809) 2 Camp 336; *Cumming v. Roebuck* (1816) Holt, 172.

¹¹⁹⁷ Comyn, 130ff.

¹¹⁹⁸ In addition to the frequency of executed consideration, *supra*, see Chitty 2, 18-19, referring to the role of trade customs and past courses of dealing in revealing when a contract was formed.

¹¹⁹⁹ Lobban’s thesis, *supra* (n1183), 330; Lobban suggests the rules of *offer and acceptance* are primarily about temporally spaced agreements.

¹²⁰⁰ See Lobban, *ibid* 329, noting the various requirements for writing in the Statute of Frauds 1677 s 4; see Comyn, 73-74, 109-116.

¹²⁰¹ See Lubbe, *supra* (n1189), 7-8, arguing that the use of specialty, particularly bonds, ‘obscured the development of contractual theory.’ He argues that, in Scotland, the relative unpopularity of bonds allowed more issues of consent to arise.

going back to the 17th century¹²⁰² - was that distance communication was more ambiguous regarding delay.¹²⁰³ If two parties were speaking and one made an offer to buy something from the other who then walked away, the understanding would be that there was no bargain and both were free to deal elsewhere. Here, and in other standard trading contexts, the jury could be reliably trusted to produce reasonable outcomes.¹²⁰⁴ Conversely, in situations like deals by letters, telegraph, telephones, and auction houses, the social norms were more complex, either requiring technical rules or being entirely indeterminate in the case of an emerging technology.¹²⁰⁵ In such cases, it would be necessary to create default legal rules delineating when a party would be bound until reliable, transaction-specific¹²⁰⁶ trade customs formed.¹²⁰⁷ This leads to the second point: the legal construct of general ‘offer and acceptance’ rules for all contracts is, in practice, highly misleading. The specific contracts ranged widely and contained a variety of different formality requirements which, in turn, had a variety of intention-channelling effects. The formation of contracts involving land, for instance, was centred around deeds, whilst the law of bills of exchange had its own intricate rules on the correct formal words, delivery, and acceptance. A useful example of this plurality is the first edition of Addison’s *Treatise*,¹²⁰⁸ where, in the place of general formation rules, he listed rules for different transactions. Sorted as a subset of consideration (‘mutual promises’), Addison listed: *Offers by Marriage*;¹²⁰⁹ *Offers of Sale and Purchase*; and *Biddings at an Auction*.¹²¹⁰ In the second edition, under influence from Pothier, he combined the former two under a general discussion, leaving the latter as an additional section to be sorted alongside ‘postal contracts’ and ‘contracts made by telegram.’ The point is not that abstracting general rules of formation was altogether pointless or contingent - abstraction can be both highly general and useful. Rather, that, as usual, the bulk of formation rules continued to accrete around mandatory (formality) rules which, in turn, produced most of their detail within the specific contracts.¹²¹¹

¹²⁰² Gordley, *supra* (1190), 46.

¹²⁰³ (Perillo 2000) argues that contracts by correspondence were not enforceable prior to the 19th century for this reason. This was unlikely a problem in practice, although it seemed as a matter of doctrine mutual promises had to be exchanged on the same day to be valid consideration for one another, (Simpson 1975), 261, *Nichols v Rainbred* (1615) Hob. 88, *Tradesman’s Lawyer*, 57, citing *Howlet’s Case*, Latch 150, 151. This requirement was possibly behind the ruling *Cooke v Oxley* (1790) 3 T.R. 653. Cf the equitable approach in *Kennedy v Lee* (1817) 3 Mer 441, 454-5.

¹²⁰⁴ See *Humphries v Carvalho* (1812) 16 East 45, 46, in which the question of how long an offer was open was taken initially as a matter of trade custom. In theory, all the O&A cases could have been resolved by asking ‘what did the offer intend when making his offer’; this, of course, would have been fictional in most cases. The standard for trade custom was quite high: *Wood v. Wood* (1823) 1 Car. & P. 59, 60

¹²⁰⁵ E.g., when one party misaddressed the letter, *Adams v Lindsell*, *supra*, (n1183) 681. Lobban, *supra* (n1183), 333-5, emphasises the question of delay had previously been subsumed under a general question of whether there was ‘firm agreement’ manifested by the parties’ writings.

¹²⁰⁶ See Chitty Jr 2, 17, and Pollock, 1, 28, on the heterogeneity of implied contracts.

¹²⁰⁷ *Henthorn v. Fraser* [1892] All ER 908, 912 leaving as a matter of fact the conditions of an acceptance appended to the contract, subject to manipulation, as always, by the court, Gardner, *supra* (n1179), 192.

¹²⁰⁸ Comyn, 2-3, which substantially influenced Chitty Jr 1st 3-5, merely repeated Plowden’s definition; Chitty Jr 2, 8-17, adopted a model inspired by Pothier. Cf Chitty Sr, 3, 2-3, 103-5, who treated agreement either as a matter of fact or as properly the subject of individual contracts.

¹²⁰⁹ See Ibbetson, *supra* (n1), 222, noting that offer and acceptance was established for marriage early.

¹²¹⁰ Addison 1, Ch VII, a similar pattern can be seen in Addison’s particularistic account of implied terms.

¹²¹¹ Such as the formality rules for financial instruments; marriage; guarantees; and contracts involving the sale of land. See Addison 11, Section 2, pg 22 for the heterogenous mixture of ‘authentication’ rules.

3.2 Construction

It is well-known that the majority of contract litigation centres around the interpretation of contracts. The terms of the contract determine party intention, which, in a system prioritising party autonomy, has the power to determine virtually everything else. A perusal of the 19th century contract treatises reveals, however, that interpretation was a relatively neglected doctrine, and one which never secured much space.¹²¹² One intuitive explanation is that this was because interpretation was treated primarily as a matter of ‘fact’, and thus the majority of detail was deflected into the factual findings of the jury or trial judge. This thesis is essentially correct, though requires substantial elaboration. In this section, I will explore three aspects of interpretation. First, the doctrinal boundary between fact and law. Although contract interpretation was explicitly and unambiguously considered a matter of ‘law’ by judges, it nevertheless often behaved like a question of ‘fact’ in practice. Second, the important, ever-present role of specific contracts in absorbing the bulk of doctrine relating to specific terms. I consider where and how this detail was stored, focusing in particular on the accumulated bank of standardised contract forms held by large companies and law firms. Surrounding these was an immense orbiting cloud of quasi-law, produced by the elaboration of trade custom which only occasionally touched the courts and thereby appeared in the formal sources. Third, I explore the role of the judiciary (and legislature) in producing *default* terms which applied in the absence of explicit terms. As mentioned above, these rules worked as a kind of ‘soft’ contract review, albeit a highly defeasible one.

The question of whether interpretation was a matter of fact or law, and therefore jury or judge, was largely ignored in the formal sources until the mid-19th century.¹²¹³ Prior to this point, the boundary was traced implicitly by the judges deciding the meaning of terms, thereby incidentally confirming the matter was ‘legal.’¹²¹⁴ In 1839, in *Hutchinson v Bowker*¹²¹⁵ Parke B explicitly confirmed the meaning of all written instruments was a matter for the court, though this decision might partially depend on facts, such as particular technical, customary, and mercantile meanings, found by the jury.¹²¹⁶ The question of interpretation is a good example of how a matter of ‘law’ could, in practice, operate like one of fact.

¹²¹² Earlier chapters can be found in Comyn, 532 and Chitty Sr, 106-118. The only purely interpretation-focused treatises I could find were (Beal 1896) and (Wood 1886).

¹²¹³ Questions of interpretation were often regarded as straightforward facts, represented by the maxim that “it is not allowable to interpret what has no need of interpretation.” (Chitty Jr, 22). See Beal, *Cardinal Rules*, 2nd Edition (1908), lxxv. Counsel in *Hutchinson v Bowker* (1839) 5 M & W 535, 540 applied this maxim, suggesting that where the words are clear and unambiguous the court was not to put a construction on the contract. By the later 19th century, this appears to have been reversed, such that everything *except* technical meaning was for the judge. See *Alexander v Vanderzee* (1872) L.R. 7 C.P. 530, 533; *Bowes v Shand* (1877) 2 App Cas 455, 462; and *Turner v Sawdon & Co.*, (1901) 2 K.B. 653, 656.

¹²¹⁴ For various examples, see *Jeffries v. Legandra* (1693) 2 Salkeld, 443 *Robertson v French* (1803) 4 East 130, 135-6; *Beckford v Crutwell* (1832) 1 M & R 187; *Smith v Wilson* (1832) 3 B & Ad 728; and *Goldshede v Swan* (1847) 1 Ex 154

¹²¹⁵ *Hutchinson v Bowker* (1839) 5 M & W 535, 542, the earlier case of *Dunkin & Another v Wilford* (1814), cited at 538 suggests the court was previously more inclined to leaving the issue to the jury.

¹²¹⁶ E.g. *Chaurand v Anferstein* (1790) Peake Rep 43; *Neilson v Harford* (1841) 8 M & W 806, 823. There was some doubt regarding disagreement between the jury and judge over technical phrases in *Alexander v Vanderzee* (1872) L.R. 7 C.P. 530, 533-4, rendered irrelevant by the replacement of the jury by the trial judge.

Courts routinely insisted that matters of construction had to turn on the particular instrument¹²¹⁷ and deferred extensively to the intentions of the parties involved.¹²¹⁸ It was only after 1870 that the doctrinal and precedential status of rules of construction began to receive explicit consideration.¹²¹⁹ Howard Elphinstone in an 1885 article¹²²⁰ noted the latter question ‘has received much attention of late years’,¹²²¹ contrasting a strict precedential view with one of infinite discretion.¹²²² Elphinstone took a middle path, suggesting that whilst decisions on construction have no legal precedential value, they might indicate factual trends in the meaning of contractual terms which point towards finding the same way in future cases.¹²²³ As such, Elphinstone could ignore the question of construction’s doctrinal place. For those who believed construction to be a matter of law, it remained unclear where construction ought to fit into the doctrinal map. Phipson, supposedly representing the views of ‘almost all the text-writers on evidence’, argued that construction was really just a matter of ‘adjective’ law.¹²²⁴

The status of construction cases as substantive, precedential law was therefore never explicitly resolved. Unsurprisingly, this meant the conceptual place of construction was also unclear within the contract treatise. Chitty Jr and Addison, given their practical focus, devoted a section entirely to construction.¹²²⁵ Their sections consisted of general canons of interpretation and numerous specific classes of term, such as quality warranties in goods contracts and time clauses in charterparties. Neither of these fit neatly within the academic treatise. The former were considered to be commonsensical, such as following party intention, and looking at the document as a whole;¹²²⁶ not specifically related to contract but all written documents;¹²²⁷ and for which, in any event, the ‘preponderance’ were really rules of evidence.¹²²⁸ The latter, on the other hand, were too specific for a general treatise and frequently dubious in their status as law. After all, the construction cases existed as an array of rules across a wide spectrum of doctrinal topics and commercial spheres.¹²²⁹ In turn, these spaces placed different degrees of weight on past decisions following, most likely, the factors averted to in Chapter 2 regarding the *persuasive* rather than *formal* impact of precedent.¹²³⁰ The academic treatise fixation on legal principles ensured there was little

¹²¹⁷ Addison 1st, 167; Dennistoun, xi. See *Howard v Patent Ivory Manufacturing Co.* (1888) 38 Ch. D. 156, 165

¹²¹⁸ The responsiveness of the courts to intention seems to be inversely related to the binding status of decisions. See Pollock 5, 244 and Ibbetson *supra* (n1), 225.

¹²¹⁹ Likely reflecting the rise in judge-only trials. 1896, the editors of Chitty’s Practical Treatise, 109 made several changes to the text to reflect this rise, noting that a jury was only sometimes present and replacing the concept of ‘jury questions’ with ‘questions of fact.’

¹²²⁰ (Elphinstone 1885)

¹²²¹ *ibid.*, 466

¹²²² *ibid.*

¹²²³ *ibid.* 468-9.

¹²²⁴ (Phipson 1904), 247, arguing the ‘preponderance of interpretation is a matter of evidence.’ C.f the views of (Thayer 1898) 404-5.

¹²²⁵ Although for Chitty Jr it was placed in a general chapter with offer and acceptance and consideration until the 12th edition. For the numerous specific terms considered, 12th, 134ff; 16th, 99ff.

¹²²⁶ Most of these can be found in Shepherd’s *Touch-stone* Chapter V, 86-88; see also *Robertson v French supra* (n1209)

¹²²⁷ Pollock 5, 243

¹²²⁸ Pollock 1, 437; Pollock 5, 239; Phipson, *supra* (n1224), 247

¹²²⁹ See Beal, Part V considering mercantile instruments separately; Chitty Jr, 3rd Edition, 83 devoted a separate section to mercantile contracts.

¹²³⁰ The precedents governing precedent are provided succinctly in Beal, *supra*, lxxv; see also 24, citing *Cann v Cann* (1830) 3 Sim 447; *Palmer v Johnson* (1884) 13 Q.B.D. 351, 358, 359.

room for this material. Leake and Pollock subsumed construction as an aspect of performance, the latter almost entirely ignoring the topic until his 5th edition.¹²³¹ Anson divided construction in two, one half being rules of evidence and the other, a far briefer section, covering ‘true’ legal rules of construction.¹²³² The sizable body of doctrine had to be found elsewhere: the specific treatises.

The process by which these, specific and multifarious commercial terms were (partially) absorbed into the law of specific contracts was complicated. To begin, we must recognise that the 19th century inventors, drafters, editors, and often interpreters, of contract terms were primarily commercial actors.¹²³³ The self-perceived role of the court was primarily to *receive* this information, rather than to shape it themselves. In this regard, numerous doctrinal ‘bridges’ connected mercantile custom directly to the interpretation of contracts.¹²³⁴ Chitty Sr makes this clear: documents were to be construed ‘conformably to the usage and custom of merchants’, given:

“the courts have always endeavored to adapt the rules of law to the course and method of trade and commerce, in order to promote it, and when new cases have arisen on the mercantile law they consult traders and merchants as to their usage of trade in general, and of the particular trade to which the contract relates.”¹²³⁵

The relation of courts and commercial parties was not always this harmonious - in addition to the constraint of mandatory rules (above, 2.1), commercial terms would sometimes be interpreted contrary to their commercially expected meaning.¹²³⁶ Nonetheless, most of the rules were weak default rules and the few rigid canons of construction which did persist were justified on the basis that parties who were familiar with the rules could contract around them.¹²³⁷ It is always tempting as a legal historian to believe that the law played a crucial role in storing information about contract terms and their effects. For instance, we could point to Moore’s *Handbook of Practical Forms; The Law of Bills of Sale with an Appendix of Statutes and Precedents*; and Underhill’s *The Encyclopaedia of Legal Forms*, as central repositories of contract terms. This would however be highly misleading. As Cranston persuasively argues, the vast amount of complexity in the structuring of mercantile contracts occurred within the

¹²³¹ Leake, 1st, 332, 435; Pollock, 1st, vii, 437.

¹²³² Anson 1, 225, 226, 241.

¹²³³ Cranston *supra* (n106), 73-76, 124, 126.

¹²³⁴ For instance, the power of juries (as a ‘matter of fact’) to ascertain the meaning of technical or mercantile terms. *Hills v London Gaslight Co* (1857) 27 L.J. Ex 60, 63; *Bowes v Shand* (1877) 2 App Cas 455, 462. For the role of custom generally, see *inter alia*, *Trueman v Loder* (1840) 11 A & E 589, 597; *Lewis v Marshall* (1844) 7 M & Gr. 729, 743-744; *Gibson v Small* (1853) 4 H.L. Cas 353, 397. See (Baker 2013a) 321-322 for the 17th and 18th century context; Cranston *supra* (n106), 48-52, for the 19th and 20th centuries. By 1909, sufficient custom had accumulated for a treatise to be formed: (Aske 1909), 18, Part III generally, 156 on the role of the Jury.

¹²³⁵ Chitty Sr, 109, citing primarily insurance cases. See also *Lilly v Ewer* (1779) 1 Dougl. 72, 74; and Addison, 1st, 153; Pollock 5th, 243.

¹²³⁶ Cranston *supra* (n106), 80 describing common law ‘formalism’; see also the rule that mercantile custom could not contradict the ‘plain meaning’ of the contract, Chitty Sr, 110, *Trueman v Loder* (1840) 11 A & E 589; It seems after 1873 courts became significantly more ‘liberal’ regarding accepting custom, (Aske 1909), 147; for the difference, when assessing the ‘reasonableness’ of custom between traders in the customary community and strangers 169-199.

¹²³⁷ Pollock, 5, 246.

commercial sphere.¹²³⁸ In particular, from the mid-19th century onwards, trade associations crafted standard form contracts used by their members - and beyond - which effectively codified mercantile custom. It was here where ‘chaos’, the ever-changing interplay of member interests and fluctuating market conditions, was incorporated into re-balanced standard contracts.¹²³⁹ It is doubtful lawyers, either as academic, counsel, or judge, would have the flexibility, adaptability, or information to structure terms this way themselves. In this sense, the doctrinal bridges of mercantile custom served as a conduit for complexity, the courts relatively rarely adjudicating on terms, and more rarely still glossing it in a manner contrary to mercantile understanding.¹²⁴⁰

Relative to the activity of commerce, the body of contractual rules on terms was minute; by the metrics of legal rules, however, they were immense. The sea of ‘ever-restless’¹²⁴¹ trade contained vast quantities of information, and even the slightest contact - to say nothing of the extreme case of mandatory rules - could generate vast quantities of law.¹²⁴² We see this across the specific contracts, where extensive default terms were created.¹²⁴³ For many of these, as Pollock suggests, the courts simply intended to create a clear default which the parties could use as a starting point. These are akin to driving on the left side of the road, or perhaps the postal rule: “it matters little whether the reasons originally assigned for an established rule be convincing or not.”¹²⁴⁴ There was, however, another class of rule where judges tried to produce defaults which would create particular, desired outcomes. This class was naturally disliked by Pollock, who regarded them as rules “imposed by a policy which was then in the hands of the judges, but is now held to be in the exclusive competence of the Legislature.”¹²⁴⁵ For Pollock, attempting to shape transactions this way was paternalistic and imposed terms upon ‘parties of full age with the means of independent judgment.’¹²⁴⁶ Nonetheless, the line between the two classes was not always clear, and judges continued to create such defaults in a wide variety of commercial settings across the 19th century. A classic example of this kind of ‘soft-regulation’ was the default rules of interpretation and term-incorporation for carrier contracts. Numerous cases can be found balancing the rights and obligations of train passengers and operators, mediated by statutes passed by Parliament.¹²⁴⁷ Another traditional method was the *contra proferentem rule*, a canon working against the party relying on the term in question, which

¹²³⁸ Cranston, *supra* (n106), 201, 291-292, 302-343.

¹²³⁹ *ibid.*

¹²⁴⁰ *ibid* 351.

¹²⁴¹ President of LCTA, Annual General Meeting, 27 May 1926, cited in Cranston, *ibid* 332.

¹²⁴² The most fertile were sales of goods, marine policies, and bills of lading, see *The Interpretation of Mercantile Agreements* Dennistoun Wood 1886.

¹²⁴³ For a clear example of this process, see *Gibson v Small* (1853) 4 H.L. Cas 353, 397; and *Edie v. East India Co.* (1761) 2 Burr. 1216 considering the common law’s codification of custom and production of default terms.

¹²⁴⁴ Pollock 5th edition, 245

¹²⁴⁵ *ibid*, referring to the equitable jurisdiction. See Newland, 328-9 on this jurisdiction.

¹²⁴⁶ *ibid*, 246. These concerns were undoubtedly connected to the will theory. Nonetheless, as Ibbetson *supra* (n1), 224 notes, nineteenth century courts often used ‘party intention’ as a mask for policy.

¹²⁴⁷ Tofaris *supra* (n63); (Lobban 2010b), 473, 967-8.

was used as a tool for consumer protection in a wide variety of cases.¹²⁴⁸ Ultimately, however, these were *passive* and *circumventable* forms of regulation, relying, first, on litigation coming before the courts, and, second, operated solely as defaults (with varying strengths). As Llewellyn notes, they were fundamentally limited.¹²⁴⁹ They might work in a particular case, but, unless the courts were willing to produce a strict rule of law, tighter drafting would eventually preclude the protection provided, thereby releasing lexigenerative pressure.

3.3 Performance

After the contract is made and its term demarcated, performance can commence. Yet, alas, sometimes things go wrong and the dreaded lawsuit is necessary. Unfortunately, this one of the most technical areas of all contract law, largely due to the persistence of the 18th century learning.¹²⁵⁰ The essential doctrinal question can be stated simply: ‘when does the non-performance or mis-performance of a term by the plaintiff release the defendant from their obligations to perform?’¹²⁵¹ Theoretically, the answer can be found exclusively in the intentions of the parties: did the parties intend that the non-performance *Z* of term *X* by party *A* would thereby release party *B* from any/all of his obligations under the contract? In other words, the solution could have been purely one of construction, converting the doctrine of ‘conditions’ into a neat sub-set of Part 2 above. If this path had been taken, the production of law would have followed that of construction generally. This did not occur for two reasons. First, as Pollock noted, parties rarely anticipated (at least in the early-mid 19th century), that they or their counterparty would fail to perform the contract, let alone expressly specified the relevance of specific instances for a potential lawsuit.¹²⁵² The failure to put such terms in left a gap to be filled with judicially-formulated default terms.¹²⁵³ Even if the parties had been active in specifying the legal effects of different cases of non-performance, however, this would probably not have prevented law forming. This is because, second, the effects of this doctrine were often extreme: if the non-performance of a clause was construed as precluding a party from suing, they could be denied any compensation for all the work they had carried out.¹²⁵⁴ The famous case of *Cutter v Powell* is a good example of this: a sailor completed 70% of a lengthy sea-journey before dying and it was held his widow could not sue the master because of the non-

¹²⁴⁸ See (McCunn 2019), 24-30

¹²⁴⁹ (Llewellyn 1938b)

¹²⁵⁰ Due to its relevance to modern private law, a large amount has been written on this topic, see (S.J. Stoljar 1957)

¹²⁵¹ See (S. J. Stoljar 1975), 147. I do not consider here what *in addition* to such a breach would be required, which touches on the law of rescission and waiver. See *Franklin v Miller* (1836) 4 A & E 605, 606.

¹²⁵² Pollock, 5th edition, 248; also (Stoljar 1957), 218.

¹²⁵³ (S.J. Stoljar 1953), 195 noting that the question of what the judges consider to be intention can be ‘unpredictable indeed.’

¹²⁵⁴ See *The Juliana* (1822) 2 Dods, 504, 511; discussed in (Stoljar 1975), 164.

performance of the final part.¹²⁵⁵ As such, judges were incentivised to adjust the rules to get fair outcomes, whether explicitly or covertly under the rubric of finding the ‘true intentions of the parties.’ Both of these features, gap-filling and soft-regulation, had the innate potential to stimulate a large body of law. This potential was further supplemented by two additional lexi-generative sources. One was the procedural influences origins of the doctrine, framed in terms of whether the plaintiff had averred all he needed to in his declaration to bring an action.¹²⁵⁶ The other, more potent, was the incomplete and isolated development across different specific contracts.¹²⁵⁷ These factors prevented the formulation of a general, substantive rule, and led to the proliferation of doctrinal concepts.¹²⁵⁸ Judges would ask whether the promises were ‘independent or dependent’; ‘conditions or warranties’; ‘conditions precedent or subsequent’;¹²⁵⁹ ‘warranties or representations’;¹²⁶⁰ ‘entire¹²⁶¹ or apportionable’;¹²⁶² whether there had been a ‘total failure of consideration’, and whether the breach went to the ‘root of the contract.’

The oldest, and most influential, of these concepts was the law of dependent and independent promises.¹²⁶³ As Simpson notes, promise interdependency was concerned with determining when a party’s promise would be actionable: for a dependent promise (often referred to as a ‘condition precedent’), the non-performance would prevent actionability.¹²⁶⁴ For independent promises, both parties could bring actions without alleging their own performance.¹²⁶⁵ These rules were, in turn, linked to the law of consideration: contracts involving independent promises were pleaded as involving a consideration of mutual promises (e.g, your promise is the consideration for my promise, and vice-versa).¹²⁶⁶ In the early-18th century, the question was typically treated as one exclusively of construction, turning on technical wording, especially in land-related cases.¹²⁶⁷ By the late-18th century, this had given way to an approach focused on the intention of the parties broadly construed, thereby opening up the problem of

¹²⁵⁵ (1795) 6 TR 320

¹²⁵⁶ Seen clearly in Chitty Jr’s reliance on pleading and evidence textbooks. See 274, fn (a). For examples, see *Hotham v East India Company* (1787) 1 T.R. 638; *Chanter v Leese* (1838) 4 M & W 295, 295. S41 of the CLPA rendered the pleading somewhat less important.

¹²⁵⁷ See Stoljar, *supra* (n1253), considering construction, employment, sales of land, sales of goods, and charterparties.

¹²⁵⁸ See Simpson *supra* (n462), 544 for the ‘alternative conceptual schemes.’ This is clear in Addison’s section on *Conditional and Absolute Engagements*, 980, followed by similar sections on *divisible and indivisible considerations*, and *mutual conditions*, and *dependent and independent covenants and promises*.

¹²⁵⁹ This particular language comes from *Hotham, supra* (n1255), 645-646, where Ashurst J found a term was a condition subsequent, not precedent, in order to avoid the defendant’s objection that the plaintiff had not averred performance of it. See also *Morton v Lamb* (1797) 7 T.R. 125, 129, and *Stavers v Curling* (1836) 3 Bing N.C. 355, 366.

¹²⁶⁰ *Graves v Legg* 9 (1854) Exch 709, 423, 424, seemingly deciding that all non-representations were therefore also conditions.

¹²⁶¹ E.g., *Ritchie v Atkinson* (1808) 10 East 295, 298-9; *Chanter v Leese* (1838) 4 M & W 295. 311. Note, even for entire contracts, though ostensibly turning on construction per *Appleby v Myers* (1867) L.R. 2 C.P. 651, an accepted part-performance might allow a claim, see *Sumpter v Hedges* [1898] 1 Q.B. 673, discussed in detail in (McFarlane 2002), 569-599.

¹²⁶² See *Neale v Ratcliff* (1850) 15 Q.B. 916

¹²⁶³ The most important synthesis of these rules is Serjeant Williams’s survey in *Pordage v Cole* (1799) 1 Wms Saund 319, fn 4, which was cited in many of the following cases, which provides five general rules for ascertaining whether a term is dependent or not.

¹²⁶⁴ Simpson *supra* (n462), 543.

¹²⁶⁵ The canonical expression of these is Lord Mansfield’s judgment in *Kingston v Preston*, extracted in the arguments of counsel in *Jones v Barkley* (1781) 2 Doug 684, 690

¹²⁶⁶ See Chitty Sr, vol 3, 120. The early treatise literature was rooted in pleading, with Chitty Sr, followed closely in Chitty Jr, 1st edition, 272 providing only the loosest overviews. It took until the mid-19th century to separate the role of consideration in actionability from formation. See Leake, 2nd edition, 647; Pollock 5th Edition, 233, and *Akcyjna v Fairbairn* [1943] A.C. 32

¹²⁶⁷ The presumption was of *independence*, see Stoljar, *supra* (n1252).

missing intentions more directly.¹²⁶⁸ Simultaneously, this intention-based approach was qualified by Lord Mansfield's decision in *Boone v Eyre*, deciding that if the promise breached only went to 'part of the consideration' then it would be considered independent.¹²⁶⁹ *Boone* was applied in many subsequent cases, albeit its formula was fundamentally fuzzy.¹²⁷⁰ Over the century, it was re-cast into a variety of different, equally ambiguous monikers, such as 'materiality',¹²⁷¹ 'going to the root of the contract',¹²⁷² being the 'pith and essence of it',¹²⁷³ providing 'substantial performance',¹²⁷⁴ and anything less than 'whole frustration'¹²⁷⁵ or 'total destruction of value.'¹²⁷⁶

As has been noted elsewhere, the justification behind *Boone* was left fatally ambiguous by Mansfield.¹²⁷⁷ Throughout the 19th century, courts, and treatise writers, seemed to treat it as a matter of fairness.¹²⁷⁸ Provided damages were an adequate remedy,¹²⁷⁹ it would be unfair to allow the counterparty to escape liability after having received a substantial benefit, and after the breaching party had expended considerable sums in performance.¹²⁸⁰ Equally, however, they treated part-performance as a heuristic for determining the intentions of the parties *ex ante*¹²⁸¹ under the general construction approach.¹²⁸² If one party had received substantial performance, this would suggest that *at the time of agreement* the parties had intended the term to be dependent, the breach of which precluding an action. Although often used to reach the same results - in many cases being referenced as joint justifications¹²⁸³ - these doctrinal formulations are fundamentally different.¹²⁸⁴ The former, as expressed in *Ellen v Topp*, is diachronic and open-ended: a wide range of events subsequent to the formation of the contract could alter the respective rights and liabilities of the parties under it.¹²⁸⁵ Conversely, the latter is synchronic and closed, fixing the position of the parties at the time of making the contract based on their agreement alone. These approaches possess different lexi-generative properties. As Stoljar notes, if the courts had adopted the first

¹²⁶⁸ Lord Kenyon suggests the courts moved away from technical interpretation of the exact wording here. See *Goodisson v. Nunn* (1792) 4 T.R. 761, 764, 765-6; (Baloch 2009), 102-3 citing the manuscript report of *Kingston*. This may mark a movement from primarily land cases to general mercantile contracts.

¹²⁶⁹ *Boone v Eyre* (1777) 1 H. Bl. 273, for the judgment of Ashurst J, see *Campbell v Jones* (1796) 6 T.R. 570, 573.

¹²⁷⁰ Stoljar *supra* (n1252), 250; Baloch, 106.

¹²⁷¹ *Freeman v Taylor* (1831) 8 Bing 124, 138, *Glazebrook v Woodrow* (1798) 8 T.R. 366, 375

¹²⁷² *Davidson v Gwynn* (1810) 12 East 389, 389

¹²⁷³ *Graves v Legg* 9 (1854) Exch 709, 712

¹²⁷⁴ *Ellen v Topp* (1851) 6 Exch 424, 442

¹²⁷⁵ *Tarrabochia v. Hickie* (1856) 1 H. & N. 183, 187-8.

¹²⁷⁶ *Fillieul v Armstrong*, (1837) 7 A & E 557

¹²⁷⁷ (Carter and Hodgekiss 1977)

¹²⁷⁸ E.g., in *Ritchie v Atkinson* (1808) 10 East 295, 312. *Campbell v Jones* (1796) 6 T.R. 570 Lord Kenyon describes it as turning on the 'good sense of the case', though also expresses that it is part of the process of construction. For a clear case, see *Hotham v East India Company* (1787) 1 T.R. 638, 645

¹²⁷⁹ The adequacy of damages is clearly a central factor in this calculus, see *Boone, supra* (n1264), *Duke of St Albans v Shore*, (1789) 1 H Bl 270, 278; *Ellen v Topp* (1851) 6 Exch 424, 431

¹²⁸⁰ *Boone* was applied, in rare cases, to executory agreements. E.g., *Shore, ibid*, and *Bettini v Gye* (1876) 1 Q.B.D. 183, 244.

¹²⁸¹ E.g., *Graves v Legg* 9 (1854) Exch 709, 714-5, 717.

¹²⁸² There are numerous cases referencing the 'construction' approach, e.g. *Ritchie v Atkinson* (1808) 10 East 295, 302-3, *Stavers v Curling* (1836) 3 Bing (N.C.), 355, 368

¹²⁸³ E.g. *Campbell, Ritchie, ibid*, 310-11; *Porter v Shephard* (1796) 6 T.R. 665, 668-9.

¹²⁸⁴ Treated as the essential tension by (Stoljar 1975), 197-9 and (Baloch 2009), 100. In addition to their conceptual differences, it is also possible the question of 'materiality', as opposed to construing intentions, was a jury matter, see *Stavers v Curling*, 3 Bing (N.C.) 355, 366; *Freeman v Taylor* (1831) 8 Bing 124, 138

¹²⁸⁵ *Ellen v Topp* (1851) 6 Exch 424, 441; likewise, *White v Beeton* (1861) 7 H & N 42, 50; and *Behn v Burness* (1863) 3 B & S 751; 755

exclusively, it could have stunted the creation of law: each case could be made to turn on the particular circumstances. Indeed, there were signs in the early-19th century that ‘materiality’ would be treated as a question for the jury, and therefore ‘fact.’ Nonetheless, the courts were unprepared to ignore party intention and, following the basic principle of freedom of contract,¹²⁸⁶ re-asserted that the parties had the power to designate a term as dependent - now increasingly referred to as ‘conditions’ - *ex ante*. Although parties often did not specify the terms’ effects, the courts were nonetheless able to build up a bank of default terms in a range of contracts with explicit classifications as conditions or their opposite, ‘warranties.’¹²⁸⁷ By the late-19th century it was therefore possible for courts to start assuming that an absent classification was not a gap to be filled with judicial discretion, but a genuine preference for the - now frequently statutory - default rules.¹²⁸⁸

The resulting build-up of law was simply the process of construction described above, whereby some, though not all cases, were treated as binding to guide parties. This was not, however, the complete story. The diachronic element was still present: the fairness of part-performance after agreement could not be ignored by the courts, even in a primarily *ex ante* paradigm. The mid-century approach, described above, had been to emphasise part-performance as a heuristic for construction. Accordingly, it gave the courts the power to adjust the findings of ‘party intent’ to achieve desired results, even in the teeth of explicit designation of terms as ‘conditions.’¹²⁸⁹ By the late-19th century, they started to avoid this fiction and stated instead simply that post-contractual reliance precluded the party from relying on what had otherwise been a condition before. This reflected a maturation of the *ex-ante* construction-model. Whilst subsequent performance could be relevant, it could no longer act through the post-facto alteration of the contract terms.¹²⁹⁰ Instead, the judiciary increasingly, though not uniformly, insisted that the construction question was to be determined by the construction of the contract *at the time of formation*. By 1890 it had stabilised into the following formula: terms were to be classified into either ‘conditions’ or ‘warranties.’ The breach of a condition would release the counterparty from their performance, whilst the breach of a warranty would not.¹²⁹¹ Parties could always be assumed to have designated the terms as one or the other in advance, either explicitly or through reliance on a default. From this point, the case-law thinned out, reflecting a dampening of the two core lexi-generative factors: (1) the production of sufficient defaults to

¹²⁸⁶ (Lobban 2010b), 489, and (Baloch 2009), 120

¹²⁸⁷ See Chapter 6, for a few general defaults, see *Goodisson v Nunn* (1792) 4 T.R. 761, 763, (concurrency in sale); *Winstone v Linn* (1823) 1 B & C 460, 467 (independency in apprentices). See Benjamin, (1868) 422. “In practice, the courts came to treat certain stipulations systematically as conditions precedent, but others not.”

¹²⁸⁸ For this argument generally, Mitchell *supra* (n138), 201-2.

¹²⁸⁹ See Lord Selbourne’s dissent in *London Guarantee Co v Fearnley* (1880) 5 App Cas 911, 920.

¹²⁹⁰ See *Glaholm v Hays* (1865) 2 Man & G 257, 265; *MacAndrew v Chapple* (1866) L.R. 1 C.P. 643, 647. Carter and Hodgekiss, *supra* (n1272), 44-45 argue that this is also reflected in Chalmers’ ability to refer to dependent promises as condition precedents, and that the resulting SoG generalised this to all contracts.

¹²⁹¹ Or get a deduction in the plaintiff’s damages, see *Allen v Cameron* (1833) 1 C & M 832, 840.

fill gaps in party intention, combined with more detailed drafting; and (2) a corresponding reduction in emphasis on post-contractual equitable adjustment. Nonetheless, whilst the former remained settled, the latter did not, and probably can never be fully quieted. Post-formation performance continued to raise a steady, if denuded, stream of highly specific cases,¹²⁹² eventually culminating in important mid-20th century doctrinal developments.

3.4 Remedies

The law of contractual remedies produced several boundaries within and around contract law. It was the closest of all the traditional substantive topics to the law of procedure - courts could not invent new remedies for which procedures of enforcement did not exist. It was also the closest to the non-legal sphere of the market: in many ways, the courts allowed (and relied upon) the market to determine the outcomes of adjudication.¹²⁹³ These boundaries also worked inwards: whilst a court might declare every right comes with a remedy, causation could flow in the other direction.¹²⁹⁴ Take the inadequacy of a bargain: one of the central arguments provided for its inapplicability was that the common law courts could not *calculate* the fair value of a contract. If the remedy cannot be assessed, then the right cannot be protected - it is unclear, in fact, if it is a legal right at all. Given this background, party autonomy regarding Remedies worked a little differently from Construction and Formation. Party A could stipulate Party B was to pay £X should he breach his side of the agreement, or £X in Y instalments, over Z period of time, or with an acceleration clause.¹²⁹⁵ Provided the clause was not a 'penalty', courts would happily accept it and, with the assistance of parliament, enforced a variety of efficient debt-collection procedures. What Parties A and B could not do, however, was stipulate for a non-monetary remedy. The rules of specific performance were demarcated by law rather than contractual terms. Following the basic theme across this Chapter, where rules confined party choice - as with penalties and specific performance - law was formed in bulk. Otherwise, within the field of monetary remedies, parties could structure their remedies freely and the lexi-generative pressure was released. Before discussing these rules, two other boundaries are worth noting in passing. First, the thin line between the law of contract and criminal law: most obviously, the proactive prosecution of workers under the Master and Servant Laws and the persistence of pre and post-judgment imprisonment, but also prohibitions against violent self-help by would-be plaintiffs. Second, the line between law and non-law. Private parties, especially merchants and stock-jobbers, had alternative

¹²⁹² E.g., *Poussard v Spiers & Pond* (1876) 1 Q.B.D. 410 and *Hosking v Pahang Corpn (No 1)* (1891) 36 Sol Jo 107. Whether or not this was a matter of fact or law was not clearly resolved in the period; in theory, see supra X, not helped by the unclear status of construction itself. See *Bradford v Williams* (1872) LR 7 Exch 259, Martin B for an attempt to reduce the precedential weight of such findings.

¹²⁹³ (Waters 1958), 364-6, 372 for the relative absence of law on the concept of the 'market' itself

¹²⁹⁴ A central theme of the first edition of *Mayne on Damages*, 1st see *preface*, 17.

¹²⁹⁵ See, generally, (Francis 1985), 825-830.

reputation-based enforcement, such as revoking membership in trade associations.¹²⁹⁶ The state's modes of coercion did not exhaust the modes of contractual enforcement.

The substantive law of contractual remedies, as with virtually every contract doctrine, emerged from the discretion of the jury¹²⁹⁷ and the forms of action. The extent to which the jury had discretion is debated, although it seems clear that by the mid-18th century they were substantially controlled by the pleading process and trial instructions.¹²⁹⁸ As Francis notes, when parties sued on a money bond the jury was absent (the form being debt) and the plaintiff could count on a 95% chance of recovering the stated value.¹²⁹⁹ Francis's detailed study shows the vast majority of litigation involved debt collection, and of this a large proportion involved formal instruments, whether as bonds or financial instruments¹³⁰⁰ centred primarily around proving the existence of the debt,¹³⁰¹ followed by rapid and direct recovery of the listed amount. The explicit doctrinal movement from jury to judge, which only occurred in the early-mid 19th century, occurred in the shadow of these cases.¹³⁰² Only where the parties failed to specify the value of the contract would the jury matter, and only in a few cases - although increasingly common as the century wore on - would the jury's discretion be problematic.¹³⁰³ The most well-known case in this regard was *Hadley v Baxendale* (1854).¹³⁰⁴ *Hadley* involved consequential losses from a breach of contract, supplementing the previous causation-oriented rule¹³⁰⁵ with a two-part test: in the absence of explicit terms, a party would be liable for (1) the natural consequences of the breach, typically limited to the 'value' of the performance;¹³⁰⁶ and (2) any results within the contemplation of both parties. As with many other leading cases, shortly after *Hadley* a general treatise on damages was released (*Treatise on the Law of Damages* by J. D. Mayne). The successive editions of 'Mayne on Damages', and the general treatises, trace out the basic lexi-generative pattern across contract law. First, a moderately sized body of general law on damages (focused, in particular, on the assessment of interest and penalties). The development of the twin tests in *Hadley* is a useful example of the lexi-generative process at play. Necessitated by (1) the

¹²⁹⁶ Cranston, *supra* (n106)

¹²⁹⁷ Barton *supra* (n978), 120-122; Ibbetson, *supra* (n517), 127, 138-142. For a late, explicit doctrinal endorsement, see *Walker v. Broadhurst* (1853) 8 Ex. 889, 897.

¹²⁹⁸ Francis *supra* (n1295), 813, 818-9; Lobban, *supra* (n78), 459, 462.

¹²⁹⁹ Francis, *ibid*, 817, Appendix #15; Ibbetson, *supra* (n517), 146.

¹³⁰⁰ Francis, *ibid* 810, arguing around 90% of all cases involved debt collection; see Appendix #4 - 10 and #15 for an analysis of the proportion of cases involving formal instruments. As Francis notes at 816, these figures are, however, unreliable and not necessarily representative of total rates of usage given the more certain the contract form, the less likely they were to proceed to trial.

¹³⁰¹ *ibid*, 811-2, and Lobban, *supra* (n78), 462-4.

¹³⁰² See the emphasis on liquidated damage in Chitty *A Practical Treatise*, 1st Edition.

¹³⁰³ Losses were often captured by the customs and tacit understandings of specific trades. See *Wilson v Newport Dock Co*, (1866) L.R. 1 Exch 177, 183 and Barton, *supra* (n978), 40-41; for an argument the complexity of business undermines such defaults, see Danzig *supra* (n98), 280-1; cf *Fletcher supra* (n1049), 28 and *O'Hanlan v. Great Western Railway Co.* (1865) 6 B. & S. 484, 491 on the reliability of mercantile juries; and Pigott J's resistance in moving the question to the judge, *Sawdon v Andrew* (1874) 30 LT 23, 25. For judicial regret of moving the issue from the jury, *McMahon v Field* (1881) 7 Q.B.D. 591, 595

¹³⁰⁴ For a detailed account of the fact-pattern of *Hadley*, see (Faust 1994) and Danzig *supra* (n98). The decision of *Hadley* and its subsequent development have been treated extensively. (Simpson 1975), 278; Ibbetson *supra* (n1), 229-232;

¹³⁰⁵ For this reading, see Ibbetson *ibid*, 229; Danzig, *ibid*, 256

¹³⁰⁶ Many questions about 'value' and the valuation of immediate losses had been formalised in the early 19th century; e.g., *Gainsford v Carroll* (1824) 2 B & C 624;

‘natural and probable’ results of a contract often being unclear;¹³⁰⁷ and (2) the parties failing to contemplate particular risks or apportion them,¹³⁰⁸ a wave of cases arose, lasting until ~1880, formalising various specific default rules.¹³⁰⁹ Nonetheless, as with the rules of construction,¹³¹⁰ (a) and (b) were applied like questions of fact.¹³¹¹ The resultant, highly casuistic mass was left un-synthesised by the general contract treatises and judges came to doubt whether any general legal rules existed in the first place.¹³¹² Second, an immoderately large, and older, body of particular rules of damages appended to the specific contracts, such as carriage, land tenure, suretyship, work and labour, promissory notes, and sale.¹³¹³ The law of damages was one of the last general topics to be abstracted from specific transactions,¹³¹⁴ and, was one where the shadow of the jury was particularly long.¹³¹⁵ Even Leake, arch-classifier, was forced to resort to detailed sub-headings for the various, particular topics.¹³¹⁶

In the case of both general and specific rules, the default rules were defeasible to explicit contract terms to the contrary. There are two major exceptions to this trend. The first is the doctrine of ‘penalties.’ According to this surprisingly old principle, parties were limited in the degree of damages they could stipulate for in their contracts. These ‘mandatory’¹³¹⁷ rules produced a deep and wide jurisprudence, one which dominated most of the space in the early contract treatises. The other prominent early-19th century discretion-confining doctrine was the law of specific performance. As noted above, it was not possible for parties to use contract terms directly to force the other party to perform. Instead, the availability of this remedy was determined by a complex of rules elaborated by the Chancery.¹³¹⁸ These were a mixture of historical legacy and the hesitancy of the Chancery to compel physical performance where pecuniary damages would be adequate. This legacy was inherited, in turn, across the law following the Judicature Acts.¹³¹⁹ Overall, damages followed a rather unimaginative path, with the court happily taking its place as an account-settler.

¹³⁰⁷ Danzig, *supra* (n98), 280-281.

¹³⁰⁸ *Wilson supra* (n1298), 185

¹³⁰⁹ Possibly stifled by the widespread presence of exclusion clauses and standard-form contracts, see *supra*, and Danzig *supra* (n98), 280-1, placing *Hadley* within a fairly short window where a general rule could be useful.

¹³¹⁰ Which, given some interpretations of the ‘contemplation’ test in *Hadley v Baxendale*, was reducible to contractual interpretation. See *Smeed v Foord* (1859) 1 El & Bl 602., 608; *British Columbia Saw-Mill v Nettleship* (1868) 3 C.P. 449

¹³¹¹ See *Prehn v Royal Bank of Liverpool* (1870) L.R. 5 Exch. 92, 101

¹³¹² *Wilson, supra* (n1303), 184, 190; *Gee v Lancashire and Yorkshire Railway Co* (1860) 6 H & N 211, 221.

¹³¹³ See (Washington 1932), 96-97 for an extensive list. Following the general trend, formalisation accelerated from 1800 onwards. For early 19th century examples leading up to *Hadley*, see *De Vaux v Salvador* (1836) 4 Ad & El 420 (marine insurance); *Black v Baxendale* (1847) 1 Ex 410 (carrier); *Waters v Towers* (1853) 8 Ex 401 (manufactured goods).

¹³¹⁴ For judicial desire for such abstraction, see *Fletcher v Tayleur* (1855) 17 C.B. 21, 27-28. The abstraction was, in any event, quite incomplete: *Hadley* itself was often treated as a unique case relating to carriers, see *Smeed, supra* (n1309), 616 and Mayne, 4th, 47.

¹³¹⁵ *Supra*, fn570; for judges directing themselves as ‘jurymen’ when applying *Hadley*, see *Simpson v The London and North Western Railway Company* (1876) 1 Q.B.D. 274, 276-7.

¹³¹⁶ E.g., 3rd Edition 911-933; 6th edition, 775-796. As did Chitty Jr and Addison.

¹³¹⁷ The law of penalties was often couched in terms of party choice, but the application of the rules was clearly paternalistic. For an extensive doctrinal history, see (Lobban 2010g) 525-529.

¹³¹⁸ See Lobban, *ibid*, 549-559.

¹³¹⁹ (Fry 1881), 2-3.

3.5 Where a Rule Must Be Had

There is no doubt that the 19th century judiciary made general default rules; these rules, in fact, are now taken to be the central topics in the modern contract textbook. As we have seen above, however, the production of such defaults arose for several different reasons and their internal structures were correspondingly varied. A common theme is their arbitrariness. As many commentators have observed, although the defaults might be couched in terms of party intention, in the overwhelming majority such ‘findings of intent’ were fictional. They instead serve as a mask for either particular policies the judiciary wanted to pursue, such as protecting directors or carriers, or the basic normative vacuum where, as with driving on the left side of the road, ‘a rule must be had.’ Two points can be made regarding the crooked nature of these law-making sources.

The first is that - in spite of attempts by treatise writers - synthesising these rules according to unifying legal principles is very difficult.¹³²⁰ Due to the haphazard and semi-organic nature of their development, the default rules virtually always lacked a connection to the merits of particular parties. Gordley declared the general part of contract intellectually incoherent and fundamentally philosophically bankrupt for this reason.¹³²¹ At most, all that can be said for the defaults is that they will either tend towards some desirable outcome provided parties do not contract out of them, or that they match what the average commercial practice happens to be at the time. Neither of these are convincing from a matter of commutative justice - they say nothing about the entitlements of the parties relative to one another. The problem is that default rules can only be understood outside the internal intellectual system of the law. They follow from a fundamentally passive role for the legal system: allow parties, as much as possible, to structure their own agreements, and only step in when they fail to do so.¹³²² The freedom of parties enshrined by the thin rules of the general part is assumed to produce desirable outcomes, although that market process is considered too complex to be captured within a system of legal concepts. The judges had no interest in planning the economy, and in such a passive, facilitative, and intellectually deferential framework, no deep meaning or structure can be found behind its backdrop of defaults.

¹³²⁰ (Slawson 1993)

¹³²¹ (Gordley 1993), 8-9. For an example, see *Offer and Acceptance*, 109, 179.

¹³²² (Ayres 1993), 20-23 for the ‘organic approach’, arguing it the map of specific contracts is highly specific and contextual, depending mostly on the extra-legal environment. Cf Dagan, *supra* (n1178) 70 for an alternative, pro-active rather than passive model of creating contract ‘types.’ Nb, from the proposals as 78, 102, 115, the potential this has for creating large amounts of law.

The second is that the nitty gritty of the default rules between different legal systems differs greatly. Virtually all modern legal systems possess a similar ‘common core’ of rules related to, *inter alia*, contractual formation, fraud, duress, status, construction, and remedies. These are – however – not strictly speaking ‘defaults’, and are instead the bare-minimum for producing party autonomy and private coding. Their presence in legal systems as heterogeneous as Soviet Russia, the Ottoman Empire, East Germany, Apartheid South Africa, and Meiji-Era Japan, suggests either the basic conditions, and therefore problems, which lead to the common core are extremely thin - perhaps simply the presence of *any* market - or that contract law has no practical relevance whatsoever.¹³²³ Conversely, when it comes to the elaboration of the common core, and the formulation of defaults in specific contracts, countries diverge more noticeably. Following the first point, this is not because the philosophical incoherence of the 19th Century model of contract inevitably leads to chaos *per se*, but because different countries have differently structured markets and varying industrial policies. As Ayres argues, extra-legal environment plays a key role in the extent private parties need default rules: in the US, for example, the *American Institute of Architects* provides extensive standard form contracts, lowering the need for court-created default rules.¹³²⁴ Further, polities also differ in their willingness to ‘legislate’ default terms, which also influences the overall pattern of defaults.¹³²⁵ As such, the pattern of divergences can only be explained by looking at the domestic factors producing the specific contracts themselves, the subject of the next, and final, chapter.

¹³²³ The view of Watson *supra* (n635), and Gordley, *supra* (n1321), 71, 159. For the remarkable presence of contract liability in East Germany, see (Grossfeld 1962)

¹³²⁴ Ayres, *supra* (n1322), 25-6.

¹³²⁵ (Núñez del Prado Ch. 2019); See also (Pistor 2006), for an argument the common law/civilian divide also traces a split between *liberal market economies* and *coordinated market economies*, reflecting different national policies in structuring market relations.

Chapter 6: Islands of Contract

There is no existing theory on why the general or specific rules of contract law form. At a high level of abstraction, Peter Birks argued that a system of contract law has two tasks: first, to determine if there is a binding obligation (‘what promises are binding at law?’); and second, to create ‘packages’ of obligations, referred to by Birks as ‘*natura contractus*’, which fill in the gaps of transactions when parties leave them empty (‘what package of unmentioned rules does a given promise carry with it?’).¹³²⁶ The former produces the general law of contract, the latter, the specific contracts; Birks also assumed that the ultimate shape of these doctrines was *natural*.¹³²⁷ In light of this, he did not burden himself with a theory necessary to explain the detailed unfolding of these doctrines. Chapters 4 and 5 explored the General Part; we will now turn to the specific contracts. There are three basic features of the specific contractual map. First, all the law on the specific contracts from 1750-1914 emerged from pre-existing commercial practice. The ultimate boundaries of possible specific contracts was therefore determined by the formal market, the complexity of which was in turn delimited by regulations (e.g. on drugs, prostitution, sacrilegious goods), and internal market factors (such as market scale and technological development). Second, by the end of the period all the major forms of economic transaction, produced by the social wellspring of the economy, had been graced with a specific legal treatise. Most of these were, however, merely the *general* rules for each transaction: the law of personal property sales; of stock-contracts; of deposit; of auditors. Only a few produced *specific* subsets: the law of *fire, life, marine, and accident* insurance; the sale of *horses* and the sale of *beer*. Third, the *general* and *specific* transaction topics were far more voluminous than the law of contract in general (Benjamin’s *Sale of Goods* alone matching the total length of the 14th edition of Chitty Jr’s *Practical Treatise*). Yet compared to the total complexity of the economy, the specific contracts were proportionally minuscule, stopping at the highly abstract general-transaction framing. Explaining these patterns requires another exploration of lexi-generative factors.

¹³²⁶ (Birks 2014), 26-31.

¹³²⁷ (Birks 1997), 2 analogising Gaius to Darwin. See (Scott 2020), 145-7 for a useful exploration of Birks’s views on taxonomy. In general, (Samuel 2000).

I proceed in three stages. First, I provide the first survey of all the specific contracts in England from 1750-1914, using a combination of general treatises, abridgments, specific treatises, legal bibliographies, and encyclopaedias. The survey suggests the majority of contract topics had emerged by the mid-18th century (though, following the overhang theory, plausibly could have emerged much earlier). These were then rapidly filled, triggering a round of specific treatises, and those which had grown the earliest and fastest were codified. Second, I outline three different lexi-generative factors behind the production of specific contracts. These are: (1) the presence of mandatory rules; (2) structural features in the economic sector or trade; and (3) a close connection to ‘core’ modules of private-ordering, such as agency and property. Unlike Chapters 4 and 5, there is insufficient space to engage in a detailed study of all the specific contracts produced by these factors, although I provide some general examples. Finally, I explore the history of the sale of goods, from 1750-1915 as a detailed case study, tracking the factors behind its continual growth.

Part 1: Survey of The Specific Contracts

The generation and development of specific contracts both pre-dated the general part and outlasts it. Attempting to count the specific contracts is in many ways like counting all the crimes: difficult and virtually impossible to guarantee completion. Nonetheless, a survey - no matter how imperfect - is essential for answering the basic question of *why did these specific contracts form and not others*. Two preliminary points are useful. First, in the 18th and 19th centuries specific contracts both emerged and disappeared. Tracing when a specific contract has formed is much easier than identifying when it has vanished. The former can be done through positive inclusion in statute law or legal literature; the latter, on the other hand, often resides in the out-of-date treatise, obsolete statute, and forgotten precedent. Second, all the specific contracts in this period were predated by the mercantile practice they governed. The law followed responsively behind commercial practice; it is only in general commercial codes and modern, proactive legislatures that contracts are regulated in advance of commercial reality. I will begin my survey by explaining the process of ascertaining and classifying the emergence of specific contracts. This is then followed by a table digesting the complete list by year (see *Fig. 66*).

On any metric, very little specific contract doctrine was produced prior to the 16th century. As with every other area of contract law, a trickle of cases and statutes traced a map in the 16th century onwards, after which, in the mid-late-18th, it became a flood. The order in which these specific contracts were

formalised, and their content upon arrival, is important and relates to their underlying lexi-generative qualities. The matter of identifying new contract types is difficult: arguably, a specific contract forms whenever any form of legal regulation is appended to a particular transaction. Under such a broad definition, the number of specific contracts must approach all legal commercial activity, as virtually no part of the economy is legally untouched.¹³²⁸ I will apply a slightly narrower criteria here, looking solely at specific contracts which have generated a sufficient quantity of detail to be conceptualised as a distinct field of legal study. There are different metrics for detail-accumulation;¹³²⁹ prior to the mid-18th century a loose, highly imperfect gauge is the specific contract's inclusion as a distinct heading in the abridgments.¹³³⁰ Under this criteria, the first set of specific contracts can be dated to the 15th century from their presence in *Statham's Abridgment* (1490). *Statham's Abridgment*, like all abridgments, focused primarily on the forms of action. Consequently, whilst a range of contracts, such as bailment, service, goods, leases, and marriage, could be found under general headings like *barre*, *condiciones*, *covenant*, *debt*, and *obligation*, very few were given their own explicit headings. Those which did were narrow, following from procedure, statute, or early regulation, such as debt, annuities, arbitration, champerty, labourers, and maintenance.¹³³¹ This trend continued until the mid-16th century, and likely reflects the fact the metric being used - accumulation of legal detail - was being suppressed by the prevailing intellectual structure of pleading and forms of action.¹³³² In the wake of the English legal renaissance, 16th century abridgments onwards started widening their menu of specific contract headings.¹³³³ Brooke's *Graunde Abridgment* (1573) and Sheppard's *Epitome and Abridgment* (1656) included such headings as: assurances; bailment; purchase; guarantee; leases; marriage; agent; carriers; and master and servant.¹³³⁴ Sheppard in particular vastly expanded his sub-headings, generating a highly particularistic list of subjects, such as 'archery', 'gig-mills', 'silk', and 'drapery and clothing',¹³³⁵ an approach reproduced later in Chitty Sr's *Treatise on Manufacturers*.¹³³⁶

The widening of topics continued into the 18th century, the first half of which saw the emergence of several new, more theoretical digests and abridgments.¹³³⁷ Of these, Bacon's *New Abridgment*, Viner's *Abridgment of Law and Equity*, and Comyn's *Abridgment of the Law*, are the most important. Their

¹³²⁸ See, for example, Part 3.1b below for the kind of detail possible.

¹³²⁹ Perhaps the ultimate criteria is consolidation in a commercial code, of which the four contracts qualifying would be: Insurance; Bills of Exchange; Partnership; and Sales of Good.

¹³³⁰ See (Holdsworth 1923), for more detail; also Macneil, *supra* (n113)

¹³³¹ *Statham's Abridgment Translation*, heading on 'Contract'

¹³³² See also Fitzherbert's *Abridgment* (1516), with a similarly meagre array of specific contract sub-headings.

¹³³³ Holdsworth, *supra*, also attributes it to changes in the intellectual climate and perceived defects of unstructured lists of cases, 33.

¹³³⁴ Sheppard, *An Alphabetical Table of the Principal Titles*; Brooke, *Tabula*.

¹³³⁵ Sheppard, *ibid.* see below, 3.1b.

¹³³⁶ The general treatises partially absorbed this material under their sections on 'illegality', though most of it was left to specific treatises.

¹³³⁷ Some later abridgments, such as Rolle's *Abridgment* (1668), and D'Anvers's expansion (1701) added little beyond Statham's headings and cannot be classed alongside the early-mid 18th-century works.

contents suggest the basic map of specific contracts had been formed by 1760, with the core legal topics already existing by around 1656. As with the general part of contract, this build-up of law required a generalising treatise. Matching the mid-18th century timing, many of the new specific contracts were packaged together in the emerging mercantile treatises. The surest sign in this period of a build-up of law, however, was the emergence of treatises dedicated to a specific contract. Classic, early examples include Chitty Sr's *Practical Treatise on Bills* (1799), Jones's *An Essay on the Law of Bailments* (1781), and Park's *A System of the Law of Marine Insurance* (1787). The creation of these treatises, unlike the slightly arbitrary inclusion in an abridgment or mercantile treatise, unequivocally reflected a critical build-up of legal detail.¹³³⁸ Finally, to supplement these with specific contracts at an earlier point of crystallisation, we can include the descendants of the legal abridgments, Legal Encyclopaedias and legal bibliographies.¹³³⁹ I used this plethora of sources to produce a loose, certainly non-exhaustive timeline of the specific contracts (Fig 66).¹³⁴⁰

Figure on next page

¹³³⁸ There were also specific contracts in general treatises, such as those in Comyn's *Treatise* and Chitty Sr's *Treatise on the Law of Manufacturers*, but, like the abridgment, stylistic choices influenced their menus.

¹³³⁹ See *Legal Bibliographies* section in the Bibliography.

¹³⁴⁰ For the sources to this timeline, see Bibliography, *Miscellaneous Specific Contracts*

We can notice several things from the survey alone. First, the basic outline of commercial topics had already emerged by the mid-18th century (with several important additions in 1760, such as agency, stocks, bills of exchange, and marine insurance). These topics were then rapidly filled in from the late-18th century onwards, with the period between 1820-1840 producing a particularly high volume of treatises. By 1860, every major specific contract from 1760 had been filled in with a specific treatise. The timeline suggests, therefore, that the factors producing the specific contracts were in existence from at least the 18th century. Second, only four contracts were codified before 1914 - Partnership; Marine Insurance; and Bills of Exchange.¹³⁴¹ Of these, two emerged in the earliest round of treatises (excluding pleading treatises on the law of debt) and produced both the largest number of treatises and the treatises of the greatest volume. They also contributed by far the greatest proportion of all contract cases in the period.¹³⁴² When we break up the 1800-1914 case survey by doctrinal subcategory the following pattern emerges:

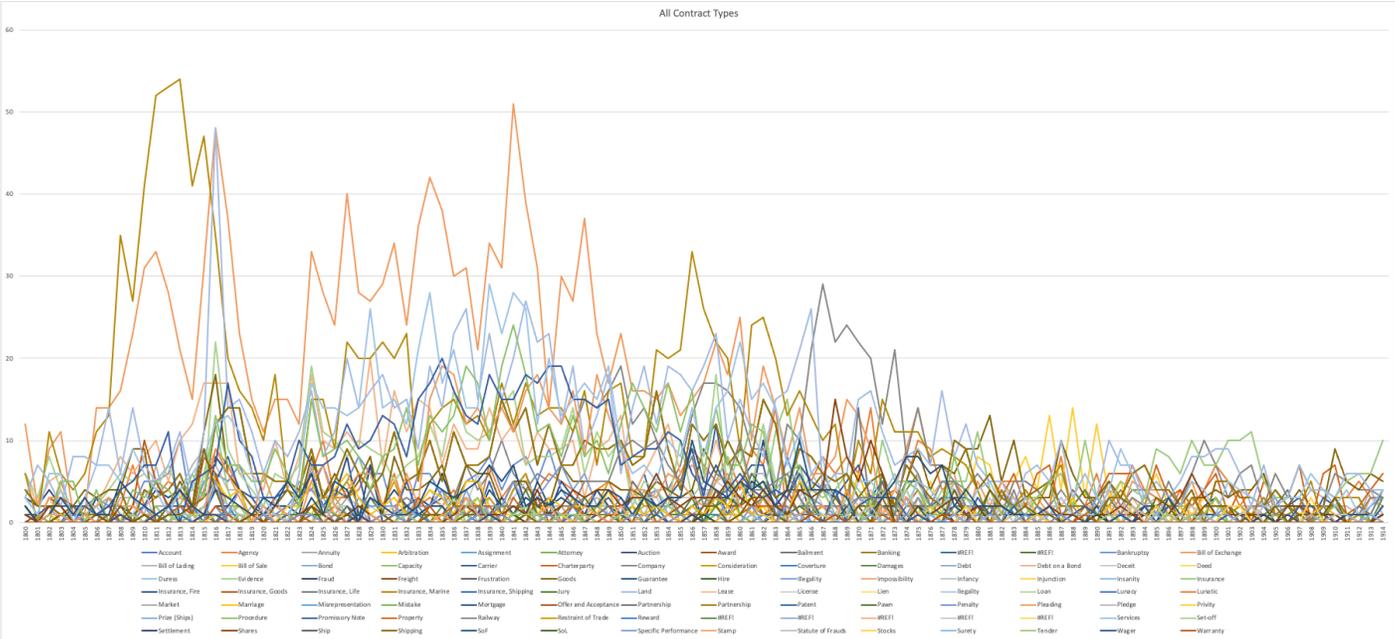


Fig 67. Number of contract cases by topic

Marine Insurance and Bills of Exchange were, in short, the two most potent areas generating law from the start to the finish of the period. In fact, these subjects were almost entirely responsible for the large increase in litigation in 1816, and seem to be behind the peaks throughout the period (with an exception

¹³⁴¹ Although arguably the law on agency, via the Factors Acts, and shipping, via the Merchant Shipping Acts, were effectively codified.
¹³⁴² These two also made up by far the largest part of Lord Mansfield's trial notes, see (Rogers 1987) 163.

for the 1865-1875 peak produced by Company cases). Of all the most fecund contractual subjects, there is one outlier: sale of goods. For some reason, it took until 1811 for any treatise to be written, and 1863 for one approaching the comprehensiveness of Park on Insurance or Byles on Bills.

Part 2: Explaining The Pattern

Specific contracts, at a variety of levels of abstraction, coalesce for several reasons; here, I provide three possible causal factors behind their emergence. These are: (1) State intervention to produce ‘mandatory rules’; (2) The involvement of other ‘core modules’ of law, such as property, bankruptcy, and criminal law; and (3) the private dispute resolution capacities of the industries. The most potent of these drivers is the first: state intervention. The emergence of many of the specific contracts can be explained by the parliamentary interventions, responsible both for increasing the mass of legal detail and more crisply dividing the specific contract from their neighbours. The late-19th century saw an increasing movement in this direction, producing a wide variety of well-defined, more specialised specific contracts. The other essential factor is the connection to ‘core modules’ of law, forming the backdrop of legal tools available for private coding (and thus not contractually avoidable). These cover areas of law like agency; negotiable instruments; marriage; leases and tenancy; conveyances; and partnership. Whilst most of these are traceable back to mandatory rules, e.g., governing who can sue or be sued, and with what remedy, they are nonetheless distinct given their role in constituting packages of rights and obligations parties were able to modify themselves. The remaining factor relates to the extra-legal environment of the economy and determined which contractual sectors would spin-out default rules.

2.1 State Intervention

One of the most powerful lexi-generative forces in contract law is the creation of mandatory rules. Such regulation was a key stimulant in producing a range of different kinds of specific doctrines. It produced a vast, ever-shifting sea of miniature specific contracts, some of which - especially those involving the professions - later grew into full, sustained topics, whilst others dissolved away. These sustained topics were specific contracts almost entirely regulatory in nature, such as money-lending, auctions, markets and fairs, carriers, gaming, innkeepers, construction, and pawnbroking contracts. An analysis of these treatises suggests the legal detail they contained was attributable almost exclusively to the role of regulations, such as requirements for licensing, setting rates, fixing liability, controlling terms, or banning a type of contract altogether. Statutory, mandatory regulations also supplemented each and every specific contract, regardless of whether its initial formation had been as a result of legal control. This process can help

explain why various older specific contracts, such as bills of exchange, insurance, and shipping, continued to grow rapidly in the late-19th century. I will briefly survey each of these causes, noting the diverse effects mandatory regulations can have in growing and demarcating specific contracts.

2.1a A Sea of Miniature Contracts

Whilst each standalone specific contract had an origin in non-treatise form, not all regulated spheres of the economy span out into full-blown treatises. The earliest overviews of these can be found in Sheppard's *Epitome* (1656) and *Grand Abridgment* (1675), which contain vast, ultra-specific lists of various goods and professions. Sheppard listed, *inter alia*, 'Ale and Alehouses', 'Bakers and Brewers', 'Butter and Cheese', 'Corn', 'Drapery', 'Felt and Hats', 'Horses', 'Hospitallers', 'Oatmeale', 'Physicians', 'Wax and Honey', and numerous entries on 'Wool.'¹³⁴³ The overwhelming majority were produced by specific regulations.¹³⁴⁴ The law of *Butter and Cheese*, for example, was stimulated by the *Butter and Cheese Act* 1549; the law of *Drapery*, by, *inter alia*, the *Cloths Act* 1533 and *Woollen Cloths Act* 1558; and the law of *Baking* by the *Bread Assizes*. These miniature contract-topics formed for a variety of reasons, such as excise; import and export control; currency regulation; regulation and control over labourers and professions; and innumerable statutes governing the quality, creation, selling, transport, weighing, packaging, and storage of goods. The life of these miniature contract topics was often short and anonymous. The last treatise-writer to produce an overview was Chitty Sr in volume 2 of his *Treatise on Manufacturers* 1826, reflecting a fleeting union of both Smithian economics and trade protectionism. Thereafter, the heterogenous mass of micro-contracts fell out of the mainstream of contract literature, to be found in neither specific nor general contract treatise. One reason is undoubtedly the immense wave of repeal from the 1810s onwards, removing several centuries of past regulations.¹³⁴⁵ By 1830, most regulation - especially those on goods - had been swept away; in many cases, following directly from Parliamentary Inquiries and trade group lobbying framed in terms of free trade.¹³⁴⁶ The other crucial factor was that the doctrinal location of many public regulations, such as the *Butter and Cheese Act* 1844 and the *Bread Act* 1830, was uncertain: too specific to be part of contract law; too meagre to form its own treatise; and, in the 19th century, too early to find a place in the nascent criminal

¹³⁴³ At, respectively, 468, 165, 186, 336, 465, 98, 644, 125, 754, 796, 1109, and 465.

¹³⁴⁴ For the statutes cited herein, see *Bibliography, Statutes*.

¹³⁴⁵ Remarkd in Atiyah *supra* (n148), but not explored in detail.

¹³⁴⁶ To take two examples. First, for bread, see (Petersen 2017), 114-116. For the laxity of the remaining bread regulations, see *Bread Laws and the Price of Bread* (1895) and *Encyclopaedia Britannica/Bread* 1911, 466;. Second, for wool, the *Woollen Manufacture Act* 1809, *ibid*, cleared away an enormous mass of legislation. See Sheppard's *Epitome Drapery and Wool*, 465 for an extensive list. The reformers were clearly motivated by principles of free trade, see (Randall 1986), 4, 16 and (Lipson 1921), 211-214. The list of statutes given in Chitty Sr V. 2, 420-440 were virtually all repealed by 1833, or obsolete (c. 1855).

or public law. Nonetheless, it was from this ambiguous and fluctuating sea that many of the Regulatory Specific Contracts emerged.

2.1b Regulatory Specific Contracts

There were several conditions for a mini-contract to graduate from anonymity into a fully-fledged specific contract. The contract had to be continuously regulated; those regulations had to be extensive; and the commercial activity in question had to be complex. Once these conditions were met, two important things occurred: first, the precedent-system produced a build-up of legal detail sufficient to produce a standalone treatise; second, within this treatise, the contract-type received a legal definition capable of being used in other regulations.¹³⁴⁷ The early-mid 19th century saw the production of several treatises,¹³⁴⁸ from topics dating to the 17th century, such as carriers; legal and medical professionals; and gaming and wagers. These were then supplemented in a second wave, starting from around 1860 onwards, whereby active Parliamentary legislation stimulated vast new swathes of law. In this later class, we can find new treatises on moneylending; pawn-broking; inn-keeping; securities; construction, architecture, and engineering; and banking. Statutory legislation also expanded and restructured existing topics, such as those on sales of goods, bills of exchange, shipping, gaming; professional regulation; partnership, agency, bailments, guarantees, and stocks and shares. In this later phase, a new tempo of law-making emerged: Parliament acted, the courts applied, and treatises digested.¹³⁴⁹ Much of the new statutory regulation managed to successfully anchor treatise literature to their text, thereby increasingly co-opting the creative development of the ‘map’ of the law. Whilst these new regulatory topics were reasonably stable, there was nothing conceptually necessary about their shape, nor could they be unified under a single principle. As with the short-lived miniature contracts above, they were merely temporary islands reflecting the shifting incentives and ever-changing policies of the legislature. By the early 20th century, it could no longer be said that commercial law had flowered in the shadow of parliament and with this shift, any pretensions of its organic, common-sensical, and universal nature disappeared.¹³⁵⁰

2.2 Core Modules

The majority of the remaining specific contracts belong to a second class I have designated ‘Core Modules.’ These form when the law is used to construct a tool for private coding, one which fulfils a

¹³⁴⁷ For the process by definitional lines are produced, see *infra* 3.2a

¹³⁴⁸ See *Specific Treatises* in the *Bibliography*

¹³⁴⁹ A similar pattern can be found following the Sale of Goods Act and Bills of Exchange Act, Bills of Sale Act, and Merchant Shipping Act.

¹³⁵⁰ For discussion, see (Calabresi 1999) on the structural factors behind the growth (70-81), and the limitations of the ‘organic’ common law in matching the needs of a fast-paced, modern society, (5), (163).

function ordinarily unavailable to private parties.¹³⁵¹ Typically, these functions had a public dimension, and were limited by the courts; such limitations were apt to generate edge-cases, and therefore law. Some simply gave parties the power to call upon the courts to apply a particular coercive remedy between two parties: within this class, we can count some of the negotiable instruments, the law of debt, liens, master and servant law, and apprenticeship law. Others, with a few exceptions, provided limited power to bind third parties in some way. In this class, I include contracts which provided these powers, or were closely related to them, such as patents, pawnbroking, bailments, bills of lading, bills of sale, agency, bills of exchange, and hire and purchase. Cutting across both of these was the law of personal and real property, providing unique remedies effective not merely against discrete third parties, but the entire world. Finally, a few served as convenient modes of creating, packaging, and limiting contractual rights and obligations - often in a manner which was regarded as requiring regulation - such as partnership and company law. All enabled parties to do something they could not otherwise achieve with a nexus of contracts. Demarcating their conditions, effects, and limits was a never-ending source of lexi-genesis. Here, I only consider two in overview to give a rough flavour of the dynamics at play: bills of exchange and company law. They possess a similar structure: the definition of a legal module, whether a valid ‘bill’ or a ‘company’, the demarcation of its conditions, and the extent of its effect. This structure has analogues with the familiar, early nodes of contract law: the law of property, and the law of personal status.

2.2a Bills of Exchange

As noted in the survey, Bills of Exchange generated a large volume of law rapidly in the 18th century, and continued to do so into the 19th.¹³⁵² The two primary *Bills* treatises were *Byles on Bills* and *Chitty on Notes*, which were followed by the Bills of Exchange Act 1882, drafted by Chalmers. The basic function of a bill of exchange is simple: person A (the ‘drawer’) draws a bill on person B (the ‘drawee’) for a value £X, payable to person C (the ‘payee’). In this triangular transaction, C is able to claim value X from B. Further, although initially uncertain,¹³⁵³ it was eventually possible for C to transfer the bill to a third party T, typically by C endorsing their name upon the bill.¹³⁵⁴ This is known as the ‘transferability’ or ‘negotiability’ of a bill of exchange. In this way, bills of exchange could act as a partial substitute for currency, enabling complex credit networks, in an era of low banking-availability.¹³⁵⁵ The generation of

¹³⁵¹ Pistor *supra* (n107); see also (Bishara 2017) both suggest these modules are constitutive of wealth itself.

¹³⁵² For a history of Bills of Exchange, see (Holden 1993); Oldham *supra* (n281); (Lobban 2010c); and (Rogers 1995). There is a staggering volume of Bill of Exchange treatises, as there are for Marine Insurance.

¹³⁵³ See (Dylag 2010)

¹³⁵⁴ Note, that in the event of the drawee dishonouring the bill, the drawer and all intermediary indorsees of a bill of exchange would be liable to pay the payee; this may have served to increase its reliability. See (Ashton 1945), 26. Bills did not have to be transferred by indorsement, see Lobban *supra* (n1352), 739ff.

¹³⁵⁵ Where B was a bank, the bill of exchange was known as a ‘check’, though this formed an increasingly specialised and distinct subset of the law of notes. See (Rogers 1995)

bills law began in earnest with Lord Mansfield in the mid-18th century,¹³⁵⁶ extracting issues from the jury, and had already produced standalone treatises prior to the 19th. As Chitty Sr notes, bills were used widely across the country¹³⁵⁷ and generated a large quantity of litigation, in part because of the need for merchants to receive technical legal advice. As paper securities conferring title to a debt,¹³⁵⁸ the doctrines which formed do not resemble other contracts, such as marine insurance or the sale of goods, but rather property conveyance. They are rigid, precisely setting out the requirements for, *inter alia*, acceptance; indorsement; presentment; and notice for dishonour. There are two reasons for this. The first relates to demarcation: bills of exchange were subject to special rules regarding negotiability, consideration, illegality, and stamp requirements. Thus, it was necessary to determine when an agreement was a bill to apply these mandatory rules.¹³⁵⁹ The second is more potent: the negotiability of bills allowed person C to sue person B, or person T, both strangers. Without a private agreement structuring their relations, it was necessary for the courts to demarcate the extent, conditions, and effects of this intra-bill binding effect. Both of these causes followed from the purposes to which bills were used. As paper securities, they circulated in vast quantities, binding together numerous strangers. Each bill could have numerous endorsements, with one merchant reporting a bill with over 120, across great distances.¹³⁶⁰ As with the law of real and personal property generally, the paramount requirement for these bills was certainty, foreclosing both the kind of fluid private-manipulation present, say, for the sale of goods,¹³⁶¹ and the easy availability of arbitration within a close-knit community. Much of the technical *Bills* law is attributable to creating a legal construct to serve these needs, mirroring the law of real and personal property.

2.2b Company Law

Whilst the legal structure of bills fits the property pattern; company law fits that of personal status. As is well known, England took a long time to recognise the modern form of limited liability company with transferable shares and strong legal personality.¹³⁶² In the early 19th century, most large business ventures took the form of partnerships, with a range of limitations following its conceptualisation as private parties binding one another. In addition to uncertainties over their legality under the Bubble Act (and potential prohibitions under the common law), the partners could not limit their liability, nor could they sue on

¹³⁵⁶ See (Ollikainen-Read 2022), 79-81. Cf (Holden 1993) 30, 112-3 for a rehabilitation of Holt CJ in this process.

¹³⁵⁷ Ollikainen-Read, *ibid*, suggests this growth was partially a result of common law dysfunctionality in the early 18th century. For a striking example, see (Rogers 2016)

¹³⁵⁸ Lobban, *supra* (n1352), 744-8.

¹³⁵⁹ Such that even two-party, non-negotiable bills of exchange would require a body of special rules.

¹³⁶⁰ (Gorton 2020), 6

¹³⁶¹ See Chitty Sr, *notes*, 2nd edition 39-40, 59; *Carlos v. Fancourt* (1794) 5 T. R. 482, 485, noting the undesirability of allowing contingencies in upsetting negotiability. See Bills of Exchange Act 1882, s3(1), Lobban *supra* (n1352), 742-3.

¹³⁶² Lobban, *ibid* 613

behalf of the firm.¹³⁶³ It was only in 1844, following a select committee investigation, that incorporated joint stock companies could be formed by a simple registration system. This was then followed by ‘the most liberal and unregulated company law regime in Europe’¹³⁶⁴ in 1855, and a consolidation statute in 1862. The details of the movement from the primarily contract-oriented partnership model to the company paradigm are less important here than the pattern of doctrinal growth. An interesting account is given by Robert C. Clark who suggests that the pace of development of a new legal institution has different rhythms and triggers. Company law, he argues, had two.¹³⁶⁵ First, an initial legal invention which achieves cost reduction in some way following technological, social, or other ‘external changes.’ Second, ‘substantial legal development’ triggered by litigation motivated by tussles over the distribution of these initial cost-savings, and further cost-savings made possible by development of the legal invention.¹³⁶⁶ Whilst the former is exogenous (or ‘external’) and may include only a basic framework of legal principles, the latter is primarily endogenous (or ‘internal’), being driven by the intricate doctrinal working out of those initial principles.¹³⁶⁷ For company law, the first stage was triggered by the growing size of enterprises in terms of capital, membership, and complexity of operations. Within the partnership-model, this growth produced numerous transaction costs and inconveniences, both internally and with those dealing with them. The basic ‘invention’ was the recognition of the basic principles making up the institution of the company: limited liability; share transferability; strong legal identity; and centralised management. The second stage, following the wake of extensive and creative use of the company form, developed the implications and operation of these principles.¹³⁶⁸ Many of these implications related to the interaction of company law with other contract doctrines, such as agency, and the overall lexi-generative pattern therefore matches that of the law of status most closely.

2.3 Environmental Factors

The production of law created by *mandatory rules* and *core modules* is clear and will operate regardless of, although not totally unaffected by, the ability and intent of parties to avoid the courts. The production of *default rules*, on the other hand, relates directly to party autonomy, and as such interacts with the feedback model in a more complex manner. Whilst not as numerous as state regulations, these rules are

¹³⁶³ *ibid*, 616

¹³⁶⁴ *ibid*, 629

¹³⁶⁵(Clark 1981), 1242, does not commit to these stages being applicable generally across the law.

¹³⁶⁶ *ibid*, 1241-2.

¹³⁶⁷ *ibid*, 1242.

¹³⁶⁸ *ibid*, 1246, giving examples like fiduciary liability and anti-fraud rules. Clark suggests such rules will be highly doctrinal and complex, due to the interplay of parties (such as managers, the shareholder, and the public).

important because they gave many of the specific contracts their distinct character. Early contracts, such as marine insurance and the sale of goods were almost entirely composed of the courts creating default terms, and virtually every specific contract included *some* default rules. The feedback model process behind the creation of default rules was covered in C.1, s3.2; and then in C.5, s3.1 for the general defaults. They suggest default rules will be created by the meeting of commercial party needs and judicial perceptions of the desirability of guiding positive law. Failure to produce law could arise at both stages.

First, parties may simply not require *ex ante* guidance as to the effect of their contract terms. Their relationship could be primarily of reputation and personal ties within a community, as appears to have been the case of the stock exchange. Even if parties did need some form of *ex ante* guidance on the meaning and effect of their terms, they did not necessarily need *law* to fill this role. For some industries, such as the cotton trade, the explanation is straightforward: they possessed their own, highly effective means for resolving disputes. The same can be said of the commodity trade in general: as Cranston explains in detail, when such traders left gaps in their contracts, they did not turn to the courts but instead the trading associations which actively and quickly re-drafted their standard form contracts.¹³⁶⁹ Thus, whilst there was a need for centralised information about the relevant contracts, it did not require a legal solution. At the second stage, even if commercial parties did go to court, the contractual term, or gap, litigated would not necessarily be converted into law. As noted regarding the rules of construction, there was a continuum of fact and law, following, it seems, judicial perceptions as to the prevalence and importance of the term involved. In the vast majority of cases, judges would leave the construction as a matter of fact. That they could do so without further claims being brought suggests potential litigants could rely perfectly well on a psycho-social, rather than legal, prediction of how the judge, or jury, would receive that term. Of course, such predictions could only be reliable where there was a consensus in jury verdicts or, later, consistency in trial judge findings, perhaps indicated by the various reports extracted in trade journals.

In addition to explaining absences, the first and second stage analysis can also help reveal what kinds of features an industry might need to have to generate extensive positive law. The sector must involve parties which: (a) require *ex ante* guidance as to the effect of their terms; (b) lack the ability to resolve their disputes extra-judicially; (c) possess sufficient funds and access to court to set precedents; and (d) do so frequently enough and with sufficient regularity that positive law is deemed useful by the judiciary. These factors are rare, at least in the early 19th century, and more-or-less match those suggested by

¹³⁶⁹ Cranston *supra* (n106), 76-126, 302-343, 358; (Bernstein 2001)

Llewellyn as the main trigger for law formation:¹³⁷⁰ extended credit networks and increasing international trade.¹³⁷¹ Although far beyond the scope of the thesis to investigate, these factors also match those triggering the turn to law in the mid-late 19th century described by Burset. The essential follow-up question, at both the micro-level of specific contracts and the macro-level of contract law in general, is whether this process was path-dependent. If the courts had, for whatever reason, failed to create positive contract law in the 18th-19th centuries to meet the changing needs of merchants, would it have reformed later? As we will see for the sale of goods, the answer is almost certainly contextual, with a potentially unique ‘law moment’ for the sale of horses, but the extent of contextuality remains unclear.

Part 3: Sale of Goods

How did these lexi-generative forces play out in practice? Was there a limit to the amount of law they could produce? Did they differ from the general part, and how are they connected to judicial policy? I adopt the sale of goods as a case-study to answer these questions for four reasons. First, it produced a large number of default terms;¹³⁷² second, it produced subsets of contracts, such as horse law and the sale of beer; third, it was eventually codified; and, fourth, it seems partially unaffected by the post-1850 decline. In this section I reproduce the same basic analytical approach taken for the general part and specific part, with the ‘general law of sale’ as my subject. Part 3.1 begins with a survey of the emergence of sale of goods as a distinct analytical category; Part 3.2 then analyses two aspects of the general law of sale, carefully considering the lexi-generative forces in play.

3.1 Emergence of a Distinct Doctrinal Category

Direct treatments of the sale of personal property were virtually non-existent in legal literature before the 19th century.¹³⁷³ Comyn’s consideration of sale of goods in 1809 is a good example. It is mostly unstructured and is forced to extensively cite Shepphard’s *Touchstone* (1648) and Noy’s *Maxims* (1651) for general principles of sale. Further, the discussion in *those* sources is almost totally subsumed within the broader ‘bargain and sale’,¹³⁷⁴ a catch-all used to cover both real and personal property, although was more commonly used for the former. Where it was used to refer to personal property alone, bargain and

¹³⁷⁰ (Llewellyn 1931), 717-722 suggests this point is future-oriented ‘credit’ related transactions which rely on formal law when they become ‘long-run, long-distance, [and] impersonal.’

¹³⁷¹ Lemmings *supra* (n283), 85-6, suggests the primary, early commercial participants in the King’s Bench were large traders with ‘overseas’ interests; likewise, see (Ferguson 1984), 202 describing the most common litigants as ‘outside men’; and Francis *supra* (n145), 887-8, fn344, 903

¹³⁷² According to Jelf, it was the commonest form of contract (Jelf 1895), 373

¹³⁷³ (Friedman 1960), 414, though he notes that highly detailed rules on sale did exist, as with the law on bills of lading, much earlier. See also Baker *supra* (n251), Ch 39, ‘transfer in title’; Baker *supra* (n196), Ch 22, Modes of Transfer: Sale; (Ibbetson 1992), this is consistent with the overhang thesis.

¹³⁷⁴ 224.

sale was classified as a ‘contract’ generally.¹³⁷⁵ Matching this terminological looseness, these early works reproduced an odd mixture of general contract principles, such as the role of consent, consideration, and the *contra proferentem* rule, alongside very specific sales of goods scenarios. Little was made of this base in the 18th century and the abridgments did not include sale of goods entries,¹³⁷⁶ instead subsuming the law under other sections (such as the law of personal property, conditions, or deceit).¹³⁷⁷ In this interstitial period, the law of sale of goods was hidden behind the law of personal property, as merely one mode of ‘conveyance’, or as a particular case-example of general principles. A distinct concept of ‘sale of goods’ rapidly gestated at the turn of the 19th century:¹³⁷⁸ *Points in Law and Equity*¹³⁷⁹ and Montefiore’s *Commercial Dictionary* included standalone headings on ‘buying and selling’, followed in turn by Comyn’s *Treatise*. Then, in 1811, the first general treatise on the sale of goods was released: Ross’s *Treatise on the Law Relative to Sale of Personal Property* (1811). Ross’s *Treatise* came alongside the general rising tide of treatises; in turn, its internal structure was picked up in Chitty Sr’s *Treatise on Commerce*, and thus Chitty Jr’s *Practical Treatise*. A run of treatises followed Ross: those by Brown (1821), Long (1821), Harrison on *Ross* (1826), Morton (1837), Hilliard (1841), Blackburn (1845), Atkinson (1853), Benjamin (1868), and, eventually, Chalmers (1893) following the Sale of Goods Act 1893.

In some ways, the general sale of goods treatises matched the law of contract as a whole. The early treatises, such as Comyn and Ross, devoted large proportions of space to the Statute of Frauds (SoF); contract parties; and illegality. In particular, the Statute of Frauds proved to be the most powerful node, partially obscuring the law of delivery, and almost entirely that of acceptance. Ross, which was a large influence on Chitty Sr’s discussion of sales of goods, was also dominated by maritime law (covering in detail stoppage in transitu and ship registration), likely a legacy from the older mercantile treatises. Unlike the general law of contract, however, there was relatively little emphasis on property, possibly explaining its absence in the abridgments. Instead, the focus in Comyn, Noy, and Sheppard (to the extent it could be disentangled from the SoF), was on unambiguous events: payment, delivery, and remedies.¹³⁸⁰ A good example of a ‘failed experiment’ from this period is Morton’s *treatise*, which provided two taxonomies: (1) sale in general, divided by location, status, and rules of mandatory regulation by statute or common law; and (2) rights, liabilities, and remedies, structured on the basis of the forms of action.¹³⁸¹

¹³⁷⁵ Sheppard, 221; Noy, 87.

¹³⁷⁶ See Viner; Bacon; and Blackstone’s *Commentaries*. Comyn’s *Digest* discussing ‘*Bargain and sale*’, 541 exclusively covers lands and tenements. Moyne’s *Mercantile Treatise*; The *Bibliotheca Legum Angliae*; and Butterworths *General Catalogue* also ignore the sale of goods.

¹³⁷⁷ In the 18th century, ‘*Bargain and Sale*’ was exclusively restricted to real property. C.f. earlier discussions, such as Sheppard, 224, which did not.

¹³⁷⁸ Described by (Friedman 1960) as the ‘classical age of the law of sales.’ (411).

¹³⁷⁹ (*Points in Law and Equity* 1792), covering ‘delivery of goods’ at 69 and ‘sale of goods’ at 164. The coverage is ‘aphoristic’ (iv) and mainly constitutes citations from *Noy’s Maxims*.

¹³⁸⁰ The main influence of Sheppard and Noy (87-91) was their discussions of dependency. For the earlier question of dependency, see (Simpson 1987a)

¹³⁸¹ Xxxvii-xxxviii

The first recognisably modern treatise is Long's, which increased both the quantitative presence and conceptual centrality of property. This predominance was then carried forward into Benjamin's *Treatise*, which unpacked in greater detail the temporal sequence of the contract, and the conditions and effects of its passing property. Nonetheless, even in Benjamin's more mature work, a large quantity of space – well over half - was taken up by formalities and general contract rules. This position was only partially reduced in the 5th edition (the first edition post-1893 Sale of Goods Act), with the general laws of sale making up just over 3/5 of the treatise. The strong linkage with the general rules of contract was bi-directional: sale of goods, alongside charterparties, seem to have constituted much of the general part's raw material. By the late 19th century, the two were almost coterminous, a dominance further increased by the Sale of Goods Act 1893.¹³⁸² Yet despite this *conceptual* linkage, the sale of goods diverged *quantitatively* from the general run of contract cases:

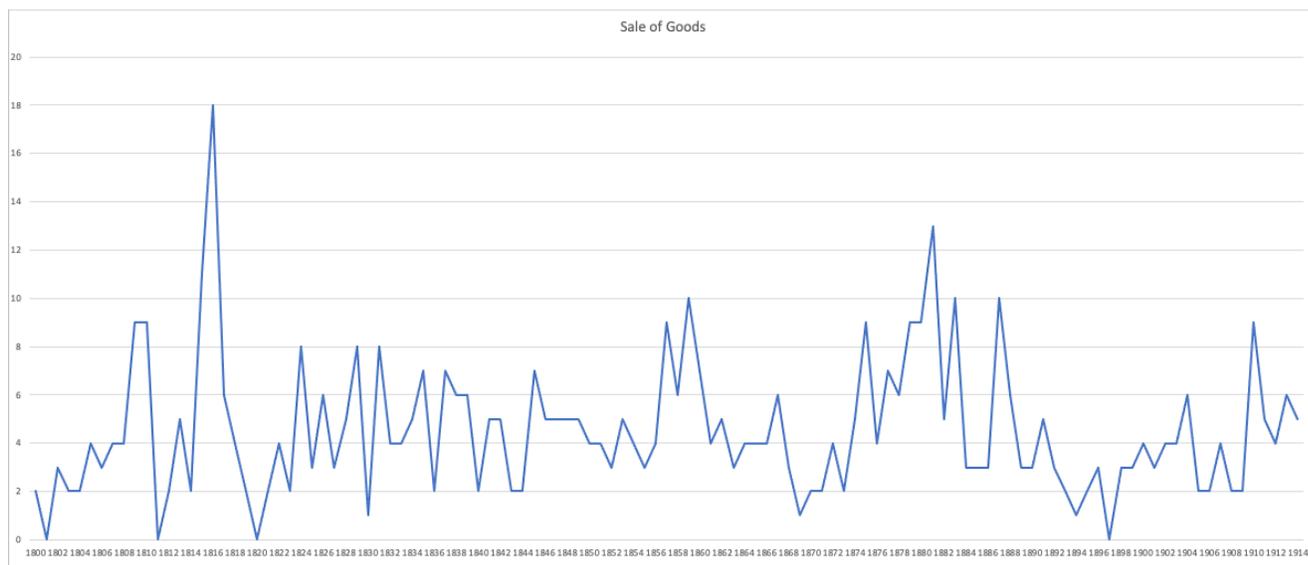


Fig 68. Sale of Goods Cases

The reason for this lexi-generative divergence, at least from an analysis of the reported cases and the treatises of Chalmers and Benjamin, can be attributed to two factors. First, the law of sale continued to produce precedents on specific terms,¹³⁸³ revealed by the large growth in the sections related to conditions and warranties, and the law of property. It is likely the continued crystallisation of general construction-related defaults was present in other specific contracts, such as the law of insurance.¹³⁸⁴ This suggests a possible hypothesis that, when it comes to law-making, the way people make contracts is less varied and

¹³⁸² There is a notable shift in the law of conditions and warranties, remarked upon by (Carter and Hodgekiss 1977), 45.

¹³⁸³ See Chalmers, 7th edition, *Preface to 7th Edition*.

¹³⁸⁴ E.g., see the large growth represented in the English section of (Stone 1914)

dynamic than the content of those contracts. Indeed, if one compares 20th century and 17th century English contract rules, it is in the detailed specific contracts, rather than general law of contract, that the most fundamental innovations appear. Second, the Sale of Goods Act 1893 (SoGA), whilst a ‘self-contained’ statute compared to, say, Lord Cairns’s Act,¹³⁸⁵ nonetheless generated a body of case-law working out the implications of its terms. As Mitchell notes in the context of warranties for quality of goods, and Thomas for quantity, the SoGA frequently failed to settle the law, either through tacit reform or by leaving doctrinal loose-ends open. The duration of the lexi-generative ‘bump’ of semi-codifying statutes like the SoGA is unclear and seems to have extended beyond 1914.¹³⁸⁶ Whilst it is possible that, in the long term, such semi-codifications will reduce litigation, in the immediate aftermath only an increase can be detected.

3.2 The General Law of Sale

What were the essential rights and duties involved in the contract of sale? In Birks’s phraseology, what was its *natura contractus*? We can produce a list of the basic core of the contract of sale, adapted from Stoljar’s outline:

- 1) The promise to pay the correct price for the goods (‘Price’).
- 2) The promise to give title to the goods (‘Property’);
- 3) The promise to deliver the goods at the right time (‘Delivery’);
- 4) The promise to accept the goods at the right time (‘Acceptance’)¹³⁸⁷
- 5) The promise to deliver the right quality and quantity of goods (‘Description’);

This list is obviously an idealised version of the law of sale, and only reflects English law once it had been formalised in Benjamin’s *Treatise*. For all five of these basic duties, the parties could modify the default terms established by the law. The process of their emergence can therefore be used to partially test the theses about the emergence of default rules in Chapter 1. Overall, I suggest many of these rules emerged from mandatory rules – such as pleading, procedure, property, and judicial regulation of bargains – and that there are signs of path-dependency in how much law they stimulated. In contrast to these more contingent outgrowths, I also consider more fundamental aspects of sale – the non-default definitional rules – as an analogue of the general part’s ground rules. I suggest there was a common

¹³⁸⁵ (Steele and Arvind 2020), 46.

¹³⁸⁶ Chalmers’s Digest on Bills of Exchange goes through a similar trend of adding cases, with the rate becoming constant around 1896-1903, matching the SoGA period of growth. The rate of case addition for Pollock’s Digest of the Law of Partnership also levels off by 1909, following a small bump following the 1890 Partnership Act. Cf Ferguson *supra* (n164), 29-31.

¹³⁸⁷ Due to the pressure of space I have omitted a discussion of acceptance. This doctrine was mostly obscured by the Statute of Frauds: upon emergence, it filled a modest body of caselaw.

process: a non-default seed¹³⁸⁸ which produced a flowering of default rules, only for those to slowly – but not completely - be winnowed down as parties learned to draft around them.

3.2a Property and Price

Neither the rules relating to property nor price were default rules but fall into the ‘definitional’ category. They formed the irreducible core of sale: a party could expressly contract out of the need for any delivery or acceptance, just as they could contract to receive goods of any quality and quantity. Yet whilst they could alter the *timing* of the passing of property, and the *magnitude* of the price, they could not dispense with either entirely without thereby altering the type of contract. There had to be a real, non-zero price, with a theoretical, though not practical, requirement for it to be monetary; and the contract had to pass title in a specified item of property. These requirements form, if anything does, the *natura contractus* of sale. I do not have space to consider both in detail, especially the latter given the extensive and wide-ranging rules on the law of personal property. I will give a brief outline, however, of both to show their interesting role in defining the edges of sale.

Turning first to the ‘price’ part of the contract. The definition of sale in terms of price follows an interesting lexi-generative factor: ‘contract differentiation.’¹³⁸⁹ The need for differentiating specific contracts is intrinsic to the role of default terms; further, as noted above in Part 2.1c, the borderlines between specific contracts could also become important when mandatory regulations were appended. Determining when such rules, default or mandatory, applied could produce differences in outcome, and therefore litigation. For sale, the most important line was between contracts with a price and those without, e.g., between sales and gifts. The requirement of the price being in *money* seemed to play little practical role; its development is an interesting case study in treatise fictionality. Early theoretical discussions of the law of sale barely distinguished the law of sale from that of ‘exchange.’ Ross’s early *Treatise on the law of vendors and purchasers* (1811), suggested that a sale was constituted by ‘some price or recompense in value’,¹³⁹⁰ citing Blackstone’s definition.¹³⁹¹ This seemingly expansive definition, however, was qualified later: “this recompense in value, in the contract of *sale*, is always in money.”¹³⁹²

¹³⁸⁸ See Llewellyn, *supra* (n1370), 719 describing the various ‘parasitic’ fn40, modes by which the law grows. One factor, the progressive elaboration of doctrine for its own sake, is also noted by Baker and Simpson, though it is difficult to detect traces at least in the *reporting* market.

¹³⁸⁹ Parties could determine the effects of their contracts, e.g., *Hutton v Lippert* (1883) 8 App Cas 309, but not their legal classifications. For some of sale’s boundaries with ‘cognate contracts’, see *Chalmers, Sales of Goods Act* 3-6

¹³⁹⁰ Page 1, Citing, 2 Blackstone Comm, 446. A similarly broad definition can be found in Sheppard’s Touchstone, 224, reproduced in Comyn, vol 2, 211. See also Long, 148, citing *Bach v Owen* 5 T.R. 409; and Morton, 1.

¹³⁹¹ Blackstone, *ibid*

¹³⁹² Ross, 4. Although he contradicts himself at 2, where he noted a sale could be made binding by something either ‘paid down’ or ‘tendered.’

The vagueness of the initial definition, and apparent conflict with the requirement for money, reflected a belief in its practical irrelevance.¹³⁹³ The reason for making the division at all, it seems, was a carry-over from Civilian influence.¹³⁹⁴ Minor practical differences slowly emerged in the late 18th and early 19th centuries: a barter had to be specially pled in assumpsit rather than taken on the general counts;¹³⁹⁵ procedural differences in execution might follow from barter;¹³⁹⁶ and the default authority of a factor was said to exclude barter.¹³⁹⁷ The most explicit case dividing the two is *Harrison v Luke* in 1845, where Alderson B stated that the price being in money or goods would determine the ‘nature of the contract.’¹³⁹⁸ Nonetheless, the only reason this law formed was its brief contact with familiar lexi-generative nodes: the law of procedure and pleading.¹³⁹⁹ Despite these somewhat meagre, primarily procedural grounds, the sale-barter division was elevated to one of fundamental importance in Benjamin’s *Treatise on the Law of Personal Property*. When discussing the *essential elements* of the contract of sale, Benjamin described sale as “a transfer of the *absolute or general* property in a thing for a price in *money*.”¹⁴⁰⁰ He noted that goods can be given in exchange for property other than money - such as lodging¹⁴⁰¹ - but that this is properly the contract of ‘barter.’¹⁴⁰² Benjamin’s definition, like Ross’s half a century earlier, did not reflect the doctrinal state of English law, but again an influence from civilian sources.¹⁴⁰³ In an instance of convergent legal evolution, the civilian distinction itself also followed from a primarily procedural division drawn by the Romans several centuries earlier.¹⁴⁰⁴ Benjamin’s definition, practically relevant or not, was then codified in the Sale of Goods Act 1893, s1(1), explicitly designed to exclude barter from its ambit.¹⁴⁰⁵ Nonetheless, whilst in theory a monetary price defined sale, in practice anything of value would suffice which, following the extremely loose requirements consideration,¹⁴⁰⁶ was virtually unlimited. Contrast this to the division between sale and gift. The line was simple: when parties expressly stated there was no price¹⁴⁰⁷ the transaction would be one of gift rather than sale.¹⁴⁰⁸ Determining the right box

¹³⁹³ Blackstone, 446, ‘there is no difference.’ Reproduced, following Ross, in Chitty Sr *Treatise on the Law of Manufacturers*, 308, fn 4. *La Neuville v Nourse* (1813) 3 Campb 351; for some minor differences, see *Anon* 3 Salk 157, 158; *Ingram v Shirley* (1816) 1 Stark 185; likewise, see Blackburn, *Personal Property*, pg. 3. For a modern affirmation, see *The Roman Law of Sale*, Zulueta, 17.

¹³⁹⁴ Ross, 4, Puffendorff J.N. 1.5.c.6 s2, and Justinian’s Institutes, 1, 3, 24. cf Blackburn, 153-4. See also, *Anonymous*, 3 Salk 157. The same can be seen in Atkinson, 49

¹³⁹⁵ See *Harris v Fowle* (1787) cited in *Barbe v Parker* (1789) 1 H. Bl. 284; later, *Harrison v Luke* (1845) 14 M & W 139.

¹³⁹⁶ E.g., procedurally, *Germain v Burrows* (1813) 5 Taunt 259; *Ingram v Shirley* (1816) 1 Stark 185; *Emanuel v Dane* (1812) 3 Campb 299

¹³⁹⁷ *Gurreiro v Peile* (1820) 3 B & Ald 616

¹³⁹⁸ See also *Keys v Harwood* (1846) 2 C.B. 905

¹³⁹⁹ Producing a number of cases: *Forsyth v Jervis* (1816) 1 Stark 437; *Hands v Burton* (1808) 9 East 349; *Sheldon v Cox* (1824) 3 B & C 420; See Benjamin, 5th edition, pg. 3, fn(4) noting the relevance solely as a matter of the old pleading rules. It appeared that in all other substantive respects, the law of barter followed sale. E.g., *Emanuel v. Dane* (1812) 3 Camp. 299; *La Neuville v. Nourse* (1813) 3 Camp. 351

¹⁴⁰⁰ Benjamin, 1st edition, 1. Benjamin notes, fn 1, that Kent’s definition is sufficient to include barter, whilst analogous, is “certainly not identical, with sale.”

¹⁴⁰¹ *Keys v Harwood*, *supra* (n1393)

¹⁴⁰² Benjamin cites, pg. 3, *Harris v Fowle*, in *Barbe v Parker* 1 H. Bl. 287; *Hands v Burton* 9 East 349; *Harrison v Luke* 14 M & W 139, *Sheldon v Cox* 3 B & C 420; *Guerreiro v Peile* 3 B & Ald, 616, *Forsyth v Jervis* 1 Stark 437, and *Read v Hutchinson* (1813) 3 Camp 352.

¹⁴⁰³ See Benjamin’s explicit comparison at 65; likewise, the extended footnoted in the 3rd Edition, page 1, fn(a) by Pearson and Boyd.

¹⁴⁰⁴ See G.3.141, D.18.1.1.1.; (Zimmermann 1996), 250-252.

¹⁴⁰⁵ Chalmers, Sales of Goods Act 1893 7th Edition, pg. 6 denies that the statute applies to sales of barter and suggests “the question has been by no means fully worked out.”

¹⁴⁰⁶ (Lobban 2010a), 372-376; Ibbetson *supra* (n1), 238-239.

¹⁴⁰⁷ As opposed to leaving the price implicit, which the courts began to fill in around the mid-19th century, see *Acebal v Levy* (1834) 10 Bing 376; *Hoadly v McLaine* (1834) 10 Bing 482, see also *Valpy v Gibson* (1847) 4 C.B. 837 and, *Webber v Tivill* (1681) 2 Saund 121c n2

¹⁴⁰⁸ *ibid*, fn 2, *Irons v Smallpiece* (1819) 2 B & A 551

was, unlike barter and sale, practically salient: depending on which applied, there could be special formality rules for passing property in moveables¹⁴⁰⁹ and different tax implications.¹⁴¹⁰ The role of mandatory rules in sharpening conceptual boundaries was mirrored elsewhere in the law of sale, such as the application of tax rules, gaming regulations, Statute of Frauds, and Stamp Act.¹⁴¹¹

The other core constituent part of sale was the passing of ownership. Unlike price, which, had it not been for the rules of consideration,¹⁴¹² requirements for delivery for gifts, and some minor procedural differences, would have been entirely irrelevant, the passing of property was a truly irreducible *practical* part of sale. As noted above in 3.1, the law of sale increasingly came to be dominated by property law. Indeed, stripped of its default rule accretions, and the law of formalities relating to gifts, sale can be taken as a pure link between the general law of contract and the law of personal property.¹⁴¹³ Of the latter, much could be written given the complex and interesting way the law of property generates legal rules. The law of personal property is a subset of the *Legal Core Modules* (3.2 above), with much of the law stemming from the extensive mandatory rules used to create and limit the power of property rights. These rules include the remedial consequences of having a property right, and the methods by which such rights could be transferred, created, and destroyed. Both were especially dense areas of law due to the variety of types of property recognised; the periods and persons the right could be split between; and the intricate, extensive network of formalities attached. It is helpful to work backwards to understand the contract of sale's incidence with property. The late-19th century statement of the law was clear, as seen in Benjamin's *Treatise* and the Sales of Good Act it influenced. The basic position was that it was for the parties to determine when property should pass, which could be upon the conclusion of the contract or at a later date. Nonetheless, as elsewhere, Benjamin noted the parties often failed to specify whether property would pass, either because they were unclear in expression or had given it no thought.¹⁴¹⁴ In the place of these omissions, the courts produced default rules construction which "in most instances furnish conclusive tests for determining the controversy."¹⁴¹⁵ The most interesting defaults relate to the physical characteristics of the items being sold. These were framed as presumptions over whether a sale was intended as a true 'bargain and sale', that is, to pass property immediately upon agreement, or merely as an 'agreement to sell,' the conveyance in which to be completed later.¹⁴¹⁶ Most of these were

¹⁴⁰⁹ See *ibid*, *Irons*, confirmed after some doubt by *Cochrane v Moore* (1890) L.R. 25 Q.B.D. 57. For extensive analysis of these rules, including their numerous exceptions, see (Stoljar 1958); and the small history in *Benjamin on Sale* 5th Edition, pg. 8.

¹⁴¹⁰ E.g., see the *Revenue Act* 1845, 8 & 9 Vict c.76.

¹⁴¹¹ E.g., *Hutton v Lippert* (1883) 8 App Cas 309 and *Re Gieve* (1899) 1 Q.B. 252 ; See Chalmers, *Sale of Goods Act 1893*, 7th Edition, pg. 4-5.

¹⁴¹² *Antrobus v. Smith* (1805) 12 Ves. 39, 46, see (Lobban 2010a), 358-361.

¹⁴¹³ Friedman, *supra* (n1378), 412 offers a useful corrective that the rules of delivery and payment have significant *practical* relevance, as did the parties' personal rights for breach.

¹⁴¹⁴ Benjamin, (1868), *A Treatise on the Law of Sale of Personal Property*, 214; Blackburn on Sale, 121.

¹⁴¹⁵ *ibid*

¹⁴¹⁶ The distinction was an old one, see *Ross*, 3. For a basic example, *Boyd v Siffkin* (1809) 2 Campb N.P.C. 326.

straightforward, such as the presumption of a postponement of passing property when the seller must do various things to the goods to make them saleable.¹⁴¹⁷

Others, whilst framed in terms of intention, arose for subtly different reasons. A good example is the presumption related to specification of goods out of a larger ‘bulk.’ Blackburn wrote that “the parties do not contemplate a bargain and sale till the specific goods on which that contract is to attach are agreed upon.”¹⁴¹⁸ This is misleading, however, insofar as it implied the rules were possibly defeasible to party intention.¹⁴¹⁹ The ambiguity, present also in Ross’s and Long’s treatises, followed from the case law itself. The early 19th century saw the emergence of a sizable case law, condensed between 1807-1814, discussing the question of unspecified goods. The general position, with the important exception of *Whitehouse v Frost* (1810),¹⁴²⁰ was that goods out of a bulk had to be specified first before property could pass. Yet the judgments in these cases provided multiple overlapping reasons for this restriction, justifications which whilst aligning in the cases themselves, cached out differently in edge cases. One was that ascertainment of goods out of a bulk was necessary to determine the price when it was sold by weight.¹⁴²¹ Another was that *delivery* could not occur until the goods had been ascertained, relevant either as a matter of pleading¹⁴²² or as a term of the contract. Finally, the most influential - and vague - was the citation of the formula above regarding further ‘material’ acts needed to be done by the seller, regarded either as conditions precedents,¹⁴²³ default terms,¹⁴²⁴ or simply stated as a general rule.¹⁴²⁵ Over time, these justifications were teased out in cases where the price was clear and delivery was unnecessary.¹⁴²⁶ The conclusion was that ascertainment nevertheless remained necessary,¹⁴²⁷ a position eventually codified in s16 of the Sale of Goods Act 1893. In treatise literature, as the other justifications fell away, the requirement was treated as a fundamental aspect of personal property. As Blackburn himself noted, it was one ‘founded on the very nature of things.’¹⁴²⁸ Within this class we can also add the presumption related

¹⁴¹⁷ *Hinde v Whitehouse* (1806) 7 East 558, 571, such as the paying of duties, though this was rebutted by party intention here.

¹⁴¹⁸ Blackburn, 121

¹⁴¹⁹ Benjamin, 1st edition, 246 addresses this in the context of the power of earnest to pass property, noting, first, that it was merely evidence of party intention; and second, could not enable parties to pass property for unspecified goods.

¹⁴²⁰ *Whitehouse v Frost* (1810) 12 East 614.

¹⁴²¹ *Hanson v Meyer* (1809) 6 East 614, 625 Lord Ellenborough suggested that the price needed to be ascertained so that it could be paid, as a ‘term of the bargain’ and as ‘the generally received rule of law in contracts of sale.’ This justification was also applied in *Zagury v Furnell* (1809) 2 Camb 240, 242. Blackburn, 153, 170-171 believed these followed from an uncritical adoption of the rules of Civil Law, and notes that, as a matter of substantive law, nothing in English law prevents a sale for an uncertain price. The justifications in the cases themselves, however, suggest that a certain price was required for the purposes of pleading and jury control, e.g. see *Simmons v Swift* (1826) 5 B & C 857, 863, 865; and an argument for blurring the requirements of pleading, *Zagury*, bid, 241. This is, incidentally, likely the reason for the ancient roman requirement (G.3.140).

¹⁴²² The law was made more complex by the fact that apportionment had different relevance depending on the form of action. See Scarlett’s argument in *Whitehouse*, 618-619; *Simmons v Swift* (1826) 5 B & C 857, 862; and *Jackson v Anderson* (1811) 4 Taunt 24, 26. Delivery could also be relevant for rescission, see *Shepley v Davis* (1814) 5 Taunt 617, 621.

¹⁴²³ E.g., *Rugg v Minett* (1809) 11 East 210, 217; *Withers v Lys* (1815) 4 Camp 237; *Hanson v Meyer* (1809) 6 East 614; Long, 152.

¹⁴²⁴ See Blackburn, 120, 151.

¹⁴²⁵ See Ross, 147, who describes all the caselaw in terms of general, mandatory rules. Nb Lord Ellenborough’s test of ‘materiality’ in *Wallace v Breeds* (1811) 13 East 522, 525-6; and Gibbs C.J.’s categorical stance in *Shepley v Davis* (1814) 5 Taunt 617, 621.

¹⁴²⁶ The crucial case being *Simmons supra* (n1422)

¹⁴²⁷ See *Gillett v Hill* (1834) 2 C & M 530 for a robustly positivist statement.

¹⁴²⁸ Blackburn, 122, suggesting the rule ‘has existed at all times.’ See also *White v Wilks* (1813) 5 Taunt 176, 178-9 in its discussion of new physical theories of liquids.

to manufactured goods: until the goods were made and appropriated in some way to the buyer, e.g., through delivery or specification, no property would pass.¹⁴²⁹ These rules, in their logical form, are much closer to the rules listed by Benjamin related to ‘The Thing Sold’, such as the positions of future goods, and sales of chances, than they are to the proprietary default rules. They flow not from procedure nor optional default rules, but from an intriguing alternate lexi-generative factor: the ‘nature of things’, or, in modern terms, the structure of the world modelled by the legal system. According to 19th century judges, there was no way to affix property rights to an object which had not been specified, because the law needs to identify an object for the purposes of any action brought.¹⁴³⁰ Thus, the exclusion of unspecified goods from a bulk and goods yet to be created. The categorical nature of this limitation may give the impression of a conceptual or ‘natural’ source behind the rules, assisted by the incredible similarity of problem-sets arising in both Ancient Rome and Victorian England. Yet treating them as such is also misleading. There are workarounds to the ‘the nature of things’ based on more sophisticated drafting - determining, for instance, that property will pass in the ‘first’ item built by the seller¹⁴³¹ - or through more complex defaults, such as giving parties selling in bulk proportional shares.¹⁴³² In this way, these basic conceptual limits can be circumvented (albeit by creating more law) as part of a general cognitive expansion of the legal system. The law of property grows as new things come into the sphere of human knowledge and quantifiable control, in turn becoming available as potential candidates for ever more complex forms of ‘ownership.’ In this simple and direct sense, the nature of the world sets the fundamental pace of development for the law of sale.¹⁴³³

3.2b Delivery

Ross described delivery as an ‘inseparable incident to all sales’;¹⁴³⁴ as an incident, it had three central roles.¹⁴³⁵ First, a delivery of goods could obviate the need for writing for sales of goods above £10 under the Statute of Frauds.¹⁴³⁶ Second, delivery was one of the central duties of the vendor under the contract, the correct performance of which typically being a prerequisite before they could make a claim for the

¹⁴²⁹ The law emerged early here. See *Towers v Osborne* (1722) 1 Str 506; *Clayton v Andrews* (1767) 4 Burr 2101; *Dunmore v Taylor Peake* (1791) NPC 41; *Mucklow v Mangles* (1808) 1 Taunt 318. These were taken up later in a series of more complex manufacturing, ship-building, and construction cases. see *Atkinson v Bell* (1828) 8 B & C 277; *Bishop v Crawshay* (1824) 3 B & C 418; *Laidler v Burlinson* (1837) 2 M & W 602; *Tripp v Armitage* (1839) 4 M & W 687; *Woods v Russell* (1822) 5 B & A 942

¹⁴³⁰ Referred to as ‘individuality’, *Swanwick v Sothorn* (1839) 9 A & E 895, 900, derived from Lord Ellenborough’s judgment in *Busk v Davis* (1814) 2 Ma & Selwn 397, 403. The pragmatic justification, first led in Scarlett’s argument in *Whitehouse*, *supra* (n1420) 618-619, was that it would be unclear who was to bear the loss if a portion of the bulk was destroyed. See *White*, *supra* (n1428), 179.

¹⁴³¹ For other, problematically complex, evasions, see (Burns 1996), 262-3.

¹⁴³² See Burns, *ibid*. He notes s16 of the SOGA 1893 produced problems for buyers when the seller became insolvent (see *Re Wait* (1927) 1 Ch 606). In the US, the common ownership solution was adopted in the UCC 2-105(4), adopted finally in England in the Sale of Goods (Amendment) Act 1995.

¹⁴³³ And, of course, its boundaries with the law of real property. See SoGA 1893, s62(1), Benjamin, 6th Edition, 198ff.

¹⁴³⁴ Ross, 54; described by Benjamin, 1st edition, 497, as ‘the chief and immediate duty of the vendor.’

¹⁴³⁵ Remarkd upon by Benjamin, *ibid*, 497.

¹⁴³⁶ S17 SoF. See Benjamin, *ibid*, 498.

price.¹⁴³⁷ Finally, delivery played an important role in the default rules related to when title passed.¹⁴³⁸ The second of these was conceptualised initially as a basic rule in all sale transactions, expressed in its classical form in *Noy's Maxims* c.42 and *Sheppard's Touchstone*. A sale would only be 'actionable', that is, allow a party to sue, once either (a) there was a delivery; (b) there was a payment, either in full or in earnest; or (c) the parties explicitly arranged a later date for payment. Further, in cases in which delivery was held to be a dependent promise - with concurrent dependency applying to all sales by the late-18th century - it was also necessary for actionability. Determining when a delivery had occurred was therefore of great practical significance in virtually all cases. I will contrast two aspects here: whether a delivery *had* to occur for the various effects listed above; and, following this, when it could be said a *correct* delivery had occurred.

Regarding the first, the mid-19th century position was clear: physical delivery was unnecessary to make a contract binding; to make it actionable; nor to pass title. All of these things could be achieved *sans*-delivery provided the parties expressed their intent in the contract terms. Whilst this position was partially visible from the 15th century onwards,¹⁴³⁹ in the 19th century it was decisively confirmed and crystallised by *Simmons v Swift* (1826). This movement occurred early and, in its wake, relatively little caselaw was produced. The majority of law which did form related to *non-standard* deliveries and can trace their origin to a different lexi-generative source. The earliest cases of non-standard delivery in our period occur in relation to three purposes: first, ascertaining when sufficient delivery had occurred to pass property (regarding gifts);¹⁴⁴⁰ second, interpreting the requirements of the statute of frauds;¹⁴⁴¹ and third, for differentiating pleading forms.¹⁴⁴² These mandatory rules necessitated decisions on the meaning of delivery and therefore 'possession.' Although treated as a matter of fact, English law could not avoid converting possession, even in its apparently factual '*de facto*' form,¹⁴⁴³ into a matter of law.¹⁴⁴⁴ These rules were then accompanied by more detailed rules on delivery to special individuals, such as carriers, and the use of legal instruments which could pass a 'right to possession.'¹⁴⁴⁵ Outside these areas, however, ascertaining the factual aspect of possession for sale contracts produced far less law, likely

¹⁴³⁷ Benjamin, *ibid*, 499.

¹⁴³⁸ See *Hanson v Meyer* (1805) 6 East 614, discussing delivery - and specification of the goods - as incidents of property conveyance. See also *Dixon v Yates* 5 B & Ad, 340, cited in Benjamin, 498.

¹⁴³⁹ See Baker, *supra* (n251), 738-744; Baker *supra* (n196), 409-410; Simpson, *supra* (n1374), 161

¹⁴⁴⁰ E.g. *Ward v Turner* (1751) 2 Ves Sen 431.

¹⁴⁴¹ See *Hodgson v Le Bret* (1808) 1 Camp N.P.C. 233; *Elmore v Stone* (1809) 1 Taunt 458 *Chaplin v Rogers* (1800) 1 East 194, There was also some discussion in the context of stoppage in transitu, *Hurry v Mangles* (1808) 1 Camp 452; *Ellis v Hunt*, (1789) 3 T.R. 464; and, much later, the bills of sale Act, *Gough v Edward* (1863) 2 H & C 1.

¹⁴⁴² *Simmons supra* (n1422), noting the question of delivery was almost resolved by the pleading point; see also *Elmore v Stone* (1809) 1 Taunt 458, 460.

¹⁴⁴³ Referred to as 'manual control', see (Pollock 1888), 65, citing *Gough*, and Pollock, 14 on 'de facto control.'

¹⁴⁴⁴ See (Nicholas 1969), 114-115; the differentiation likely followed, first, the inherent ambiguity in the everyday usage of the term 'possession', and, second, the need to adjust its meaning depending on the legal outcome 'possession' was relevant for.

¹⁴⁴⁵ E.g., transfer to carriers, wharfingers, and skippers; likewise, instruments such as bills of lading which could be said to pass a 'right to possess.' (Pollock 1888) 61.

because its relevance to bindingness, actionability, and title was superseded by a general criterion of party intention.

Along similar lines, the *performance* aspect of delivery - ascertaining what kind of delivery the plaintiff was required to perform - could also have been reduced to one of construction: “delivery occurs according to the definition provided by the parties.” In contrast to whether delivery was *necessary*, the *conditions* of delivery was a matter parties often left unspecified¹⁴⁴⁶ and the courts ended up producing a raft of intricate default terms.¹⁴⁴⁷ These covered questions like whether the seller had to deliver them or merely allow the buyer to collect them;¹⁴⁴⁸ the location,¹⁴⁴⁹ manner, and quantity of delivery; and the time for delivery.¹⁴⁵⁰ The question of *time* is a particularly interesting special case of lexi-genesis. Questions of *time* seem to generally produce large volumes of law,¹⁴⁵¹ likely because of its relevance to court procedure and statutory clauses, and possibly also because time is something which tends out of convenience towards a standardised formula applied across disparate regions and practices. This standardising phenomenon is evident in the law of sale. In the early 19th century, the courts were willing to apply a variety of tests in the measurement of time based on context,¹⁴⁵² the most explicit recognition of this policy being *Lester v Garland*.¹⁴⁵³ The general attitude in *Lester* - doubting the possibility of any meaningful general rules - prevented formal rules being crystallised.¹⁴⁵⁴ This scepticism changed from the 1830s onwards. Judges - Parke B in particular - began to concretise the meaning of numerous contractual time clauses,¹⁴⁵⁵ extracting the question from the jury as settled rules.¹⁴⁵⁶ These were then accompanied by other standardising efforts across the law, such as the *Interpretation Acts*.¹⁴⁵⁷ It is possible the inherent ‘abstractability’ of time concepts, such as the definition of a ‘year’,¹⁴⁵⁸ is also a factor behind judicial

¹⁴⁴⁶ It seems in most cases this question could be resolved through trade custom, see *Goodall v Skelton* (1794) 2 H. Bl. 316.

¹⁴⁴⁷ Prior to 1826, however, these were not framed in those terms; they were, instead, subsumed under the general requirements for passing title, E.g., Long, 151. See *Owenson v Morse* (1796) 7 T.R. 64; *Hammond v Anderson* (1803) 1 Bos & Pul (NR) 69; or for actionability, Ross, 55.

¹⁴⁴⁸ Benjamin, 1st edition, 502. See *Salter v Woollams* (1841) 2 M & G 650; *Wood v Manley* (1839) 11 Ad & E 34, for a case of forming default rules out of jury discretion.

¹⁴⁴⁹ *ibid*, 505, with no modern decisions on this point.

¹⁴⁵⁰ Benjamin, 1st edition, 505.

¹⁴⁵¹ See, for example, (Woolrych 1851)

¹⁴⁵² Most radically, early authorities applied inherently local temporal tests, such as the timing of sunset. See *Duppa v Mayo* (1680-81) 1 Saund 282, 287 and 2 & 3 Phil & Mary 7. Courts applied a variety of methods for computing days, the most common being the maxim ‘there is no division of the day.’ Latch 151. This likely followed from evidential limits in precise time measurement; it was, in any event, applied contextually, see *Pugh v Robinson* (1786) 1 T.R. 116; *inter alia*, Comyn’s Digest, 5 ‘Temps’, Viner’s Abridgment ‘Night.’

¹⁴⁵³ *Lester v Garland* (1808) 15 Ves 248, 257-8, noting the impossibility of laying down any general rules. In *Cochran v Retberg* (1799) 3 Esp 121, 122 Lord Eldon relies upon a special merchant jury to determine a usage of trade. The only reason it became law was the strategic conversion of jury verdict and facts into law within the headnote by the reporter.

¹⁴⁵⁴ For an application of this approach in sale, see *Lang v Gale* (1813) 1 M & S 111, 117-8.

¹⁴⁵⁵ For instance, fixing the meaning of ‘month’ commercially as a calendar month. *Hart v Middleton* (1845) 2 C & K 9, 10

¹⁴⁵⁶ The question of ‘reasonable time’ went through several iterations. *Scheibel v Fairbain* (1799) 1 B & P 388 fairly conclusively declared it a question of law, though, as usual, gave few reasons why and used somewhat dubious sources, see *Startup v Macdonald* (1841) 2 M & G 395, fn(x).

¹⁴⁵⁷ E.g., Statute 13 Vict c.21 s.4; Statutes, Definition of Time Act (1880) 43 & 44 Vict c. 9 s1; Interpretation Act 1889 52 & 53 c 63; see also SoGA s10(2); Bills of Exchange Act 1882, s14(4).

¹⁴⁵⁸ Comyn’s Digest 1, ‘Anno’, 376 noting the law’s refusal to recognise the remaining hours left in the calendar year. The same seems to have occurred with methods of measurement, cf Touchstone, 225 and 5 Geo. 4. c.74.

decisions to extract default rules generally in the place of leaving them as particularistic construction findings.¹⁴⁵⁹

3.2c Description

The seller not only had to deliver goods, but they had to deliver goods of the correct quality and quantity. Both of these have been studied in great depth. I am going to consider warranties in detail here, occasionally contrasting the issue of quantity to illustrate the particular lexi-generative factors at play. In the early-18th century, the law regarding breach of warranty was procedurally separate from the other nascent rules of contract.¹⁴⁶⁰ A party alleging such a breach had to plead in trespass, rather than assumpsit, producing the inconvenient result that a party could not join warranty-related issues with those relating to contract generally.¹⁴⁶¹ This division was removed as early as the mid-18th century,¹⁴⁶² following a general loosening of pleading requirements in that period, and parties could use assumpsit for breach of warranty. Nonetheless, the procedural split left a legacy, seen clearly in the separate treatment of warranty in Chitty Jr's *Practical Treatise*. In terms of substantive law, the most important question was whether, and when, the courts would find an *implied* warranty of quality. As Oldham notes, the answer is complicated by a number of factors. One is that the law of warranties seems to have been divided between types of goods, the principal division coined by Karl Llewellyn being 'horse and non-horse.'¹⁴⁶³ The latter were virtually absent in the reports prior to the 19th century,¹⁴⁶⁴ although there are signs there was an implied warranty of quality in sales of beer.¹⁴⁶⁵ Anderson suggests that, in general, such implied warranties would not be necessary because of the pervasive use of express warranties in contract terms, and the fact large swathes of the economy, as noted above in 2.1b, were closely regulated by statute.¹⁴⁶⁶ Another factor lies in the opacity produced by legal procedure: we do not know the extent to which the jury, or judge via their directions, attempted to tip the scales in favour of purchasers. At most, from the formal sources, it appears as if there was no implied warranty for horse sales,¹⁴⁶⁷ producing a default position of caveat emptor, possibly ameliorated in practice at trial.¹⁴⁶⁸ The 18th century base produced several points for 'legal

¹⁴⁵⁹ See general discussion of default term, *supra*. For the alternate, construction approach, see *Coddington Paleologo* (1867) L.R. 2 Ex 193

¹⁴⁶⁰ See Lobban, *supra* (n78), 460;

¹⁴⁶¹ See *Williamson v Allison* (1802) 2 East 446, 451.

¹⁴⁶² See *Ross v Edgar* from the Ryder Documents, cited in Lobban, *supra* (n78), and (Swain 2012), 288. Confirmed in *Stuart v Wilkins* (1778) 1 Doug 18.

¹⁴⁶³ (Llewellyn 1936a), 711, fn 39; (Ibbetson 2024), 43-44.

¹⁴⁶⁴ Oldham *supra* (n281), 236

¹⁴⁶⁵ *ibid*. Oldham notes that horses, as 'used merchandise,' are qualitatively different as a matter of quality control from a manufactured product like beer.

¹⁴⁶⁶ *ibid*, 237.

¹⁴⁶⁷ *Stuart v Wilkins* (1778) 1 Doug 18; Lobban, *supra* (n975), 460-1.

¹⁴⁶⁸ See also the amelioration of periods of return, Swain, *supra* (n1462), 294.

growth.¹⁴⁶⁹ One of these was to expand the law of implied warranties across the law, following judicial instincts to do justice between the parties and meet new social needs.¹⁴⁷⁰ Another, denied by Llewellyn, but undoubtedly fertile, was the interpretation of warranties in horse contracts.¹⁴⁷¹ Although the growth of law was subtly different between the two, they followed a similar trajectory.

Chronologically, and thematically, it makes sense to start with the law of horse contracts.¹⁴⁷² As Ibbetson notes, these formed a distinct branch of contract law, one which was only partially integrated as the 19th century unfolded. The law of horse sales is therefore unique insofar as it is possibly the only subset of the general law of sales of goods which produced a sufficient body of law to spin out its own doctrinal treatises.¹⁴⁷³ Ascertaining what is special about horse-sales and why they generated so much litigation is not particularly easy, and may be the result of the feedback loop mentioned in Chapter 1. What is clear is that they are an area of particularly aggressive judicial activism¹⁴⁷⁴ and reveal, in detail, some of the strategies by which law could be fabricated. A good example is the lengthy case-line regarding ‘unsoundness.’ For the majority of warranties, the question of what constituted a ‘breach’, such as the merchantability of silk, grain, or wool, was left to the jury. For horse-ailments, however, judges began extracting and formulating explicit rules from 1810 onwards.¹⁴⁷⁵ Courts pondered the legal status of temporary lameness, roaring, crib-biting, and bone spavin; reporters queried the consequences of thrushes, splints, and quidding;¹⁴⁷⁶ much law was made. The development of this highly specific doctrinal growth can be attributed to two basic processes. First, there appeared to be no clear expert consensus on the internal ailments afflicting horses in the early 19th century,¹⁴⁷⁷ circumvented partially by the use of trial periods in horse markets, leaving an absence of communal standards. The uncertainty of internal defects within living creatures produced law on other livestock as well,¹⁴⁷⁸ and is mirrored in the extensive roman rules related to human (slave) ailments.¹⁴⁷⁹ Second, the judiciary, and reporters, treated this vacuum as one requiring a stable, legal substitute, considering past-precedents on unsoundness as

¹⁴⁶⁹ Llewellyn’s term, *supra* (n1463), 725, referring to ‘growth point’ or ‘pruning point.’ Llewellyn’s concept of legal growth, or *lexi-genesis*, is founded on legal detail. He suggests all growth (or ‘pruning’, an unhelpful mixed metaphor) comes from formulations which leave their ‘operative facts’ undisclosed, 726, fn90.

¹⁴⁷⁰ Lobban, *supra* (n78), 467-8; Ibbetson *supra* (n1463), 45.

¹⁴⁷¹ Llewellyn, *supra* (n1463), 711, fn 39, 724, fn79; Although Llewellyn may have simply been referring to ‘growth’ solely in the context of the general doctrine of implied warranties, of which most development did occur in non-horse cases.

¹⁴⁷² See Swain *supra* (n1462)

¹⁴⁷³ For horse treatises and manuals, see *Bibliography, Horse Treatises*

¹⁴⁷⁴ Swain, *supra* (n978), 96.

¹⁴⁷⁵ Lord Mansfield typically left the issue to the jury, see *Hopkins v Hopkins* (1778) 481 nb 202, 327 Oldham, *supra* (n281).

¹⁴⁷⁶ See *Bassett v Collis* (1810) 2 Camb 523, referring to the various (unreported) trials on these ailments.

¹⁴⁷⁷ *ibid*, noting the opinions of farriers and veterinarians were so conflicting the court could not lay down any general rules. Part of the uncertainty over ‘crib-biting’ clearly flowed from a lack of understanding of the internal mechanism by which it hampered digestion (e.g., saliva or intake of breath). Compare the explanations in *Broennenburgh v Haycock* (1817) Holt 630 and *Scholefield v Robb* (1842) 2 M & Rob 210.

¹⁴⁷⁸ See *Joliff v Bendell* (1824) Ry & Mood 136 (sheep); *The Veterinarian* (1870) v43, (cows), 903; cf., Law Journal 31 (1896), July 11, 1896, 424 commenting on the absence of ‘dog law.’ Nb the relative absence of contract matters in (Lupton 1888)

¹⁴⁷⁹ D.21.1.; (Zimmermann 1996), 312-3. It is possible that living things, by their nature, are apt to produce distinct, detailed contract law. See Zimmermann, 326, referencing the animal provisions of the BGB in the context of *Read v J. Lyons & Co. Ltd.* [1947] AC 156 (HL), 182, “the law...has grown up historically in separate compartments and... beasts have travelled in a compartment of their own.” n.b. *The Laws Relating to Horses*, 26-7. A similar list of horse-ailments can be found in the infantile laws; see (Dzikowski 2020), 486-7.

binding¹⁴⁸⁰ and explicitly taking discretion away from the jury.¹⁴⁸¹ Despite some scepticism towards this approach,¹⁴⁸² it ultimately prevailed, and was assisted extensively by reporters who converted jury findings into legal rulings in the headnote.¹⁴⁸³ The various cases produced by these processes were divided over the appearance, timing, and nature required for an ailment to constitute unsoundness, producing two conflicting case-lines.¹⁴⁸⁴ Part of this uncertainty flowed from the progressive incorporation of different ‘scientific’ concepts, such as ‘internal’,¹⁴⁸⁵ ‘organic’,¹⁴⁸⁶ ‘structural’,¹⁴⁸⁷ and ‘disease’¹⁴⁸⁸ which failed to produce the clear, differentiating lines craved by the courts.¹⁴⁸⁹ These authorities were eventually reviewed and synthesised in *Kiddell v Burnard* (1842)¹⁴⁹⁰ and *Holliday v Morgan* (1858),¹⁴⁹¹ which created a single, general test for ‘unsoundness.’ From that point onwards, the case lines were still and any particular findings were subsumed beneath the ‘pruned’ abstract formulations.¹⁴⁹² Whether this law on *unsoundness* was inevitable is unclear, and it is entirely possible that had the judiciary left the issue as one of pure fact, a stable consensus would have eventually formed outside the courts within the farrier and veterinary surgeon community, obviating the need for formal precedent.

The second growth area was the development of implied warranties generally, across several distinct types of goods. Caveat emptor is theoretically legally complete - the courts could have exclusively asked

¹⁴⁸⁰ Lord Ellenborough was particularly active on the subject of roaring, see *Basset supra* (n1471); *Elton v Brogden* (1815) 4 Camp 281; and *Onslow v Eames* (1817) 2 Stark 81, and coughing. For a strong example of the latter, see *Shillitoe v Claridge* (1816) 2 Chitty Rep, 425.

¹⁴⁸¹ The jury sometimes contradicted judicial instruction in the 18th century, see *Hollingsworth v Tattersall* (1778) in J. Oldham, *supra* (281), Vol I, 332–3; see also *Garment v Barrs* for a case of judicial collusion with jury discretion. Swain argues that, in general, juries seemed to have favoured purchasers, *supra* (n1462), 291. The conversion of soundness into a question of law may have been part of a general turn against equitable flexibility in horse warranties, see *Bywater v Richardson* (1834) 1 Ad & E 508; *Budd v. Fairmaner*, (1831) 8 Bing. 48.

¹⁴⁸² See Surtees, *Horseman’s Manual*, v-vi; *Lewis v. Peake* (1816) 7 Taunt 153, 154; cf *Broennenburgh v. Haycock* (1817) Holt 630, 631. Swain suggests by this point “the definition of unsoundness was unequivocally a matter for the judge.” *Ibid*, 296.

¹⁴⁸³ For clear examples of this process, see *Joliff v Bendell* (1824) Ry & Mood 136; *Dickinson v Follett* (1833) 1 M & Rob 299; and *Watson v Denton* (1835) 7 Car & P 85. See also Oliphant on Horses, 4th edition, 76-107, and appendix, for numerous ‘precedents’ around 1847 extracted from guildhall cases.

¹⁴⁸⁴ Seemingly divided between the Common Pleas (*Bailey; Dickinson*) and Exchequer (*Coates; Kiddell*), a divide rendered possible because most of the differences emerged at the nisi prius level. It is unlikely to be a coincidence the case-lines were finally resolved once Alderson J moved from the Common Pleas to the Exchequer alongside Parke B.

¹⁴⁸⁵ *Onslow v Eames* (1817) 2 Stark 81, Lord Ellenborough’s preferred concept.

¹⁴⁸⁶ *Best v Osborne* (1825) Ry & Mood 290, where the standard of soundness was said to be ‘perfection.’

¹⁴⁸⁷ *Coates v Stephens* (1838) 2 M & Rob 157. Footnote (a) to the report gives the source for Parke B’s judgement as the treatise *The Horse*, actually written by Coates, and remarks on the inherent uncertainty in the terms ‘natural’ and ‘structure.’ The test for ‘structure’, and a new category of behavioural defects known as ‘vice’, was applied in *Scholefield v Robb* (1842) 2 M & Rob 210.

¹⁴⁸⁸ See *Joliff v Bendell, supra* (n1473), considering the relevance of the disease being in the sheep’s ‘blood.’

¹⁴⁸⁹ For criticism, see Surtees, v. The problem relates to fluidity: (1) scientific concepts change, and sometimes rapidly grow, over time; (2) in their pre-paradigmatic stage, scientific theories and concepts are highly contestable; and (3) such concepts are often synchronic, either definitionally (e.g. an ongoing process) or because they can be falsified by subsequent events. If the law uses scientific concepts for its own, it is forced to keep up with new discoveries: (Feldman 2009); and (Anon 1847b), 287.

¹⁴⁹⁰ *Kiddell v Burnard* (1842) 9 M & W 668; Parke B strongly opposed a test which determined unsoundness based on subsequent events.

¹⁴⁹¹ *Holliday v Morgan* (1858) 1 EL & EL 1, 5 counsel trying to argue that a congenitally misshaped eye was not a defect; judges conclude that the defect need not arise from a *disease* or *changed structure*, but could be present from birth.

¹⁴⁹² Cases at lower levels of adjudication continued to be reported, see Lawrence (1846 cases), and the various cases reported in the *Veterinarian*, continued to the final edition, *Veterinarian v.53* (1879), 650. Veterinary surgeons seem to have become more involved in arbitration, e.g. *Watson v Denton* (1835) 7 Car & P 85; and the establishment of the Royal College of Veterinary Surgeons in 1844, and subsequent register of members, may have pushed ‘soundness’ further into the realm of fact. In trade practice, it seems to have become the norm to get a veterinary surgeon’s certificate, see *Howard v Sheward* (1866) 36 L.J.C.P. 42. For an interesting (veterinarian) analysis, see *The Veterinarian* (1869), v42, 332, 333, arguing, first, that barristers strategically conflated fact (e.g., scientific terms) and law, and, second, that litigation could be reduced by more routinely bringing in surgeons at the time of sale. Many thanks to Jane Davidson for her help on the professionalisation of veterinary surgeons.

whether there was an express warranty, leaving it all to construction. A uniform rule of caveat emptor was established in the early 19th century on basic liberal principles,¹⁴⁹³ colourfully described by Llewellyn as the law ‘hitting bottom and meeting bilge.’¹⁴⁹⁴ Nonetheless, caveat emptor is by no means *socially* complete and the judiciary, accordingly, sought to adjust case outcomes for policy reasons.¹⁴⁹⁵ The earliest cases were barely distinguished from the mass of ‘horse’ contracts; this was a necessary first step given the special characteristics of horse sales.¹⁴⁹⁶ *Gardiner v Gray* can rightfully be seen as the first ‘landmark’ case protecting consumers. The legacy of *Gardiner* was, however, muddy. As with other areas, judges trialled a variety of justifications for implied warranties, much as they did for the rule on goods separation and horse ailments, until one canonical definition was reached.¹⁴⁹⁷ Mitchell outlines four distinct grounds for implying a warranty of quality: (1) the sale involved manufactured goods; (2) inspection of the goods was impossible; (3) the purchaser could not exercise their judgment in selecting the goods; and (4) the description of the goods contained an implicit warranty. The last of these, ‘description’, was the most important doctrinally and, initially, was not distinguished from the issue of warranty.¹⁴⁹⁸ *Gardiner*, for example, was partially reasoned as a case of the goods (waste silk) not matching their denomination.¹⁴⁹⁹ These justifications, though often producing the same outcome, have important differences. Using ‘description’ as the legal ground implies the parties had intended to warrant the quality of goods, the courts were merely unpacking their language as a matter of (factual) construction. Conversely, an implied warranty arises from the circumstances as a whole - such as the inability, as in *Gardiner*, for the parties to inspect - and more directly raises the potential for legal, rather than factual, rulings. As we will see below, they also had important remedial differences. By 1824, these justifications had been separated, leading to an array of cases implying warranties on the various grounds noted above. These were added to in *Barr v Gibson*, introducing another distinction between ‘specific’ and ‘non-specific’ goods which cut across the existing justifications.¹⁵⁰⁰ The capstone of these various experiments - the *Kiddell* of implied warranties - was *Jones v Just* (1868).¹⁵⁰¹ *Jones* attempted to review and consolidate the prior cases, and in doing so provide a general formulation which could thereby

¹⁴⁹³ See Campbell in *Gray v Cox* (1824) 1 Car & P 184, 186; *Broennenburgh* (1817) *supra*, 632, fn* affirming caveat emptor as the default. The leading case was *Parkinson v Lee* (1802) 2 East 314. In *Parkinson*, counsel provides stock liberal arguments, 320: “every person entering into a contract in the course of trade is presumed to have a competent skill to enable him to judge of the commodity he bargains for.” He also insists on the difficulty of drawing lines and the potential for creating law. This was accepted by the judges, 321-5, noting the lack of fraud and the responsibility of the buyer, who had inspected the goods, to exercise his own judgment. For discussion, see Llewellyn (*supra* n1463), 717, fn 56.

¹⁴⁹⁴ Llewellyn, *supra* (n1463), 718.

¹⁴⁹⁵ E.g. *Jones v Bright* (1829) 5 Bing. 533, Ibbetson *supra* (n1463), 45-6 for discussion of the more strident alternate report. Best CJ clearly intended to take a proactive, paternalistic role. cf Burroughs J. See also Lobban, 467-8, *supra* (n975), referring the judicial pursuit of ‘fairness.’

¹⁴⁹⁶ See Ibbetson, *ibid*, 43-4, citing Sewlyn’s *Nisi Prius* (1806), 584-5; Mitchell *supra* (n138), 648-50, noting the extensive warranty system for horse sales ensured no implied warranty was needed.

¹⁴⁹⁷ For criticism, and a neater analytical framing, see (Stoljar 1952) 435, 445.

¹⁴⁹⁸ Mitchell *supra* (n138). The most obvious examples were *Jones v Bowden* (1813) 4 Taunt 847, 852 (pimento and sea-damaged pimento, turning on different entries in a commercial catalogue) and *Bridge v Wain* (1816) 1 Stark N.P.C. 504 (scarlet cuttings, though the alternative, ‘worthless scarlet cuttings’ is dubious).

¹⁴⁹⁹ Although later emphasis was placed on the lack of opportunity for inspection, see Ibbetson *supra* (n1463) fn(41).

¹⁵⁰⁰ *Barr v Gibson* (1838) 3 M. & W. 390, argued on entirely different grounds to the warranty cases. Stoljar, *supra* (n1497), 399-401.

¹⁵⁰¹ LR 3 QB 197.

replace them. *Jones*'s formulation¹⁵⁰² was then eventually codified in the Sale of Goods Act s14 and s15. In evaluating the growth-paths of 'consumer protection' provided by the judiciary, it is important to bear two facts in mind. The first is that whilst the judiciary expanded the scope of implied warranties, the total coverage was small,¹⁵⁰³ in part due to Parke B's interventions,¹⁵⁰⁴ and probably extended little beyond that which merchants themselves expected. It was only until the early-20th century that the judiciary started expanding protection again by extending the definitions of 'sale by description' and 'sale for a particular purpose.'¹⁵⁰⁵ The second, more profound, is that this qualified expansion was not a strict reversal of laissez-faire. The cases only imposed *implied* warranties of quality: provided the parties used express terms, the protection was excluded. In Llewellyn's words, the law can shift quite far towards *caveat venditor* "without disturbing business, or disturbing the unregulated character of business competition."¹⁵⁰⁶ The law of implied warranties was not intended to, nor could it, firmly regulate the economy.¹⁵⁰⁷ In these interconnected ways, the courts once again managed to outsource decision-making from the common-law, trusting instead private-ordering¹⁵⁰⁸ and, in the later years of the 19th century, more strident interventions from Parliament.

3.3 The Propensity to Truck and Barter

The law of sale is theoretically the purest contract: the agreed exchange of property rights in one item for those in another according to the conditions articulated by the parties. It is the counterpart of Leake's perfectly abstract individual and represents, arguably, the completed process of capitalist commodification.¹⁵⁰⁹ In practice the development of the doctrines and their final forms were significantly less elegant. We can comment on three interesting lexi-generative features of the development of the law of sale. The first is the same pattern found in the general part: mandatory aspects of the law generating most of the surrounding defaults, with only a relatively small pocket of 'true defaults.' One cause can be seen in the law of warranty of quality: here, courts deliberately avoided regulating bargains too closely, deferring to sophisticated contextual drafting practice, and the body of precedents was therefore

¹⁵⁰² Cf *Randall v Newson* (1877) 2 QBD 102, which attempted to turn the question of implied warranties into one of construction (of the 'description' intended by the parties), eliding the question of description and warranty once again. An earlier attempt can be found in Martin B's judgment in *Turner v Mucklow* (1862) 6 L.T. 690, 692.

¹⁵⁰³ For further limitation, see *Budd v. Fairman* (1831) 8 Bing. 48, 52 and *Dickson v. Lizinia* (1851) 10 C. B. 602, 608 finding an express warranty typically precludes an implied warranty as a matter of construction; cf *Bigge v. Parkinson* (1862) 7 H. & N. 955, 961-2.

¹⁵⁰⁴ The rule as to specific goods applied even to the sales of foodstuffs, see *Emmert v. Mathews* (1862) 7 H. & N. 586, 592-4; *Smith v Baker* (1878) 40 L.T. 261. These were apparently overruled, albeit indirectly via jury verdict, in *Cointat v Myham* [1913] 2 K.B. 220.

¹⁵⁰⁵ (Stoljar 1952) 438-445; (Stoljar 1953), 179-80.

¹⁵⁰⁶ Llewellyn *supra* (n1463), Lobban *supra* (n78), 473-4. In particular, see Mercantile Law Commission, 2nd Report, PP 1854-5 [1977], xviii, 653, at p. 10, cited in Lobban.

¹⁵⁰⁷ Lobban, *ibid* 477.

¹⁵⁰⁸ *ibid*, 475-7;

¹⁵⁰⁹ (Pashukanis 1924)

correspondingly small. Second, the presence or absence of contingency in these defaults. The boundless horse-warranty learning appears to owe much of its existence to early judges, such as Lord Ellenborough, and the precedent-hungry reporters. In contrast, it is hard to imagine a world without the defaults on *time*. Here, we trace a potentially deeper lexi-generative dynamic relating to *standardisation*: the same widespread dynamics pushing for economic standardisation – for example, in weights and other technical standards – appear to apply also to legal formalisation. Time is perhaps the strongest example of this as it is almost inconceivable that private parties could create their own private standards for timekeeping. Third, the divided courts of the common law often appeared to trial – whether deliberately or not – multiple case-lines for the same doctrinal question. Whether this led to superior results is an open question. On one hand, the various justifications for soundness, separability, and implied warranties of quality worked like experiments in the ‘free marketplace of doctrines’ which were slowly falsified through experience and the test of collective judicial wisdom. On the other, some such ‘experiments’ like implied warranty of quantity, were never resolved. Here, the over-determination of doctrinal solutions was the product of simple confusion, ambiguity, and an inability to disentangle concepts left over from the old pleading paradigm, rather than any slow process of testing solutions.¹⁵¹⁰ It is in the quagmire of centuries of simultaneously formally-binding and utterly confused doctrines that the dream of *calculating with our concepts* is at its most distant.

¹⁵¹⁰ (Thomas 2014)

Conclusion

In this thesis, I have attempted to track the growth of legal complexity in the English legal system from 1750-1914. I have made many claims throughout; the most central are: (1) there was a rise in litigation from 1750 onwards which triggered greater substantive law; (2) in turn, this produced a rise of substantively reasoned case reports; (3) the expansion of substantive law (a) altered legal procedures and the precedent system at a fundamental level; (b) led to a new genre of legal literature premised on techniques of abstraction; and (c) was normatively relevant both to constitutional theories of the courts' law-making power, and the proper role of law in the economy; and (4), was mediated, through the concept of 'legal certainty', by textbook writers and judges.

Much of what I have written will have to be qualified in its details but I believe the pattern is sound. In producing this sketch, I have also tried to develop new concepts and ideas for the study of legal history. Most prominently, I used the Ibbetson and Bell *Feedback Model* to generate hypotheses about legal development. Some hypotheses I attempted to test were the relevance of legal logistics; the possibility of legal overhangs in a legal system with stable feedback; the differences between procedure and substantive law regarding legal complexity; the possible path-dependent development of default rules; the link between formal precedent and personnel coordination; and a menu of lexi-generative factors and patterns, including their different qualities and tempos of law-creation.

Overall, the aim of the thesis has been to show the relevance of *quantity* to legal development: its connections to legal complexity; to politics and morality; the economy; legal evolution; legal institutions and procedure; the content of substantive legal doctrines; legal literature; professional and judicial specialisation; and, at the deepest level, the philosophy of the common law method. The great bounty of legal wisdom produced in the early-19th century slowly turned into a deluge of anonymous formal content, one which had to be managed, massaged, categorised, and manipulated. Despite the novel use of statistics in doctrinal explanation, my thesis remains critically limited, not merely in investigating the quantities of law - barely touching the local courts - but in the kind of questions it can answer.

No-one denies law is getting more complicated but it remains an open question whether, and to what extent, this complexity is necessary. Influential legal historians, such as Simpson, Milsom, and Baker, and many of the critical legal scholars, are sceptical of the accumulation of legal complexity.¹⁵¹¹ To them, it

¹⁵¹¹ (Baker 2002), Ch 5 End of the Common Law System; (Milsom 1981a) 9-10; Simpson, *supra* (n16), 401.

serves no useful purpose, either manifesting as the pathology of legal scholars allowed to run wild or as an obfuscating legitimising strategy. I believe much of this complexity is inevitable so long as we need legal certainty across large distributions of merchants and adjudicators. This follows from the secular, inductive, and positivistic model of law in Chapter 1: law is ultimately formed from mundane social information - like 'horse roaring' or 'pig iron delivery' - and is therefore not reducible to a series of basic axioms. At most, it can be more efficiently abstracted and categorised. I have also attempted to show how this process is inherently political and how managing complexity is inextricably tied to institutional authority and competency. What I have left open are exciting forward-looking questions: to what extent is legal complexity inevitable; what happens if it continues to increase and the legal system becomes larger, slower, and more expensive? Can *new* methods be developed, as they were in the 19th, to manage legal complexity? And, most importantly of all, what impact will these methods have on authority and power, and with what principles appropriate to the present ought their use be guided?

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3 Statutes

Year	Statute Name	Statute Reference
1335	Exchange of Gold and Silver Act	9 Ed 3 1
1349	Victuals shall be sold at reasonable prices.	23 Ed 3 6
1351	Exchange of Gold and Silver Act	25 Ed 3 12
1266	Assize of Bread and Ale	51 Hen 3 c. 1
1401	Exportation of gold or silver	2 H 4 5
1424	Exportation of Gold or Silver Act	2 H 6 6
1424	Measures Act 1423	2 H 6 14
1549	Buying of Cattle Act	3 & 4 Ed 6 c 19
1554	Exportation Act	2 & 3 Phil & Mary 7
1562	Corn Act	5 Eliz. c. 12
1563	The Act for the Relief of the Poor	5 Eliz. c. 4, s26
1709	Stamps Act	8 Ann C.5, s.18
1720	Journeyman Tailors, London Act	7 Geo 1, st 1, c. 13
1754	Frauds in Manufacture of Clocks, etc. Act	27 Geo 2 c. 7
1768	Journeyman Tailors, London Act	8 Geo 3 c. 17
1777	Bricks and Tiles Act	17 Geo 3 c. 42

1779	Payment of Lace Makers' Wages Act	19 Geo 3 c 49
1785	Excise (No 3) Act	25 Geo 3. c.74, s25
1796	Combination of Workmen Act	36 Geo 3 c 111
1802	Duties on Beer Act	42 Geo 3 c .38
1809	Woollen Manufacture Act	49 Geo 3 c 109
1822	Repeal of Acts Concerning Imports Act	3 Geo 4 c 41
1822	London Bread Trade Act	3 Geo. 4. c. cvi
1823	Master and Servant Act	4 Geo. 4. c. 34
1824	Weights and Measures Act	5 Geo 4. c. 74
1825	Combinations of Workmen Act	6 Geo 4, c. 129
1827	Excise on Malt Act	7 & 8 Geo 4 c. 52
1830	Beerhouse Act	11 Geo 4 & 1 Will 4, c. 64
1830	Law Terms Act	11 Geo. 4 & 1 Will. 4 c. 70
1831	Truck Acts Repeal Act	1 & 2 Will 4 c 36
1832	Coinage Offences Act	2 & 3 Will. 4. c. 34
1833	Excise Duties, etc., on Tiles Repeal Act	3 & 4 Will 4 c 11
1836	London Bread Trade Act	6 & 7 Will 4 c.37 1836
1844	Butter and Cheese Trade Act	7 & 8 Vict. c. 48
1844	Forestalling, Repeating, etc. Act	7 & 8 Vict. c 24
1845	The General Railway Consolidation Act	8 & 9 Vict. c. 16
1849	The Bankrupt Law Consolidation Act	12 & 13 Vict. c. 106, s 233
1852	The Common Law Procedure Act	15 and 16 Vic., c. 76
1854	The Common Law Procedure Act	17 & 18 Vict. c.125
1867	Sale of Reversions Act	31 & 32 Vict. c. 4,
1869	Bankruptcy Repeal and Insolvent Court Act	32 & 33 Vict. c. 83, s. 20
1870	Inland Revenue Repeal Act	33 & 34 Vict. c. 99
1870	Married Women's Property Act	33 & 34 Vict. c. 93
1874	Infants Relief Act	37 & 38 Vict. c. 62
1875	Conspiracy and Protection of Property Act	38 & 39 Vict. c. 86
1880	Definition of Time Act	43 & 44 Vict c. 9 s1
1882	Bills of Exchange Act	45 & 46 Vict. c. 61
1882	Married Women's Property Act	45 & 46 Vict. c. 75
1889	Interpretation Act	52 & 53 c 63
1890	Partnership Act	53 & 54 Vict. c. 39
1892	Statute Law Revision Act	55 & 56 Vict. c. 19
1893	Sale of Goods Act	56 & 57 Vict. c. 71

1893	Married Women's Property Act	56 & 57 Vict. c. 63
1906	Marine Insurance Act	8 Edw. 7. c. 41

4 Parliamentary Papers, Docket Rolls, and Entry Books

4.1 Parliamentary Inquiries and Reports

<i>Title</i>	<i>Year Published</i>	<i>Reference</i>
RC Practice and Proceedings of the CL		
Royal Com. on Practice and Proceedings of Superior Courts of Common Law. First Report.	1829	Paper Number: 46 Volume: 9. IX.1
Royal Com. on Practice and Proceedings of Superior Courts of Common Law, Second Report.	1830	Paper Number: 123 Volume: 11. XI.547
Royal Com. on Practice and Proceedings of Superior Courts of Common Law, Third Report.	1831	Paper Number: 92 Volume: 10. X.375
Pleading Reform Reports		
Royal Com. to inquire into Process, Practice and System of Pleading in Superior Courts of Common Law. First Report.	1851	Paper Number: 1389 Volume: 22. XXII.567
Royal Com. to inquire into Process, Practice and System of Pleading in Superior Courts of Common Law, Second Report.	1852	Paper Number: 1626 Volume: 40. XL.701
Additional Judicial Statistics		
Warrant under which Court of Common Pleas was opened to King's Counsel and Outer Barristers, April 1834. Number of Actions commenced in Courts of Law, 1829-40	1840	Paper Number: 260 Volume: 41. XLI.85
Return of Numbers of Civil Cases, Special Cases, and Rules to show Cause for New Trials, in Court of King's Bench, 1814-21	1821	Paper Number: 676 Volume: 21. XXI.395
Reports on Statute Law		

Law Revision Committee Fourth Interim Report by Great Britain. Law Revision Committee.	1934-5	Paper Number: Cmd. 4770 Volume: 10. X.427
Report of B. Ker to Lord Chancellor on Proceedings of Board for Revision of Statute Law. First Report.	1854	Paper Number: 301 Volume: 24. XXIV.153
Abstract of Expurgatory List of Statutes prepared by Messrs. Anstey and Rogers, late Coms. of Statute Law	1854	Paper Number: 36 Volume: 43. XLIII.409.
Law Revision Committee Fourth Interim Report	1934-5	Paper Number: Cmd. 4770 Volume: 10. X. 427
Departmental Committee on the Law and Practice with regard to the constitution, qualifications, selection, summoning, &c., of Juries; Evidence and Appendices (Juries: Jury Law and Practice)	1913	Paper Number: Cd. 6818 Volume: 30. XXX. 463

4.2 Judicial Statistics

<i>Title</i>	<i>Year Published / Year Covering</i>	<i>Reference</i>
Report From the Common Law (Judicial Business) Commissioners; Together with the Minutes of Evidence and Appendix	1857 / 1856	Paper Number: 2268 Volume: 21. XXI.1
Judicial Statistics 1857, England and Wales	1858/1857	Paper Number: 2407 Volume: 57. LVII.383
Judicial Statistics 1858, England and Wales	1859/1858	Paper Number: 2508 Volume: 26. XXVI.339
Return of Judicial Statistics of England and Wales, 1859	1860/1859	Paper Number: 2692 Volume: 64. LXIV.473
Return of Judicial Statistics of England and Wales, 1860	1861/1860	Paper Number: 2860 Volume: 60. LX.477
Return of Judicial Statistics of England and Wales, 1861	1862/1861	Paper Number: 3025 Volume: 56. LVI.491
Return of Judicial Statistics of England and Wales, 1862	1863/1862	Paper Number: 3181 Volume: 65. LXV.437

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Return of Judicial Statistics of England and Wales, 1866	1867/1866	Paper Number: 3919 Volume: 66. LXVI.523
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Return of Judicial Statistics of England and Wales, 1873	1874/1873	Paper Number: C.1055 Volume: 71. LXXI.1
Return of Judicial Statistics of England and Wales, 1874	1875/1874	Paper Number: C.1315 Volume: 81. LXXXI.1
Return of Judicial Statistics of England and Wales, 1875	1876/1875	Paper Number: C.1595 Volume: 79. LXXIX.1
Return of Judicial Statistics of England and Wales, 1876	1877/1876	Paper Number: C.1871 Volume: 86. LXXXVI.1
Return of Judicial Statistics of England and Wales, 1877	1878/1877	Paper Number: C.2154 Volume: 79. LXXIX.1
Return of Judicial Statistics of England and Wales, 1878	1879/1878	Paper Number: C.2418 Volume: 76. LXXVI.1
Return of Judicial Statistics of England and Wales, 1879	1880/1879	Paper Number: C.2726 Volume: 77. LXXVII.1
Return of Judicial Statistics of England and Wales, 1880	1881/1880	Paper Number: C.3088 Volume: 95. XCV.1
Return of Judicial Statistics of England and Wales, 1881	1882/1881	Paper Number: C.3333 Volume: 75. LXXV.1
Return of Judicial Statistics of England and Wales, 1882	1883/1882	Paper Number: C.3763 Volume: 77. LXXVII.1
Return of Judicial Statistics of England and Wales, 1883	1884/1883	Paper Number: C.4170 Volume: 86. LXXXVI.1
Return of Judicial Statistics of England and Wales, 1884	1885/1884	Paper Number: C.4518 Volume: 86. LXXXVI.1
Return of Judicial Statistics of England and Wales, 1885	1886/1885	Paper Number: C.4808 Volume: 72. LXXII.1
Return of Judicial Statistics of England and Wales, 1886	1887/1886	Paper Number: C.5155 Volume: 90. XC.1
Return of Judicial Statistics of England and Wales, 1887	1888/1887	Paper Number: C.5553 Volume: 108. CVIII.1

Return of Judicial Statistics of England and Wales, 1888	1889/1888	Paper Number: C.5882 Volume: 85. LXXXV.1
Return of Judicial Statistics of England and Wales, 1889	1890/1889	Paper Number: C.6164 Volume: 80. LXXX.1
Return of Judicial Statistics of England and Wales, 1890	1891/1890	Paper Number: C.6443 Volume: 93. XCIII.1
Return of Judicial Statistics of England and Wales, 1891	1892/1891	Paper Number: C.6734 Volume: 89. LXXXIX.1
Return of Judicial Statistics of England and Wales, 1892	1893/1892	Paper Number: C.7168 Volume: 103. CIII.1
Return of Judicial Statistics of England and Wales, 1893	1894/1893	Paper Number: C.7510 Volume: 95. XCV.1
Return of Judicial Statistics of England and Wales, 1894 (Part II – Civil Judicial Statistics)	1896/1894	Paper Number: C.8263 Volume: 94. XCIV.207
Return of Judicial Statistics of England and Wales, 1895 (Part II – Civil Judicial Statistics)	1897/1895	Paper Number: C.8536 Volume: 100. C.205
Return of Judicial Statistics of England and Wales, 1896 (Part II. Civil Statistics)	1897/1896	Paper Number: C.8838 Volume: 104. CIV.197
Return of Judicial Statistics of England and Wales, 1897 (Part II – Civil Judicial Statistics)	1899/1897	Paper Number: C.9204
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Judicial statistics, England and Wales, 1899	1901/1899	Paper Number: Cd. 659, 705 Volume: 89. LXXXIX
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Judicial statistics, England and Wales, 1901	1903/1901	Paper Number: Cd. 1441, 1588 Volume: 83. LXXXIII
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Judicial statistics, England and Wales, 1904	1906/1904	Paper Number: Cd. 2871, 2945 Volume: 135. CXXXV
Judicial statistics, England and Wales, 1905	1907/1905	Paper Number: Cd. 3315, 3477 Volume: 98. XCVIII
Judicial statistics, England and Wales, 1906	1908/1906	Paper Number: Cd. 3929, 4029 Volume: 123. CXXXIII

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Judicial statistics, England and Wales, 1910	1912/1910	Paper Number: Cd. 6071, 6047 Volume: 110. CX.1
Judicial statistics, England and Wales, 1911	1912/1911	Paper Number: Cd. 6602, 6650 Volume: 110. CX.351
Judicial statistics, England and Wales, 1912	1914/1912	Paper Number: Cd. 7282, 7267 Volume: 100. C.1
Judicial statistics, England and Wales, 1913	1914-16/1913	Paper Number: Cd. 7767, 7807 Volume: 82. LXXXII.1

4.3 KB Docket Rolls and Entry Books

Docket Book References

<i>Year</i>	<i>Reference</i>
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1775	IND 1/6244 IND 1/6243
1785	IND 1/6264 IND 1/6263
1796	IND 1/6285 IND 1/6286
1820	IND 1/6333
1830	IND 1/6363
1837	IND 1/6367
1838	IND 1/6269 IND 1/6370
1839	IND 1/6371 IND 1/6372

Entry Books

<i>Year</i>	<i>Reference</i>
1740	KB 168/10
1750	KB 168/13
1761	KB 168/17

1770	KB 168/84
1778	KB 168/23
1780	KB 168/25
1789	KB168/34
1800	KB 168/44
1810	KB 168/54
1820	KB 168/64
1823	KB 168/67
1830	KB 168/74
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1870	KB 168/119 KB 168/118
1874	KB 168/126
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5 Reporters and Judicial Handbooks

5.1 Law Reports

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T Peake, *Cases Determined at Nisi Prius in the Court of the King's Bench , &c. From the Sittings After Easter Term 30 Geo III. To the Sittings After Michaelmas Term 35 George III. Both Inclusive*, (London 1795)

TH Acton, *Reports of Cases Argued and Determined Before the Most Noble and Right Honorable the Lords Commissioners of Appeals in Prize Causes*, Vol I (Strahan, 1811)

John Leycester Adolphus and Thomas Flower Ellis, *Reports of cases argued and determined in the Court of King's bench : With tables of the names of the cases argued and cited, and the principal matters*, Vol I (Saunders and Benning, 1835)

A Anstruther, *Reports of cases in the Court of Exchequer, from Easter Term 32 George III. to Trinity Term 33 George III, both inclusive*, Vol I (London, 1796)

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J Burrow, *Reports of Cases Argued and Adjudged in the Court of King's Bench*, Vol 2 (London, 1st edition, 1794)

M Cababé and CG Ellis *Reports of Actions Tried in the Queen's Bench Division of the High Court of Justice*, Vol 1 (Maxwell, 1885)

H Cowper *Reports of Cases Adjudged in the Court of King's Bench, during the reign of King George III, 1774-1778*, Vol 1 (Dublin, 1st edition, 1800)

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S Douglas, *Reports of Cases Argued and Determined in the Court of King's Bench*, Vol 2 (Dublin, 1786)

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1806	<ul style="list-style-type: none"> • 2R 440 HLS 723688 No. 21 after Trin. 1806- H-1929-mf. 41-42 • 2R 441 HLS 723689 No. 22: after Mich. 1806 H-1929-mf. 43-44
1810	<ul style="list-style-type: none"> • 2R 455 HLS 723703 No. 36: after Hil. 1810- H-1929-mf. 71-73 • 2R 456 HLS 723704 No. 37: after Pas. 1810- H-1929-mf-76-77 • 2R HLS 723705 No. 38: Aug. 1810- H-1929-mf. 76-77 • 2R 458 HLS 723706 no. 39: after Mich. 1810- H-1929-mf. 78-79.
1814	<ul style="list-style-type: none"> • 2R 473 HLS 723721 No. 54: 24 Feb. 1814- H-1929-mf. 108-109 • 2R 474 HLS 723722 No. 55: 20 April 1814- H-1929-mf. 110-111 • 2R 475 HLS 723723 No. 56: 6 June 1814- H-1929-mf. 112-113 • 2R 476 HLS 723826 No. 57: 22 July 1814- H-1929-mf. 114-115 • 2R 477 HLS 723827 No. 58: after Mich. 1814- H-1929-mf. 116-117.
1817	<ul style="list-style-type: none"> • 2R 486 HLS 723731 no. 67: after Hil. 1817- H-1929-mf. 134-135 • 2R 487 HLS 723732 No. 68: Pas. 1817 H-1929-mf. 136-137 • 2R 488 HLS 723733 No. 69: Trin. 1817- H-1929-mf. 138-139 • 2R 489 HLS 723734 No. 70: 14 Jan. 1818- H-1929-mf. 140-141.

Lord Ellenborough (Nisi Prius, motions in banc and motions for new trials, CJKB)

Year	References
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1817	<ul style="list-style-type: none"> • 2R 583 HLS 723775 1816- Hil. 1817 (pp. 86-) H-1929-mf. 303.

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