

## MILSOM'S LEGAL HISTORY

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**ABSTRACT.** *Toby Milsom was the most original English legal historian of the twentieth century. This paper gives a preliminary assessment of the importance of his work, charting the ways in which it has changed our thinking about the subject.*

**KEYWORDS:** *Legal History, Toby Milsom, English law.*

TOBY Milsom was “the most distinguished legal historian of the twentieth century”. So read the obituary in *The Times*.<sup>1</sup> Like all obituaries there, it was unattributed, but John Baker will surely forgive me if I compromise anonymity and say that the words are his. Few of us would dare disagree, and few of us would want to.

He did not publish prolifically, though everything he did publish deserves to be read and reread and reread again. At least two major pieces of work remain in typescript. His first substantial work, his fellowship dissertation at Trinity College, was on the history of administrative law. It was awarded the Yorke Prize, though the Faculty Board withheld half of the award until such time as it was prepared for publication. We are still waiting. Some 40 years later, there were his Ford Lectures in Oxford, which I was privileged to hear as a young academic. A follow-on from his work on the land law of the twelfth century, we are still waiting for their publication too. Their author was without doubt a perfectionist, but the scholarly community would be far the richer for their publication.

In common, I suppose, with everybody whose first exposure to English legal history was within the last half-century, my first acquaintance with Milsom's work was through the *Historical Foundations of the Common Law*, then in its first edition.<sup>2</sup> I was totally unprepared for it. Not in the sense that it made the scales drop from my eyes and see legal history in a completely different way, but in the sense that I misguidedly saw it as a student textbook which would tell me the truth about what happened.

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<sup>1</sup> *The Times*, 30 March 2016.

<sup>2</sup> S.F.C. Milsom, *Historical Foundations of the Common Law* (London 1969). All citations are to Milsom's works except as attributed otherwise.

It might have been different if I had read the reviews of the work. Geoffrey Hand, in the *Irish Jurist*, had warned that hardly any but the best of final year undergraduates would make sense of large tracts of it.<sup>3</sup> Not quite right, I think. It is seductively easy to make sense of it, the problem is to separate out the facts from the interpretation of those facts. David Yale, in the *Cambridge Law Journal*, was more accurate: "It is not a book from which one learns the subject", he wrote, but rather a work of interpretations, an exercise of imagination.<sup>4</sup>

I might have been better prepared if I had read the introduction to the work, and ruminated on it. "Legal history is not unlike that children's game in which you draw lines between numbered dots, and suddenly from the jumble a picture emerges; but our dots are not numbered."<sup>5</sup> The image was to recur through Milsom's work, and it remains fundamental to our understanding of much of his writing. The dots may be fixed points, facts if you like, but we can only make sense of them against the background of the whole picture, and the picture can only be known in so far as it is reconstructed by the legal historian. Moreover, the picture can only ever be provisional. "It is right to say clearly at the outset," he ends the introduction, "that no major proposition in legal history is ever likely to be final, and that any single picture must be a personal one."<sup>6</sup>

It was only a few years later that I came across the legal introduction to the Selden Society edition of the medieval tract known as *Novae Narrationes*, which had appeared in 1963.<sup>7</sup> No seductively easy read, no imaginative joining of dots, but a highly technical commentary on the forms of action in the late thirteenth and early fourteenth centuries. Even the expert legal historian needs to keep concentration and perhaps have a dictionary to hand. Just one example from the first page of the commentary, on the principal writ of right. "If a parcel were claimed, but less an exception, the exception had to be carefully specified both in the substantive claim and later in laying the esplees."<sup>8</sup>

Consideration of these two works together reveals just why Milsom was so powerful a legal historian. The combination of technical mastery with imaginative reconstruction produced a kind of legal history which we had not seen before. It was a combination which was to characterise all of his published writing.

To this we need to add a third element: his use of court records, of plea rolls, as a source of data to explicate the development of substantive law. Milsom was not, of course, the first person since Maitland to use plea

<sup>3</sup> (1970) 4 I.J. 194.

<sup>4</sup> [1970] C.L.J. 318.

<sup>5</sup> Milsom, *Historical Foundations*, p. xiv.

<sup>6</sup> *Ibid.*, at p. xiv.

<sup>7</sup> *Novae Narrationes* (Selden Society vol. 80).

<sup>8</sup> *Ibid.*, at p. xxxi.

rolls in this way. Albert Kiralfy had done so in his book on the action on the case, published in 1951,<sup>9</sup> but where Kiralfy had referred to just over 100 cases from the records up to the end of the reign of Edward III, Milsom referred to more than 400 in his three articles on trespass from Henry III to Edward III published in the *Law Quarterly Review* in 1958.<sup>10</sup> Nor was it simply the number of cases that were cited that was impressive, it was the number of rolls which had been combed to produce these glimmers of light on the early history of the common law of tort. I do no disservice to Kiralfy when I say that he dipped into plea rolls for illustrative examples, whereas Milsom used the rolls as his source of information. The discussions in the early reports known as year books were of undoubted importance, but in their nature they only shed light on what was unusual enough to be worth discussing and noting down. Plea rolls, by contrast, could show what was more or less normal, and the normal or routine was far more revealing of the working of the law than was the unusual. The use of plea rolls by medievalists today is commonplace; it was very much less so half a century ago. Slightly behind in his study of the journals, in March 1959 the historian G.O. Sayles lamented that no one in England was systematically studying the records of the Court of Common Pleas, though it was there that so much of the history of the common law lay hidden. But he added in a footnote, “Since I spoke these words, Mr. Milsom of New College, Oxford, has told me of his interest in the records of the common bench.”<sup>11</sup> Here was the path-breaker in the new world of English legal history.

The set of three articles on trespass constituted Milsom’s master-piece, in the medieval sense of the work which marked the transition from journeyman to master in a guild. His note to Plucknett, sending him an offprint of the articles, reveals his uncertainty about the way in which the arguments will be received: “Professor Plucknett, With best wishes and trepidation. A small but real comfort is that I cannot guess whether, if you denounce me for this, it will be as a heretic or a copycat.”<sup>12</sup>

The opening couple of pages lay out the primarily destructive thesis, that trespass was not inevitably concerned with direct forcible injuries, but, as he had earlier put it put it, just meant wrong.<sup>13</sup> Gone in a moment was the then-current thinking that the writ of trespass was derived in some sense from the appeal of felony or the assize of novel disseisin.<sup>14</sup> Instead we were left with a jurisdictional question, what was it that enabled certain

<sup>9</sup> A. Kiralfy, *The Action on the Case* (London 1951).

<sup>10</sup> S.F.C. Milsom, “Trespass from Henry III to Edward III” (1958) 74 L.Q.R. 195, at 407, 561.

<sup>11</sup> G.O. Sayles, *The Court of King’s Bench in Law and History* (London 1959), 20.

<sup>12</sup> Offprint in Squire Law Library, Cambridge.

<sup>13</sup> S.F.C. Milsom, “Not Doing Is No Trespass” [1954] C.L.J. 105.

<sup>14</sup> See e.g. C.H.S. Fifoot, *History and Sources of the Common Law: Tort and Contract* (London 1949), 44–56 (critical of current theories).

wrongs to be actionable in the royal courts? What had appeared for centuries to be a fundamental division between trespass and trespass on the case was reduced to a rather less fundamental question of how a civil action for wrongdoing should be pleaded. Medieval tort law was being radically reshaped.

We must be careful not to exaggerate Milsom's originality. A year earlier Derek Hall had published a short piece in the *Law Quarterly Review* on the early history of trespass writs,<sup>15</sup> G.O. Sayles had been chipping away at the old orthodoxy,<sup>16</sup> Professor Plucknett and Dr. Dix had effectively undermined the old theory linking the emergence of trespass on the case to the Statute of Westminster the Second,<sup>17</sup> though the arch-conservative Oxford scholar Philip Landon had dismissed their thinking as "revolutionary".<sup>18</sup> He might as easily have said "bolshevik". Glanville Williams had already hinted at the relationship between trespass and case,<sup>19</sup> and in an earlier pedagogic article Milsom had himself referred to views expressed orally by Hamson, Hollond, Thorne and by the young Michael Prichard.<sup>20</sup> But what was truly original about Milsom's treatment of the early history of trespass was that it delineated the scope of the action in detail. Trespass may have meant just wrong, but to say that the scope of liability was wrongful conduct was far too bland a formulation to give much idea of the medieval law, as if a teacher of the law of torts in the twenty-first century were to say that tort meant wrong and leave it at that. Instead we get the heading of wrongs to land subdivided into ejectment, reaping crops, depasturing, hunting, shooting and fishing; wrongs to the person subdivided into assault and battery, false imprisonment, wrongs to servants, and abduction; wrongs to goods into *de bonis asportatis*, damage by fire, damage by animals and other forms of damage. The thorny question of the origins of trespass on the case was redefined. No longer was it an issue of the emergence of a new form of action, but of the propriety of using special writs instead of the general writ alleging force of arms and a breach of the King's peace. Problems remained, since some fairly radical change did seem to have occurred in the late 1360s, but the redefinition of the question meant that it was possible to approach the answer in a very different way from before; and the detailed consideration of cases from the plea rolls as well as the reports, the year books, meant that the answer was far more nuanced.

The legal history of the later fourteenth and fifteenth centuries gives greater scope for the use of reported discussions of the law as found in

<sup>15</sup> G.D.G. Hall, "Some Early Writs of Trespass" (1957) 73 L.Q.R. 65.

<sup>16</sup> *Select Cases in the Court of King's Bench* (Selden Society vol. 74), pp. xxxvi–xxxvii.

<sup>17</sup> T.F.T. Plucknett, "Case and the Statute of Westminster II" (1931) 31 Columbia L.R. 778; E.J. Dix, "The Origins of the Action of Trespass on the Case" (1947) 46 Yale L.J. 1142.

<sup>18</sup> P. Landon, "The Action on the Case and the Statute of Westminster II" (1936) 52 L.Q.R. 68, at 78.

<sup>19</sup> G. Williams, *Liability for Animals* (Cambridge 1939).

<sup>20</sup> Milsom, "Not Doing Is No Trespass".

the year books than does that of the thirteenth and early fourteenth centuries, and two articles on what we might broadly think of as contractual litigation typify this. The more accessible “Sale of Goods in the Fifteenth Century” began in thoroughly self-deprecating mode:

This is a descriptive article, without a point, begun with two aims. The narrower was to survey the vicinity of certain landmarks; the “real” nature of contracts enforced by debt and detinue, and the passing of property. Dejectedly looking at the results, little can be said except that the landmarks are gone; but some facts have emerged which seem worth recording.<sup>21</sup>

I rather doubt whether many of us would agree that the removal of well-established landmarks was a reason for dejection when so much scholarship is based on their uncritical acceptance, but Milsom no doubt wanted to do for debt what he had done for trespass a few years earlier. His diffidence is reflected in his note to Plucknett when sending him an offprint: “I’m not very happy about this, but hope that some of the spadework may turn out to be useful.”<sup>22</sup>

He continues the article with marginally more ambition: “The wider aim was selfish: the writer is preparing a study, in more detail than those existing, of the personal actions down to 1600; and the difficulty, as always, is in asking the questions.”

It is all very Milsomian. The “real” nature of contracts is in scare quotes, a throwback to the time when English lawyers might have thought in Roman terms which do not quite fit the English evidence, and where the use of the terminology obscured more than it explained. I like the contrast with Plucknett a generation earlier. In the margin of his copy of James Barr Ames’s *Lectures on Legal History*, where Ames had written of the force of the words of agreement in debt, Plucknett’s annotation reads “But debt was not created by words but by things – real contracts”.<sup>23</sup> No scare quotes here, and only a sense of puzzlement that Ames had missed so obvious a point that debt was only generated by a real contract. Milsom’s unpicking of the supposedly real nature of debt reflects his approach to trespass in the trilogy of articles of 1958. His feet are firmly on the ground in the real world of the most typical transaction, the sale of goods, not in the clouds of legal abstraction. Get the details of sale right, and you can move from there into other types of contract which might work in the same way or might work differently. By the same token, one of his primary concerns was the availability of wager of law, surely one of the primary issues for litigants in practice which was too easily overlooked by the legal historian of the twentieth century. This same concern underlay the second of the pair of articles on contractual litigation, “Account Stated in the Action of

<sup>21</sup> (1961) 77 L.Q.R. 257.

<sup>22</sup> Offprint in Squire Law Library, Cambridge.

<sup>23</sup> J.B. Ames, *Lectures on Legal History* (Cambridge 1913), 151 (copy in possession of the author).

Debt", a piece that puts demands on the reader and raises important questions about the relationship between local courts and the common law.

But the most Milsomian feature is in the last clause of his opening of the sale of goods article. "The difficulty, as always, is in asking the questions." All of us who have grappled with the problems of early modern or medieval law will recognise the truth of this, and all of us will be conscious of our own failings in getting the questions right.

Trying to find the right question lay behind what is probably Milsom's most noteworthy contribution to the history of the substantive law, the development of the law of real property in the twelfth century. It began when he was preparing a new edition of Pollock and Maitland's *History of English Law*: "There is a single particular recollection: a sudden idea about the sense of *seisin* and *disseisin* came one evening when waiting at Charing Cross station for a train home. In retrospect that seems to have been the starting point."<sup>24</sup>

From this epiphany there sprang what Milsom described as his greatest heresy, that the assize of novel disseisin, introduced under Henry II, was concerned not with the dispossession of feudal tenants generally, but in particular with the abuse by feudal lords of their seigneurial power. Only a lord could seize a tenant, and only a lord could disseise him.<sup>25</sup>

I need to spend a little time on this, conscious that a number of scholars have subjected it to detailed scrutiny with far greater expertise than I can muster.

The background can be sketched easily. The assize of novel disseisin was a crucially important remedy probably introduced in 1166, though there is no direct evidence of the date, which protected a person who had been unjustly and without judgment disseised of his free tenement. By the middle of the thirteenth century disseisin clearly meant dispossession, and it probably did so by the end of the twelfth. Orthodoxy before Milsom was that it had always meant this, so that from the start it had been available to the feudal tenant who had been thrown off his land, no matter by whom. Milsom, rightly in my view, questioned this. Seisin of land at first connoted something very different from this. It was a relationship with the feudal lord, with land as an object of that relationship. The tenant was put in seisin by the lord, typically kneeling before him, doing homage and swearing fealty, or fidelity, to him. Those of us who have been admitted to fellowships in Oxford or Cambridge colleges may have gone through a very similar ceremony, though I suspect that few would have recognised that they were taking seisin of their fellowships, and none who was not a

<sup>24</sup> F. Pollock and F.W. Maitland, *Natural History of the Common Law* (New York 2003), xxiii.

<sup>25</sup> F. Pollock and F.E.W. Maitland, *The History of English Law*, 2nd ed. reissued (Cambridge 1968), xxxviii–xlvi; further in Milsom, *Historical Foundations*, pp. 103–05, 116–19; and S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge 1976).

lawyer would have had a clue what it meant. Only the Governing Body of the college can deprive us of our fellowships. In the same way, on Milsom's analysis, only the feudal lord's court could disseise the feudal tenant. The assize was at the start aimed at the improper undoing of a relationship, not the improper ejection from land.

The question was certainly right, and the hardest thing, as always, was to ask the question in the first place. But asking the right question does not guarantee getting the right answer, and I think the scholarly consensus now is that Milsom's answer was indeed wrong.<sup>26</sup> We cannot be sure, and there is a real dearth of direct evidence. Practically all that we can go by is the wording of the assize itself, and that is decidedly ambivalent. There is slender evidence that disseisin was not necessarily something that could only be done by a feudal lord. A writ of Queen Matilda has her indignantly complaining that her own tenants had been disseised,<sup>27</sup> and we can be fairly sure that they had not been disseised by her. It looks as if the word was wide enough to encompass the ejection of someone who was properly seised, not simply the improper breach of the relationship. Other features of the writ are similarly equivocal. Milsom's interpretation is seductive, but by no means conclusive. Against it, in my view, are two things. First are the parallels with Roman law. If novel disseisin was concerned with the specific problem of seigneurial abuse, it is perhaps odd that there were marked parallels with a Roman remedy for dispossession, the interdict *unde vi*, especially when we know that Henry II's advisers included men with knowledge of Roman law. More likely, we might have thought, the English remedy was from the start envisaged as dealing with dispossession, as we know it was by 1200. Second, the Pipe Rolls show that as early as 1166 an assize was providing a remedy for nuisances, and by the time of the book known as Glanvill, written in the late 1180s, the relevant assize was explicitly novel disseisin. It is abundantly probable that it was novel disseisin that was being referred to in 1166. Now, we know that Roman law covered what we would regard as nuisances by its possessory remedies, and it is not difficult to treat a nuisance, an interference with the enjoyment of land, as a form of dispossession. It is rather harder to see seigneurial abuse as encompassing nuisances, though as Milsom himself pointed out nuisances would commonly take a form which would typically be committed by lords.

I suspect we can trace a development in Milsom's thinking, from his introduction to the new edition of Pollock and Maitland in 1968 to his developed thesis in the lectures given in 1972 and published as *The*

<sup>26</sup> See most recently J. Hudson, *Oxford History of the Laws of England*, vol. 2 (Oxford 2012), 609–14.

<sup>27</sup> *Regesta Regum Anglo-Normannorum*, III.239d. Other, less clear examples may be Selden Society vol. 77 444 no. 64, 445 no. 65 (on which see *Victoria County History, Huntingdonshire*, 3.26–28), 452 no. 79.

*Legal Framework of English Feudalism*. It is easy to read the version of 1968 in a limited sense, that disseisins were dispossessions committed by lords, whereas in the later version we are not really dealing with dispossessions at all, but with the failure to observe due process. The former, limited, thesis could well be right, but it is the latter one which is really powerful and which I find hard to accept. Its implication is genuinely radical, that the assize of novel disseisin brought about a massive legal transformation, from a feudal world in which the primary focus of the law was the personal relationship between lord and tenant, and land was simply the object of that relationship, to a world of property law, where the feudal tenant had a property right in land and the lord no more than a residual economic right. In other words, novel disseisin brought about a law of real property which did not exist in the purely feudal world.

As Milsom himself would have put it, either the fit is perfect or it is wrong. I do not think the fit is perfect, however seductive it is. That said, however, if we remove the heresy and take the assize of novel disseisin out of the picture, the fundamental thesis of the translation of feudal relationships into property rights has a lot of substance. The writ of right patent, in the form that probably goes back into the 1150s, does seem to focus on the relationship between lord and man. It took the form of an instruction to a feudal lord to do the right thing by his alleged tenant in respect of land,<sup>28</sup> not just to adjudicate on a property claim that was being made. By 1200, it would look like a property claim, and unless we are misled by appearances the major transformation from personal relationship to property right does indeed look to have occurred.

It is easy to see the attraction of attributing such a major shift in thinking to the operation of novel disseisin. Something, surely, must have happened to break down the feudal framework within which the relationship between lord and man was the dominant element and to replace it with a framework best described in terms of property rights.

But there is another way of looking at it. The shift in England's feudal framework is mirrored exactly by what was happening in continental Europe, as the feudal relationship, vassalage, was brought within the Roman world of ownership and possession of land.<sup>29</sup> We cannot be sure exactly when this occurred, but it was in the second half of the twelfth century. The first jurist unequivocally to analyse in this way was Pilius, commenting on the Milanese *Libri Feudorum* sometime before 1200, but it may

<sup>28</sup> S.F.C. Milsom, *Historical Foundations*, 2nd ed. (London 1981), 124–25; cf. 1st ed., pp. 107–8.

<sup>29</sup> E. Meynial, "Notes sur la Formation de la Théorie du Domaine Divisé", in E. Meynial (ed.), *Mélanges Fitting* (Montpellier 1908), 2.409; R. Feenstra, "Les Origines du Dominium Utile chez les Glossateurs", in R. Feenstra (ed.), *Fata Iuris Romani: Etudes d'Histoire du Droit* (Leiden 1974), 215 (with reference to further literature). For recent discussion in English, see T. Rübner, "The Roman Concept of Ownership and the Medieval Doctrine of *Dominium Utile*", in J. Cairns and P. Du Plessis (eds.), *The Creation of the Ius Commune: From Casus to Regula* (Edinburgh 2010), 127. The opening pages of Meynial's article could as easily have been a summary of Milsom's arguments.



well have been the Montpellier professor Placentinus in the early 1160s. In some manuscripts of his *Summa Codicis*, though not in all, the possessory interdict *unde vi* is said to be available to the feudal vassal.<sup>30</sup> Now, this was the Roman remedy that has been seen as the model on which novel disseisin was structured, so there may have been a connection. Moreover, there is a good case for thinking that it was Placentinus's work, or something very like it, that inspired the English assize of mort d'ancestor in 1176, which has parallels with the Roman interdict *quorum bonorum* including a curious twist of the pure Roman law which is attributed to Placentinus.<sup>31</sup> Whether or not Placentinus did have a direct influence in England, we know that Vacarius, who was certainly teaching in England, seems to have been giving a wider scope to the Roman idea of ownership than was warranted by the Roman texts, and the same may have been true of Johannes Bassianus who was very probably teaching here around the end of the twelfth century.<sup>32</sup>

It may well be that the thinking that inspired the legislative introduction of the English possessory assizes was Roman, or continental, thinking and the presence of those assizes, quick and cheap remedies, served to accelerate the proprietisation of the feudal relationship.

There are, I am sure, many other explanations and the shift was probably multi-faceted. As Milsom warned us in the introduction to the *Historical Foundations of the Common Law*, no single answer is likely to be right and any picture is a personal one.

Trespass, debt and property. Milsom's legal history was far wider ranging than these and we may all have our favourite places where his insights ripped open some area of law and brought it into sharp relief. Mine is the chapter on the writ of detinue in the *Historical Foundations* which explains, I think wholly satisfyingly, what is going on in the fourteenth and fifteenth centuries without fighting shy of the interpretative problems of the cases. But that is only one bit among many. I firmly believe that those of us who came to legal history after the 1960s cannot with any confidence reconstruct the pre-Milsom historiography with any confidence, so dependent have we become on his way of looking at things and at the professionalisation of legal historical study that his work largely precipitated.

What we have in these situations are very specific pieces of legal history based on detailed research into the sources, coupled with the asking of different questions of those sources and therefore the generation of different

<sup>30</sup> Quoted in Feenstra, "Les Origines", p. 236. In the *Summa Institutionum*, quoted by Feenstra, "Les Origines", p. 239, the vassal is listed in a group of holders of land less than owners, reflecting the proprietary dimension.

<sup>31</sup> J.C. Lawson, "The Influence of Civilian and Canonist Learning on the English Royal Law 1154–1189", Ph.D. thesis, University of Cambridge, 2015, 109–10. The link between *mort d'ancestor* and the Roman interdict *quorum bonorum* is made in H. Bracton, *On the Laws and Customs of England*, trans. G. Woodbine, ed. S.E. Thorne (Cambridge MA 1968), 2.295.

<sup>32</sup> Feenstra, "Les Origines", pp. 245–48.

answers. Behind this lie some important assumptions about the way in which law, especially medieval law, worked. Perhaps the most important of these is that the names of the forms of action at first reflect the ordinary meaning of words and only later come to take on specific legal meanings.<sup>33</sup> Trespass originally meant wrong, no more and no less: "Forgive us our trespasses." Only later did it come to refer specifically to direct forcible injuries, perhaps, Milsom says, as late as the seventeenth century. In the language of the Middle Ages, to speak of a tort of trespass would have been almost laughable. So too with covenant. Covenant originally, meant agreement, no more and no less, very much the same as our word contract today. Only later did the writ of covenant, the form of action, take on its own hue referring to an agreement under seal. But we do have to be careful with our assumptions. We cannot really be sure what the word disseisin meant in 1166, for example. Another great legal historian of the middle and later twentieth century, Brian Simpson, put it forward as a general proposition that legal concepts were expressed in words originally used in legal contexts with their natural, non-legal, meanings, and I believe that this led him into error with his analysis of the early meaning of consideration in contract.<sup>34</sup> The action of assumpsit was framed as a claim based on a breach of promise; but whether promise here connoted the taking on of an obligation by the deliberate adoption of a particular social institution or only the weakened sense of the word in which we say that all contracts are promises, that we can only guess. It could easily have been both. Did trusts originally involve trusting? And so on. Words do not always mean what we think they mean, and we need always to be awake to the possibility that they are being used in a technical sense which would have been recognised at the time, or that a legal concept has developed without an accepted name and only later has the particular technical legal name stuck. We have tort cases based on *negligentia* from the fourteenth century, but I doubt there was a clear sense that it means the failure to take the care that would have been taken by a reasonable man until the eighteenth century at the earliest. Nevertheless, so long as we are careful, the Milsomian insight that words originally had their normal general meanings is very valuable. I suspect that it is something that we all tend to assume in our own work today.

Another insight which is of general importance is that legal development consists in the repeated abuse of basic legal ideas.<sup>35</sup> Abuse, not merely use. So when we say a trespassory form of action being used for breaches of contracts in the fifteenth and early sixteenth centuries we need not assume that it was genuinely believed that these cases were seen in what we would

<sup>33</sup> S.F.C. Milsom, "Reason in the Development of the Common Law" (1965) 81 L.Q.R. 496, at 500–02.

<sup>34</sup> A.W.B. Simpson, "The Analysis of Legal Concepts" (1964) 80 L.Q.R. 535, at 545–48; A.W.B. Simpson, *A History of the Common Law of Contract* (Oxford 1975), 316–488.

<sup>35</sup> Milsom, *Historical Foundations*, p. xi.

call genuinely tortious terms. One of the very first of the cases in what we see with hindsight as the development of this action of *assumpsit* as a general contractual remedy, *Doige's Case* in 1442, has all the appearance of having been conceptualised as a contract case despite being framed in trespass on the case, in tort. "It would be marvellous law that a bargain should bind one party, but give no remedy against the other."<sup>36</sup> Modern lawyers could learn from this, as tortious actions for negligent misstatement first made up for perceived shortcomings in the sphere of contractual remedies, then, in a no doubt unconscious replication of what happened around 1500, have come to be explained them in terms of assumption of responsibility. So when the great Harvard legal historian James Barr Ames came to stress the emergence of *assumpsit* in terms of its trespassory surface he may have been guilty of a mis-analysis of what was in fact going on.

Related to this is another insight, that legal change commonly comes about as a result of lawyers, especially plaintiffs' lawyers, framing their cases in such a way as to maximise the chances of winning in the actual litigation, not with a view to developing the law in a particular direction.<sup>37</sup> If some way of achieving a result works, other lawyers will follow the same route and a new rule may in time be seen to have been born. Its history can be reconstructed, even if no-one at the time knew that they were creating a new rule. We might add that the flexibility in framing cases may equally stand in the way of the law changing. The rule that only the parties to a contract or their privies were affected by it could be manipulated as early as 1240 to give rights to a person who was not in truth a party to it, increasingly easily after the emergence of the Court of Chancery quarter of a millennium later; so easy was it to contract round it that the privity of contract rule itself remained in existence for full 750 years until it was finally, and then only nearly, abolished.

And so on. We may all have become so used to Milsom's ways of thinking, imbibing them from the *Historical Foundations* and reading them made explicit in the *Natural History of the Common Law*, that we go along his paths almost unthinkingly.

A lawyer by training, Milsom was the lawyer's legal historian. His real concern was the law itself and its heartland of private law more than public law or its institutional framework of courts, legislature and judges, though of course he did write on these too. Indeed, his first substantial work, his fellowship dissertation at Trinity, was on the history of administrative law. I cannot agree that one needs a legal background to be a legal historian, or at least this sort of legal historian, but it does require a lawyer's cast of mind,<sup>38</sup> and Milsom had that mind.

<sup>36</sup> Sir J. Baker, *Baker and Milsom, Sources of English Legal History*, 2nd ed. (Oxford 2010), 434.

<sup>37</sup> Milsom, *Natural History of the Common Law*, pp. 1–23.

<sup>38</sup> *Ibid.*, at pp. xviii–xxi.

As the more perceptive critics of the first edition of the *Historical Foundations of the Common Law* noted, the book is in some sense a work of imagination. Many law books are, as general principles are identified from the mass of case law and statutes. Those of us who are law teachers will be very familiar with the “what if” question, as we teach our students to test the boundaries of legal ideas and the limits of legal analogies. To pick up on Milsom’s parallel with the children’s joining the dots puzzle, we are almost always concerned with the space between the dots more than with the dots themselves. Most of the time, whether as academics or judges, we are assisted by the reported reasoning in previous cases, though there may still be room for the really creative imagination to work, as we can see with Peter Birks’s *Introduction to the Law of Restitution*.<sup>39</sup> The lawyer is always concerned with the way in which hypothetical cases would be decided, the “what if” questions, and Milsom’s legal history is very much concerned with this type of reasoning. And it is so much harder to do it for the Middle Ages, or indeed any historical period before the appearance of official law reports in 1865, than it is for us today. As Milsom himself said, “There is never occasion to write down what everybody knows”,<sup>40</sup> so it has to be left to imaginative reconstruction. Perhaps not never, but hardly ever. Milsom himself gives credit to Ralph Sutton’s book *Personal Actions at Common Law*, based on a course of lectures at the Inns of Court in 1929 designed to help law students understand pre-Judicature Act cases. A few years ago one of my research students pointed out the value of model answers to questions in bar exams as a way of getting to the dogmatic core of legal thinking in the nineteenth century without getting bogged down in the uncertainty of case law, and there exists similar very introductory teaching material as far back as the middle of the thirteenth century. But even this type of work raises interpretative problems, and can all too easily be consciously over-simplifying. The legal historian joining his or her dots cannot avoid the problem of lack of evidence of something. Did it not happen, or was it so routine that it was not worth recording, or was a point so obvious that parties to a dispute always compromised? All we can look for as legal historians are tiny traces in the sand of things that might have been abundantly obvious to contemporaries – or, indeed, might just as easily have been unnoticed by them too.

All this is pure Milsom, and it is eye-opening for all those of us who try to get to grips with the realities of legal history. All of it is summed up in his final book, *A Natural History of the Common Law*, and it and all his publications underpinning it are works of real scholarly genius. Even if every point he had made about substantive law were dismissed as pure

<sup>39</sup> P. Birks, *Introduction to the Law of Restitution* (Oxford 1985).

<sup>40</sup> Milsom, *Natural History of the Common Law*, p. 76.

heresy, and of course it will not be, his influence on English legal history will have been profound.

So it is with real diffidence that I end by venturing a couple of qualms about Milsom's jurisprudence.

The first perhaps proves his point that one's approach to legal history may depend on one's intellectual upbringing or background. I am, at least in part, a Roman lawyer, so it is perhaps inevitable that I will see Roman law obtruding into English law more than a non-Roman lawyer would. But I do think it cannot be ignored. We must always be careful to be suspicious of too-glib assertions of influence, but we must also not be too dismissive. This may have been especially important in the twelfth century, when we know that there were men with training in Roman law around Henry II's court, and I cannot go along with Milsom's conclusion that the Roman law in Bracton in the second quarter of the next century was only skin-deep. It was probably still significant in the late thirteenth century, when the son of the glossator Accursius, who had himself lectured at Orléans, was among Edward I's advisers; and quite possibly it extended into the fourteenth too, and was intermittently relevant later. Nor was it just Roman law that obtruded from time to time. Read Plowden's *Commentaries* from the late sixteenth century and we see Aristotle featuring in legal argument, and there is a fair amount of evidence that English lawyers at this time were using continental European law lexicons and works of legal dialectic to shape their own ideas. Two centuries later, it is abundantly clear that English lawyers were thoroughly well-read in the works of northern European natural lawyers, as well as the English philosophers Locke and Hobbes. These influences creep into case law, but they would have been far more significant in legislation, and they were undoubtedly of great importance for the writers of some legal texts from the sixteenth century onwards. Milsom, I suspect, underestimates all of this; but I might of course be wrong.

Behind this, or alongside it, there lies a particularly English model of law, consisting of rules that should be applied by judges in court. Values or preconceptions which might have been fundamental in determining the outcome of cases, either by influencing jurors or influencing judges, were not in themselves parts of the law but rather features of the application of the law to individual disputes. It is the legal model we associate with H.L.A. Hart, an attractive model but perhaps a limited one if we are attempting to understand the law as a complex institution. It lies behind what Milsom described as the premiss to his highly stimulating article, "Law and Fact in Legal Development"<sup>41</sup>: "Legal development consists in the increasingly detailed consideration of facts." The legal historian may

<sup>41</sup> (1967) 17 U.T.L.J. 1.

be driven to adopt such a model through lack of evidence, or choose to adopt it as a way of giving the law a measure of certainty and so making it possible to chart its history. But it can lead to a degree of misrepresentation, like the wonderfully memorable opening of chapter 14 of the first edition of the *Historical Foundations*: "The miserable history of crime in England can be shortly told. Nothing worthwhile was created. There is no achievement to trace." Slightly muted in the second edition, to "There are only administrative achievements to trace", it downplays the changes that did occur. Criminal law may well have a miserable history, but there were some worthwhile creations, only not in the model of law that is being assumed.

My second qualm relates to the metaphor of joining the dots, something we all do as lawyers, and probably something that common lawyers have always done. We do it because we assume that there is a right answer to a legal question, even if that answer may be controversial. As academics or judges we probably have some abstract framework which enables us to join the dots, whether that framework consists of legal or moral principles or both, or of social policies. Advocates have the luxury of choosing the framework which best represents their client's interest, persuading a court that it should accept it. Unsatisfactory though it might be for a practising lawyer, the legal historian has to accept that there may have been no right answer in a controversial case, that the law was simply indeterminate. The resolution of these indeterminacies may have been a major motor for legal development. To complete the Milsomian metaphor, legal history might look like a complicated version of the children's joining the dots, but it is not that our dots are not numbered, they don't even join. But those of us who come to legal history from law, like Milsom, can hardly resist the temptation to produce coherence where none might have existed. All we can do is populate our history with more dots, as in the three great articles on trespass in 1958, so that there is less necessity for imaginative reconstruction. And, where we do not have enough dots, we need to make clear to those who may read our work where we are making imaginative leaps and where we are on *terra firma*.

Milsom, I am sure, recognised all of this, which is why he said that in legal history all major conclusions must be provisional, all analyses personal. It was why he put so much weight on the role of lawyers trying to win the instant case, with never a thought that they might be changing the law. It was why he stressed his intellectual formation as a lawyer, though one who was also a natural scientist at heart who had reluctantly forsaken his test tubes. Why, like Charles Darwin, he was a serial heretic.

I end where I began, with John Baker's statement in the obituary in *The Times*, that Toby Milsom was the most distinguished legal historian of the twentieth century. He was also the most distinctive. No other legal historian, I think, would ever explain a series of cases and then say that what he

had said was “probably all wrong”.<sup>42</sup> But, he continued, his question must have been right; it certainly was. Even where we disagree with his reconstructions, which we may often do, his way of looking at a subject cannot fail to influence our own. His willingness to approach a topic by leaving aside orthodoxies and looking at it afresh should be an inspiration to us, though his willingness to develop his arguments through exhausting analysis of plea rolls, year books, charters and other legal literature can be dispiriting for those who want their legal history easy. No-one since Maitland had done so much to put our subject on a new footing. We are privileged to be his followers.

<sup>42</sup> Milsom, “Reason in the Development of the Common Law”, p. 510.