A W B SIMPSON'S, 'THE HORWITZ THESIS AND THE HISTORY OF CONTRACTS' (1978-1979) 46 *UNIVERSITY OF CHICAGO LAW REVIEW* 533

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I INTRODUCTION

A W Brian Simpson, who died in 2011, was a scholar of many parts.[1] In his posthumously published, *Reflections on 'The Concept of Law'*,[2] he utilised Isaiah Berlin's famous distinction between two types of thinkers: the hedgehog and the fox.[3] Berlin himself borrowed the idea from Archilochus, the Ancient Geek poet who wrote that, 'The fox knows many things. The hedgehog knows one thing'.[4] The hedgehog, according to Simpson, sees 'simplicity concealed beneath apparent complexity'. The fox on the other hand, 'emphasises complexity, and the profound difficulty in generalization or simplification in the face of the evidence'.[5] Whilst Simpson conceded[6] that the dichotomy is an imperfect one,[7] he clearly saw himself as a fox. There are fox-like characteristics in abundance in a series of essays collected in the 1990s as *Leading Cases in the Common law*.[8] It will probably be for his contextual study of law, or 'legal archaeology',[9] that Simpson will be remembered.[10]

Simpson's 1979 article was a very different enterprise. It was written in response to a paper by Morton Horwitz that was first published in 1974,[11] and which a few years

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1 Christopher McCrudden, 'Alfred William Brian Simpson' in Ron Johnston (ed), *Biographical Memoirs of Fellows of the British Academy, XI* (Oxford University Press, 2012) 547-80; David Sugarman, 'Brian Simpson's Approach to Legal Scholarship and the Significance of Reflections on 'The Concept of Law' (2012) 3 *Transnational Legal Theory* 112.

2 (Oxford University Press, 2011).

3 Isaiah Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (Weidenfeld & Nicholas, 1953).

4 For a discussion, see CM Bowra, 'The Fox and the Hedgehog' (1940) 34 *The Classical Quarterly* 26.

5 Simpson, above n 2, 125.

6 Ibid, 125.

7 The defects may be more serious than Simpson was perhaps prepared to recognise: James Allan, 'Fantastic Mr Fox' (2012) 23 *King's Law Journal* 329; Sugarman, n 1, 117-18.

8 (Oxford University Press, 1995).

9 Ibid 12.

10 Other important works of Simpson which adopt a similar approach in very different contexts are: *Cannibalism and the Common Law* (University of Chicago Press, 1984); *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Oxford University Press, 1992); *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2001). For Simpson's own thoughts on these works, see Simpson, above n 2, 132-36.

11 'The Historical Foundations of Modern Contract Law' (1973-1974) 87 *Harvard Law Review* 917.

later formed much of chapter six of *The Transformation of American Law 1780-1860.*[12] Horwitz's main thesis is evident from the title of his monograph.

As Simpson made clear both at the time and subsequently,[13] it was not his intention to examine the broad argument, 'but rather its particular application to certain aspects of contract law'.[14] Within these self-imposed limits however, he ranged widely. Features of Simpson's best writing are present in abundance. His arguments are clear and accessible to those who are non-experts in the area.[15] Evidence is accumulated one piece at a time. There is a healthy scepticism about the value of a grand overarching theory and a nice smattering of polemic. In this respect, Horwitz gets off rather more lightly than his fellow American luminary Grant Gilmore, the author of *The Death of Contract*,[16] about whom Simpson wrote that, 'He brought to the subject the confidence not simply of a hedgehog, but of an arrogant, happy, and ignorant hedgehog'.[17] Simpson had a good line in old-fashioned Oxford vituperation which was no respecter of status.[18] In a review of Lord Denning's *What Next in the Law*, he observed that, 'There is also much history, presented in a chatty style uncomplicated by heavy scholarship'.[19] Horwitz was a very different subject. Unlike Gilmore[20] or Lord Denning, he is a serious legal historian who deserves to be taken seriously. Although the disagreement is profound, Simpson never does anything less than afford him that courtesy. The issues at stake were larger in other respects too. This goes to the heart of why the article is such an important one. Here are two significant scholars, whose views differ quite profoundly, doing battle. Simpson's article also reflects divisions in approach towards legal history which although it cannot entirely be categorised by geography, gives a flavour of trans-Atlantic differences in legal historical scholarship.[21]

II THE PROTAGONISTS: SIMPSON AND HORWITZ

After seventeen years as a Fellow of Lincoln College, Simpson left Oxford in 1972 for a Chair at the University of Kent. He arrived as a visiting Professor at the University of Chicago in 1979. Not very long afterwards he would join the permanent faculty before leaving for the University of Michigan in 1987.[22] At the time that his article was written, Simpson had a well established reputation as a historian of the law

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12 (Harvard University Press, 1977).

13 'The Horwitz Thesis and the History of Contracts' (1979) 46 *University of Chicago Law Review* 533; Simpson, above n 2, 137 n 32.

14 Simpson, above n 2, 533.

15 I must confess to struggling to follow some parts of his *An Introduction to the History of the Land Law* (Oxford University Press, 1961). Simpson would describe this work as 'a simple student text', see Simpson, above n 2, 131.

16 (Ohio State University Press, 1974).

17 Simpson, above n 2, 130.

18 Anyone who has spent any time in Oxford will immediately recognise the style, which it should be said can occasionally be found in Cambridge. On the use of language at Oxford, see Peter Snow, *Oxford Observed* (John Murray, 1991) 145-46.

19 'Soft Spur' *London Review of Books* 3 Feb 1983, 22-23

20 Ironically Gilmore also wrote a review of Horwitz's book which was not wholly uncritical: Grant Gilmore, 'From Tort to Contract: Industrialisation and the Law' (1976-1977) 86 *Yale Law Journal* 788.

21 There are a number of distinguished American writers whose approach might be characterised as more doctrinal including Professors Donahue, Helmholz, and Oldham.

22 On Simpson in the United States, see R H Helmholz, 'Brian Simpson in the United States' in Katherine O'Donovan and Gerry Rubin (eds), *Human Rights and Legal History Essays in Honour of Brian Simpson* (Oxford University Press, 2000) ch 12.

of contract. His *A History of the Common Law of Contract*[23] was published a few years earlier. This work stopped at the Statute of Frauds in 1677. The preface of his *History* gives a flavour of the methodology that he applied:

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

The same sort of approach was used in a significant article on nineteenth century contract law, published in the *Law Quarterly Review* in 1975.[25] The merits of this type of legal history are conspicuously on display in his *Chicago Law Review* article as well. Yet, writing just before his death, Simpson rather mournfully concluded that work of this sort 'belongs to a genre that has become unfashionable, and proceeds on the assumption that law can legitimately be studied as an autonomous discipline'.[26] The 'unfashionable' approach is often characterised as internal legal history.[27] Legal development is examined from within the law from the perspective of those who are part of the legal process: the litigants, lawyers, judges, and legal writers. Internal legal history is sometimes contrasted with external legal history: or that which looks at legal development from outside the legal system. This division is sometimes seen as reflecting a difference between those who are trained historians, and those who are trained lawyers. The leading English legal historians from Maitland, through to Milsom and Baker, are almost exclusively in the second category.[28] On closer examination however, the division is never really an absolute one. Legally trained legal historians are perfectly well aware that legal development occurs within a social context.[29]

A very different and more radical sort of legal history began to emerge during the 1970s.[30] As a result, the discipline, at least in the United States, began to move in an entirely new direction. Morton Horwitz and his Harvard colleague, Duncan Kennedy,[31] were pivotal figures. Whilst not all of the Critical Legal Studies scholars were historians, history had a crucial place in the narrative.[32] These writers criticised the

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23 (Oxford University Press, 1975).

24 Ibid vii.

25 A W B Simpson, 'Innovation in Nineteenth Century Contract Law' (1979) 46 *Law Quarterly Review* 247.

26 Simpson, above n 2, 132.

27 David Ibbetson, 'What is Legal History a History of?', in Andrew Lewis and Michael Lobban (eds), *Law and History* (Oxford University Press, 2004) 33-40.

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

29 For example, see S F C Milsom, *The Legal Framework of English Feudalism* (Cambridge University Press, 1976) 243-59.

30 It had roots in earlier work, particularly legal realism and the important work of the so-called 'Wisconsin School'. For an account of the legal historiography of the last fifty years, see K J M Smith and J P S McLaren, 'History's living legacy: an outline of modern historiography of the common law' (2001) 21 *Legal Studies* 251.

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

32 Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987) ch 7.

conservatism of traditional forms of legal history.[33] They saw themselves as setting a new agenda.[34] Legal change, it was argued, was not neutral but ideologically and economically driven. The Critical Legal Studies movement has never made any attempt to disguise the left-wing (sometimes extremely left-wing) political sympathies of its adherents.[35] In contrast, Simpson was 'an English liberal to his core'.[36] His objections to Horwitz's views were evidential and not political.[37] He was just as happy to take on those of any political persuasion or none at all.[38] Years later, Simpson was involved in a debate with Ronald Coase: one of the founders of the Law and Economics Movement.[39] Coase penned a somewhat intemperate response to Simpson's original article.[40] Horwitz, in print at least, perhaps wisely chose to remain silent.

The esteem in which Horwitz's work was held in the United States was reflected in the award of the 1978 Bancroft Prize.[41] *The Transformation of American Law* received positive reviews.[42] To this day, it remains an iconic text alongside the later companion work, *The Transformation of American Law 1870-1960*.[43] A few years ago, two volumes of essays, with contributions from many of the leading names in legal history in the United States, were published in Horwitz's honour.[44] Simpson was not the only critic of major or minor parts of Horwitz's treatise by any means, but his *Chicago Law Review* article was the most comprehensive analysis of the contractual aspects.[45] It spans sixty eight pages. Many of his points, although expressed in a politically neutral tone, go to the core of the Critical Legal Studies movement's conception of legal change. In many ways it was a brave article to write. In the over-heated atmosphere of the time, Simpson suffered some opprobrium as a result of his analysis,[46] so much so that the experience shook his faith in American academia.[47]

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

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

35 Neil Duxbury, *Patterns of American Jurisprudence* (Oxford University Press, 2001) 428-35; Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100 *Yale Law Journal* 1515.

36 McCrudden, above n 1, 565.

37 The claim that Simpson was a man of the Right which was sometimes levelled against him can only be explained by ignorance on the part of those making the claim. For an example, see Wythe Holt, 'Morton Horwitz and the Transformation of American Legal History' (1982) 23 *William and Mary Law Review* 663, 666 n 10.

38 Simpson, above n 2, 137.

39 A W B Simpson, 'Coase v. Pigou reexamined' (1996) 25 *Journal of Legal Studies* 53.

40 R H Coase, 'Law and Economics and A W Brian Simpson' (1996) 25 *Journal of Legal Studies* 103.

41 *The Transformation of American Law* seems to have attracted much less attention in the UK. It was not reviewed in the *Law Quarterly Review* or the *Modern Law Review*. It was reviewed in the *Cambridge Law Journal*. The reviewer was not a legal historian.

42 For example, Willard Hurst, 'Book Review' (1977) 21 *The American Journal of Legal History* 175.

43 (Oxford University Press, 1992).

44 Daniel Hamilton and Alfred Brophy (eds), *Transformations in American Legal History Law, Ideology and Methods. Essays in Honor of Morton J Horwitz*, 2 vols. (Harvard University Press, 2010).

45 Other examples from different perspectives and on a range of different matters include: R Randall Bridwell, 'Theme and Reality in American Legal History: A Commentary on Horwitz, The Transformation of American Law, 1780-1860, and on the Common Law in America' (1977-1978) 53 *Indiana Law Journal* 449; Gary Schwartz, 'Tort Law in Nineteenth Century America: A Reinterpretation' (1980-81) 90 *Yale Law Journal* 1717; Eugene Genovese, 'Book Review' (1977-1978) 91 *Harvard Law Review* 726; Peter Karsten, *Heart versus Head Judge Made Law in Nineteenth Century America* (University of North Carolina Press, 1997).

46 McCrudden, above n 1, 566.

Ironically, Horwitz also seems to have come under attack. As he explained much later, 'I didn't anticipate at the time that there would be a very negative reception among law professors. I think that the raw nerve that *Transformation I* touched was in its efforts to undermine claims to the neutrality of law and legal reasoning'.[48] Simpson, the outsider, although not an ideologue, was caught in the cross-fire.

III THE HORWITZ THESIS AND CONSERVATIVE LEGAL HISTORY

The Horwitz thesis was explored at full length in *The Transformation of American Law*. The discussion is a rich one which draws on examples from property law, tort law, and commercial law, as well as contract law. Horwitz also reflects on the nature of the trial process – particularly the emasculation of the jury – and on the rise of formalistic legal reasoning. The central idea is nevertheless quite a simple one. It was summed up on the very first page: 'What dramatically distinguished nineteenth century law from its eighteenth century counterpart was the extent to which common law judges came to play a central role in directing the course of social change'.[49] Horwitz contends that lawyers and judges were allies of mercantile and entrepreneurial interests. Legal development was bound up with economic change. As a result, the law was used as a tool to further the interests of the commercial class. This marked a sea-change according to Horwitz:

> Only in the nineteenth century did judges and jurists finally reject the long standing belief that the justification of contractual obligation is derived from the inherent justice or fairness of an exchange.[50]

Once this equitable model of contract was overthrown, contracts were seen as a product of a meeting of the will of the parties. One consequence is that contracts were no longer primarily about an exchange of performance, as opposed to an exchange of promises. Instead, contracts became primarily executory rather than executed.[51] Whereas at one time judges had placed value on fairness, they now placed greater emphasis on freedom of contract and enforcing contracts.[52]

Aspects of the Horwitz thesis share some common ground with more orthodox accounts of the history of the law of contract in the nineteenth century. The period witnessed the laying of the foundations of the modern law of contract. The idea of will, when used as a justification for contractual liability, certainly did become more important. No one would argue that the law of contract in 1870 was the same as the law of contract in 1770. Simpson would certainly agree with Horwitz that the law of contract changed fundamentally in the nineteenth century.[53] In his *Law Quarterly Review* piece, Simpson argued that 'the new ideas are largely plagiarised from the civil law, and it is to the rise of the legal treatise that we must attribute the change in the character and structure of basic contract law, rather than to judicial originality'.[54] Their disagreements lay in the nature of that change. For Simpson it was inspired by the new body of legal writing that came to prominence in the nineteenth century. Other

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47 Simpson, above n 2, 129 fn 20; 137.
48 James Hackney, *Legal Intellectuals in Conversation* (New York University Press, 2012) 71.
49 Horwitz, above n 12, 1.
50 Horwitz, above n 11, 917.
51 Ibid, 920.
52 Ibid, 946.
53 Simpson, above n 25.
54 Ibid, 277.

important legal historians also accept this explanation.[55] A good case can also be made for saying that the scale of the change has been exaggerated.[56] Whilst some changes such as the decline in the jury and the development of legal literature were significant, for the most part judges were seeking pragmatic solutions. Many of these were grounded in the older law as well as in 'ideas plagiarised from the civil law'. Rather than a revolution in contract doctrine, the nineteenth century can be seen as a period where the law evolved.

Despite its title, in *The Transformation of American Law* Horwitz considered a significant number of English authorities. Unsurprisingly, these decisions feature especially prominently in the discussion of the period prior to the transformation; during the period when America was still a British colony. Some of Horwitz's ideas would have wider resonance beyond his own work, especially as an inspiration for Patrick Atiyah's *The Rise and Fall of Freedom of Contract*,[57] which was published in 1979.[58] Atiyah focused on England and was not so overtly political in his outlook. It is fair to say that he was better known as a contract theorist than a legal historian[59] and he took many of the premises of Horwitz's book at face value. As John Baker noted in a review at the time:

> It is in its legal aspect, ironically, that the book is least convincing, for here it shares some of the defects of its American precursors. The legal history *is* of a conservative kind, being based to some extent on a sense of what the law must have been rather than on contemporary records, and it often ignores or mistakes the law of preceding centuries.[60]

Baker was far from alone in drawing a parallel between Horwitz's earlier work and Atiyah.[61] Certainly many of Simpson's detailed criticism could be applied to both books with equal force. Simpson, like Horwitz, discussed the law of contract in both England and America. Confining the focus here to England, it is evident that in key respects Simpson's article has stood the test of time better than Horwitz's thesis on the transformation of contract law. Research carried out since bolsters rather than undermines many, but not all of Simpson's criticisms.

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55 Notably David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) ch 12. Although Ibbetson is more cautious than Simpson on the extent of the influence of Civilian ideas on developing the law, see especially in his book at 232.

56 This is the argument made at length in Warren Swain, *The Law of Contract 1670-1870* (Cambridge University Press, 2015) chs 8-9.

57 (Oxford University Press, 1979).

58 Atiyah attended some of Horwitz's seminars at Harvard and has acknowledged his influence: Patrick Atiyah, 'An Autobiographical Fragment', in Geoffrey Wilson (ed), *Frontiers of Legal Scholarship* (Wiley, 1995) 45-46.

59 Atiyah has produced two major volumes of contract theory: P S Atiyah, *Promises, Morals, And Law* (Oxford University Press, 1981); P S Atiyah, *Essays on Contract* (Oxford University Press, 1986). Atiyah was also extremely influential as an advocate of tort law reform: P S Atiyah, *Accidents, Compensation and the Law* (Weidenfeld & Nicolson, 1970).

60 J H Baker, 'Review of The Rise and Fall of Freedom of Contract' (1980) 43 *Modern Law Review* 467.

61 Charles Fried, 'Review of The Rise and Fall of Freedom of Contract' (1979-1980) 93 *Harvard Law Review* 1858.

IV THE GOOD OLD LAW AND EQUITABLE CONCEPTIONS OF CONTRACT

Horwitz is sometimes difficult to pin down on dates and detail.[62] One criticism of the discussion of the law of contract, prior to its apparent transformation, is that centuries pass in just a few lines. His essential claim is that developments in the late eighteenth century were a 'reaction to the medieval tradition of substantive justice'[63] which remained strong until this time. Simpson described this conception of the law prior to its transformation as 'romanticised'.[64] Critical Legal Studies scholars are not usually accused of 'romanticism'. The movement is after all built on a distrust of ideas like formalism, objectivity, and legal neutrality.[65] On this point Simpson made a strong case. It enabled him to land a glancing blow at the start of his article. Whilst it is difficult to be entirely confident that there were never any notions of justice in medieval contract law, such ideas were not in the form of broad substantive doctrine as Horwitz suggests. The idea that some kind of 'just price' doctrine operated in English law as something different from the market price, is misconceived.[66]

There are plenty of counter arguments to Horwitz's thesis. Curiously, one is even discussed by him.[67] Once the conditional bond was invented, debt on a bond became a useful and flexible device.[68] It might have been the main contract action, but it is not usually associated with fairness.[69] After all, where the debt was repaid and the debtor failed to cancel the bond having paid,[70] then he remained liable. This was so even if the un-cancelled bond was stolen back from him by the creditor.[71] Horwitz seems to accept that the penal bond was not based on fairness. Rather it was used as a device used to 'conduct business transactions free from the equalizing tendencies of courts and juries'.[72] All the same, relief on penal bonds was more widespread and granted earlier than Horwitz was prepared to admit.[73] It does not follow, as Horwitz seems to imply, that the penal bond was used because the rest of the law of contract was seen as too fair. There were certainly some advantages associated with the conditional bond, but commercial parties also frequently use other forms of action like trespass and assumpsit, both of which were tried before a jury but which did not require a deed.[74]

Although it is not an issue that was really tackled by in detail by Simpson,[75] one of the problems with Horwitz's argument is the way that he characterises the wider economy before the late eighteenth century. It is a crucial step in arguing that legal development is shaped by shifts in economic paradigms. Horwitz was guilty of underestimating the sophistication of economic development by the late eighteenth century. As Simpson put it, his 'simple and primitive' version of the earlier economy

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62 Simpson, above n 13, 535.
63 Horwitz, above n 11, 917.
64 Simpson, above n 13, 534-535.
65 For a discussion by one of the leading figures, see Roberto Unger, *The Critical Legal Studies Movement* (Harvard University Press, 1983).
66 Simpson, above n 13, 536-38.
67 Horwitz, above n 11, 927-29.
68 A W B Simpson, 'The Penal Bond with Conditional Defeasance' (1966) 82 *Law Quarterly Review* 392.
69 Simpson, above n 13, 540.
70 *Denom v Scot* (1343) YB 17 Edw III (RS) 298.
71 *Donne v Cornwall* (1486) YB 1 Hen VII f 14.
72 Horwitz, above n 11, 927.
73 Ibid, 928-29. EG Henderson, 'Relief from Bonds in the English Chancery: Mid-Sixteenth Century' (1974) 18 *American Journal of Legal History* 298.
74 Ibbetson, n 55, 43-48, 126-151.
75 Simpson, above n 13, 538-40.

does not reflect reality.[76] The older idea that the nineteenth century saw a short and rapid change known as the Industrial Revolution has long been exposed as false by economic historians.[77] In fact, the roots of these changes are traceable much earlier. So it is with the law. For example, by the late seventeenth century a complex system of mercantile bills and notes were been enforced in the common law courts on a regular basis.[78] Simpson's argument in 1979 was less concerned with such questions than it was with matters of legal doctrine. It is here that the essence of Simpson's case against Horwitz is to be found. It is what gives the article its argumentative power and explains why it still remains influential more than thirty five years later.

V DOCTRINAL ERRORS IN THE HORWITZ THESIS

Simpson contended that:

> Horwitz allowed himself to be misled by his striking and seductive thesis into a general and systematic misinterpretation of the evidence, and that his thesis once tested in detail, is quite misconceived. In order to make the case for this view it is essential if at times tedious, to subject his arguments to very close inspection.[79]

Simpson's very close inspection is not perfect. In common with Horwitz, he makes almost no use of unprinted sources. Yet in many other ways it still remains an object lesson in what legal history ought to be about. The reader can almost feel Simpson's irritation at Horwitz's obfuscation,[80] assertions,[81] exaggerations,[82] and misconceptions.[83] In places, the article reads like a bad-tempered tutorial. It would probably not be able to appear in quite this form today. Simpson takes issue with many of Horwitz's central claims. Contrary to Horwitz's position, Simpson shows that executory promises were a long way from a nineteenth century innovation.[84] Horwitz's view that implied contracts built around equitable notions could be enforced in preference to express contracts – before the rules changed in the nineteenth century – is also shown to be false.[85] Some of the other arguments merit closer attention, if only

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76 In fact the medieval economy was in many ways highly advanced: Edward Miller and John Hatcher, *Medieval England, Towns, Commerce and Crafts 1086-1348* (Longman, 1995). It is only necessary to think of the wool trade to see how markets were not necessarily, small, local and domestic: M M Postan, *Medieval Trade and Finance* (Cambridge University Press, 1973) ch 8. Equally it is a mistake to caricature the economy as anything like unchanging in the period before the late eighteenth century. For a discussion of a much earlier economic transition, see Keith Wrightson, *Earthly Necessities* (Yale University Press, 2000).

77 Jeffrey Williamson, 'Why Was British Economic Growth So Slow During the Industrial Revolution' (1984) 44 *Journal of Economic History* 687; N R F Crafts, *British Economic Growth During the Industrial Revolution* (Oxford University Press, 1985); Maxine Berg and Pat Hudson, 'Rehabilitating the Industrial Revolution' (1992) 45 *Economic History Review (NS)* 24.

78 J H Baker, 'The Law Merchant as a Source of English Law' in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays for Lord Goff of Chieveley* (Oxford University Press, 2000) 79-96; James Rodgers, *The Early History of Bills and Notes* (Cambridge University Press, 1995) chs 5-7; Swain above n 56, 49-60.

79 Simpson, above n 13, 542.

80 Ibid, 543

81 Ibid, 549, 577.

82 Ibid, 545

83 Ibid, 549

84 Ibid, 543-47.

85 Ibid, 586-88.

because on most of these the evidence since 1979 supports Simpson's version rather than Horwitz's.

According to Horwitz, the expectation measure of contract damages, which remains the standard remedy for breach of contract, only began to be used in the 1790s.[86] Simpson is sceptical. Although he concedes that the award of damages was a matter for a jury, the exercise of its discretion means it is difficult to come to firm conclusions about the extent to which the expectation measure was used.[87] Nevertheless, the evidence such as it is suggests that it was likely that juries did assess damages on an expectation measure. Practice reflected the later rule. As Simpson points out 'The best reason for thinking that the matter had long been settled is the absence of cases in the eighteenth century canvassing the choice between alternative approaches'.[88] There are more positive reasons to believe Simpson was right and Horwitz was wrong on this point. Ibbetson has recently provided conclusive evidence that in the second half of the sixteenth century the general practice of juries was to award damages on an expectation measure.[89]

Simpson seems to have been on the right side of the argument on other issues too. The idea that Chancery would refuse to order specific performance 'of any contract in which they determined that consideration was inadequate' would be, on the contrary, according to Simpson, 'exceedingly rare'.[90] Further detailed analysis supports that view. Chancery cases were not well reported on the whole until the mid-eighteenth century, but such evidence as there is shows that although Chancery would certainly refuse specific performance in cases of bad bargains, it was almost never on the grounds of inadequacy of consideration alone. On the contrary, when specific performance was refused, it was usually for a combination of reasons including usury, the fact that the defendant is an expectant heir or otherwise vulnerable, or fraud.[91]

Horwitz suggests that in law as well as equity, there was a 'substantive doctrine of consideration' which allowed a jury to take into account not just whether there was consideration, but whether it was adequate, before making an award of damages.[92] Simpson concedes that a jury may sometimes have reduced the amount of damages where the price was exorbitant.[93] The decisions on horse sales suggest a certain independence of mind when a jury was faced with what it regarded as an unsympathetic litigant, like a horse dealer.[94] Nominal damages were also sometimes given.[95] It did not become possible to overturn damage awards with anything like regularity until the eighteenth century.[96] Horwitz was right to stress that the way the system operated gave juries a certain amount of latitude.[97] As juries evolved over the

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86 Horwitz, above n 11, 937.
87 Simpson, above n 13, 549.
88 Ibid, 555.
89 David Ibbetson, 'The assessment of contractual damages at common law in the late sixteenth century' in Matthew Dyson and David Ibbetson (ed), *Law and Legal Process* (Cambridge University Press, 2013) ch 7.
90 Simpson, above n 13, 562.
91 JL Barton, 'The Enforcement of Hard Bargains' (1987) 103 *Law Quarterly Review* 118; Warren Swain, 'Reshaping Contractual Unfairness in England 1670-1900' (2014) 35 *Journal of Legal History* 120, 123-26.
92 Horwitz, above n 11, 924.
93 Simpson, above n 13, 574.
94 Warren Swain, 'Horse Sales: the Problem of Consumer Contracts from a Historical Perspective' in James Devenney and Mel Kenny (eds), *European Consumer Protection Theory and Practice* (Cambridge University Press, 2012) 282, 290.
95 Ibbetson, above n 89, 145
96 The cause of this change was the development of the motion for new trial, see Swain, above n 56, 26-27.
97 Ibbetson, above n 89, 140-41.

centuries from witnesses to finders of fact, a moral element may have formed part of its institutional character.[98] The special juries of merchants, which became so important in the eighteenth century, may have been influenced by not just notions of commercial practice but commercial morality. It is more difficult to agree with Horwitz that juries exercised this discretion on the grounds of something as well defined as whether the consideration was adequate or not.[99] Though some jury freedom is certainly evident, it should be remembered too that juries had a steer from judges through their directions. In short, it is difficult to draw firm conclusions. This part of the process is largely lost to us. There is no way of knowing for sure how juries reached their verdicts. At best we can make guesses. As Simpson pithily notes, 'Romanticism about juries is not history'.[100]

Simpson's final assault concerns Horwitz's assertion that where a 'sound price' was paid then the law, at least in the eighteenth century, would imply a warranty of quality.[101] Horwitz saw this as a further element of fairness in contract law before the transformation. Simpson described the evidence for such an idea as 'meager'.[102] On this point Simpson overplays his hand. The evidence for the 'sound price' doctrine is a little stronger than he supposed. It is discussed outside the pages of Wooddeson's and Powell's treatises which Simpson mentions.[103] Writing in his *A Philosophical and Practical Treatise on Horses*,[104] in the 1790s, John Lawrence explained that when a horse was sold for more than ten pounds the law required the animal to be sound irrespective of whether or not the vendor gave an express warranty. He even complained that it had the result of 'manifestly affording the purchaser an undue advantage'.[105]

Simpson does concede that in *Stuart v Wilkins*[106] Lord Mansfield may have adopted a 'mild variant' of the 'sound price doctrine'.[107] In this version a warranty would only be implied where a sound price was paid and the seller knew of the defect. Horwitz in contrast favoured a wider version of the 'sound price' doctrine advocated by Wooddeson – that a 'fair price implies a warranty'.[108] The narrower version is supported by the printed and manuscript report of *Stuart v Wilkins*. An earlier decision of Lord Mansfield at Hertford Assize[109] was along the same lines. The *London Chronicle* reported at the time that Lord Mansfield made clear to those present, who included some jockeys, that 'if at any time they took a sound price for a horse they

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98 For a discussion in the context of criminal juries, see Thomas Andrew Green, *Verdict According to Conscience* (University of Chicago Press, 1985).

99 The few cases reported in the common law which seem to involve the court affording some protection seem to involve more than mere inadequacy of consideration: *James v. Morgan* (1663) 1 Lev 111. On the contrary the position of the common law courts right back into the sixteenth century is that inadequacy is not relevant, see David Ibbetson 'Consideration and the Theory of Contract in the Sixteenth Century' in J Barton (ed), *Towards a General Theory of Contract* (Duncker and Humblot, 1990) 67, 72-74.

100 Simpson, above n 13, 575.

101 Horwitz, above n 11, 926.

102 Simpson, above n 13, 580, 582.

103 Ibid, 51. John Joseph Powell, *Essay Upon the Law of Contract* (J Johnson, 1790); R Wooddeson, *A Systematical View of the Laws of England* (Thomas Payne, 1792-93).

104 (T N Longman, 1796-98).

105 Ibid, vol 2, 143.

106 (1778) 1 Doug 18, LI MS Hill 13 f 258.

107 Simpson, above n 13, 582.

108 Wooddeson, above n 103, vol 2, 415.

109 The decision, *Worth v Pank* (1764) survives in Lord Mansfield's notebook, James Oldham, *The Mansfield Manuscripts* (The University of North Carolina Press, 1992) vol 1, 266.

knew not to be sound, or concealed any defect, the not warranting him should not avail them at all'.[110]

Whilst Horwitz's broad version of the sound price doctrine is not supported by most of the evidence,[111] Simpson may have overstated his case too. His conclusion that 'sound price' is 'not so much a legal doctrine as an expression used by some judges in directing juries',[112] is only right if Lord Mansfield's words are not taken at face value. In practice this may not matter very much. A 'sound price' doctrine of any sort seems only to have existed for a short period of time. In one very important context, that of horse sales, standard form contracting typically imposed conditions on the enforcement of express warranties. It was here that the way to the future lay.

VI EVIDENCE AND DOGMA

Even now, nearly forty years after it was published, Horwitz's *Transformation of American Law*, remains an exciting book to read. Law books like it do not come along very often.[113] It is not difficult to understand how anyone with a superficial knowledge of the subject could be beguiled. Horwitz is certainly a convincing writer. His arguments are cleverly constructed. The energy of his prose carries the reader along. It is difficult to deny that *The Transformation of American Law*, of which Horwitz's original article was such a central component, fundamentally changed the way that the discipline was viewed. For a while, at least in some circles, it made legal history both fashionable and mainstream. That can only be a good thing. It may not be going too far to say that works of this sort were instrumental in reviving legal history in the United States, where the subject remains in rude good health to this day.[114] This still does not alter the fact that any good work of historical scholarship is fundamentally about the strength of the evidence. As Richard Evans has observed, 'The first perquisite of the serious historical researcher must be the ability to jettison dearly-held interpretations in the face of the recalcitrance of the evidence'.[115]

Simpson's contribution put the evidence at the centre of the debate where it belongs. There is no grand theory. One of my students who recently read Simpson's article mentioned to me that he found the tone of the article rather angry. Re-reading Simpson's words again, he probably has a point. But it was anger in a good cause. Elements of Horwitz's thesis for the transformation are examined in detail and they are found wanting. It may be that Simpson was not right about everything either. But his fundamental point that the law of contract was not equitable, and so was not transformed in the manner in which Horwitz thought, now seems unarguable. No-one since 1979 has challenged Simpson on the evidence. In fact, the work that has been done tends to support his version of events. No doubt to some, Simpson and his ilk represent a 'gentleman's club' version of legal history.[116] Yet this type of careful doctrinal work is extremely difficult to do well. Polemic is easier. Such work is slow and often repetitive. It may only be fully appreciated by a fairly small group of readers. Today this sort of analysis remains as important as ever. Sadly, whilst Simpson had intended to write a second volume of his history of the law of contract to cover the

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110 *London Chronicle*, 14 August 1764.
111 And certainly not those that he cites, Horwitz, above n 11, 926 n 53.
112 Simpson, above n 13, 582-83.
113 Another good example is: Karl Llewellyn, *The Bramble Bush* (Oxford University Press, 2008). A version of this work was first published in 1930.
114 Robert M Jarvis, *Teaching Legal History* (Wildy, Simmonds & Hill Publishing, 2014).
115 Richard J Evans, *In Defence of History* (Granta, 1997) 120.
116 William MacNeil, 'Living on: Borderlines – Law/history' (1995) 6 *Law and Critique* 167, 183.

period after 1677, the project never came to fruition.[117] As a legal historical critique of another writer's work, Simpson's article would be difficult to better. In some ways it is a period piece. Something written in this style would be unlikely to be published today. And law reviews are the poorer for it.

[117] Simpson, above n 2, 132.