THE LAW OF EVIDENCE IN VICTORIAN ENGLAND

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ABBREVIATIONS

Brougham MSS	The Manuscripts of Lord Brougham in University College London
Parl. Deb.	*Parliamentary Debates*
PP	*Parliamentary Papers*
UCL	The Manuscripts of Jeremy Bentham in University College London (followed by box and page numbers)
Works	*The Works of Jeremy Bentham, published under the Superintendance of his Executor, John Bowring*, 11 vols. (Edinburgh, 1838–43)

ENGLISH LAW REPORTS

A & E	Adolphus, John Leycester, and Thomas Flower Ellis, *Reports of Cases . . . in the Court of King's Bench*, 12 vols. (London, 1834–40)
Atk	Atkyns, John Tracy, *Reports of Cases . . . in the High Court of Chancery in the time of Lord Chancellor Hardwicke*, 3rd edn, by Francis Williams Sanders, 3 vols. (London, 1794)
B & Ad	Barnewall, Richard Vaughan, and John Leycester Adolphus, *Reports of Cases . . . in the Court of King's Bench*, 5 vols. (London, 1831–5)
B & Ald	Barnewall, Richard Vaughan, and Edward Hall Alderson, *Reports of Cases . . . in the Court of King's Bench*, 5 vols. (London, 1818–22)

B&S	Best, William Mawdesley, and George James Phillip Smith, *Reports of Cases . . . in the Court of Queen's Bench and the Court of Exchequer Chamber on Appeal from the Court of Queen's Bench*, 10 vols. (London, 1862–71)
Beav	Beavan, Charles, *Reports of Cases in Chancery*, 36 vols. (London, 1840–69)
Bing	Bingham, Peregrine, *Reports of Cases . . . in the Court of Common Pleas and Other Courts*, 10 vols. (London, 1824–34)
Bing NC	Bingham, Peregrine, *New Cases . . . in the Court of Common Pleas and Other Courts*, 6 vols. (London, 1835–41)
Brod & B	Broderip, William John, and Peregrine Bingham, *Reports of Cases . . . in the Court of Common Pleas and Other Courts*, 3 vols. (London, 1820–2)
Camp	Campbell, John, *Reports of Cases . . . at Nisi Prius, in the Courts of King's Bench and Common Pleas and on the Home Circuit*, 4 vols. (London, 1812–16)
Car & Kir	Carrington, F. A., and A. V. Kirwan, *Reports of Cases . . . at Nisi Prius*, 3 vols. (London, 1845–52)
Car & P	Carrington, F. A., and J. Payne, *Reports of Cases . . . at Nisi Prius*, 9 vols. (London, 1825–41)
CB	Manning, James, T. C. Granger, and John Scott, *Common Bench Reports. Cases . . . in the Court of Common Pleas and in the Exchequer Chamber*, 18 vols. (London, 1846–56)
C&J	Crompton, Charles, and John Jervis, *Reports of Cases . . . in the Courts of Exchequer and Exchequer Chamber*, 2 vols. (London, 1832–3)
Cowp	Cowper, Henry, *Reports of Cases . . . in the Court of King's Bench from . . . 1774 to . . . 1778*, 2nd edn, 2 vols. (London, 1800)

Cox CC	Cox, Edward William, *et al.* (eds.), *Reports of Cases in Criminal Law*, 31 vols. (London, 1846–1948)
Cr App R	*Criminal Appeal Reports* (London, 1908–)
Cr M & R	Crompton, Charles, R. Meeson and H. Roscoe, *Reports of Cases . . . in the Courts of Exchequer and Exchequer Chamber*, 2 vols. (London, 1835–6)
De G F & J	De Gex, J. P., F. Fisher and H. Cadman Jones, *Reports of Cases Heard and Determined by the Lord Chancellor and the Court of Appeal in Chancery*, 4 vols. (London, 1861–70)
Dougl	Douglas, Sylvester, *Reports of Cases . . . in the Court of King's Bench, in the Nineteenth, Twentieth, and Twenty First Years of the Reign of George III*, 4th edn, by W. Frere and H. Roscoe, 4 vols. (London, 1813–31)
East	East, Edward Hyde, *Reports of Cases . . . in the Court of King's Bench*, 16 vols. (London, 1801–14)
Esp	Espinasse, Isaac, *Reports of Cases . . . at Nisi Prius, in the Court of King's Bench and Common Pleas from . . . 1793 to . . . 1796*, 6 vols. (London, 1801–7)
Exch	Welsby, W. N., E. T. Hurlstone, and J. Gordon, *The Exchequer Reports. Reports of Cases . . . in the Courts of Exchequer and Exchequer Chamber*, 11 vols. (London, 1849–56)
Fitzg	Fitz-Gibbons, John, *The Reports of Several Cases . . . in the Court of King's Bench* (London, 1732)
Holt	Holt, Francis Ludlow, *Reports of Cases . . . at Nisi Prius*. (London, 1818)
JP	*The Justice of the Peace* (London, 1837–)
LJMC	*The Law Journal Reports, Magistrates' Cases, New Series* (London, 1831–96)
LR	*The Law Reports* (London, 1866–)

LT	*The Law Times Reports* (London, 1859–1947)
LTOS	*The Law Times Reports, Old Series* (London, 1843–59)
Leach	Leach, Thomas, *Cases in Crown Law*, 4th edn, 2 vols. (London, 1815)
Lewin	Lewin, Sir Gregory A., *A Report of Cases Determined on the Crown Side on the Northern Circuit*, 2 vols. (London, 1834–9)
Lofft	Lofft, Capel, *Reports of Cases . . . in the Court of King's Bench*. (Dublin, 1790)
Mac & G	Macnaghten, Steuart, and Alexander Gordon, *Cases in the High Court of Chancery*, 3 vols. (London, 1850–2)
Mod	*Modern Reports: or Select Cases Adjudged in the Courts of King's Bench, Chancery, Common Pleas and Exchequer from the Restoration of Charles the Second to the Twenty Eighth Year of George the Second*, 12 vols., 5th edn, by Thomas Leach (London, 1793–6)
PD	*The Law Reports, Probate, Divorce and Admiralty Division* (London, 1875–90)
Peake	Peake, Thomas, *Cases Determined at Nisi Prius*, 3rd edn (London, 1820)
Peake Add Cas	Peake, Thomas, *Additional Cases* (London, 1829)
P Wms	Williams, William Peere, *Reports of Cases . . . in the High Court of Chancery, and of some Special Cases Adjudged in the Court of King's Bench*, 4th edn, by Samuel Compton Cox, 3 vols. (London, 1826)
QB	Adolphus, John Leycester, and Thomas Flower Ellis, *Queen's Bench Reports*, 18 vols. (London, 1843–52)
Rob Ecc	Robertson, J. E. P., *Reports of Cases . . . in the Ecclesiastical Courts*, 2 vols. (London, 1850–3)
Russ	Russell, James, *Reports of Cases . . . in the*

	High Court of Chancery, 5 vols. (London, 1827–9)
Russ & Ry	Russell, William Oldnall and Edward Ryan, *Crown Cases*. (London, 1825)
Ry & Mood	Ryan, Edward, and William Moody, *Reports of Cases Determined at Nisi Prius*. (London, 1827)
Salk	Salkeld, William, *Reports of Cases Adjudged in the Court of King's Bench; with some Special Cases in the Courts of Chancery, Common Pleas and Exchequer*, 6th edn, by William David Evans, 3 vols. (London, 1795)
Stark	Starkie, Thomas, *Reports of Cases . . . at Nisi Prius, in the Courts of King's Bench and Common Pleas, and on the Circuit*, 3 vols. (London, 1817–20)
TLR	*The Times Law Reports* (London, 1884–1952)
TR	Durnford, Charles and Edward Hyde East, *Term Reports in the Court of King's Bench*, 8 vols. (London, 1817)
Taunt	Taunton, William Pyle, *Reports of Cases . . . in the Court of Common Pleas, and other Courts*, 8 vols. (London, 1810–23)
Vent	*The Reports of Sir Peyton Ventris* (London, 1726)
Wils KB	Wilson, George, *Reports of Cases . . . in the King's Courts at Westminster*, 3rd edn, 3 vols. (London, 1799)
WN	*Weekly Notes* (London, 1866–1952)
WR	*Weekly Reporter* (London, 1853–1906)

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1

INTRODUCTION

In their Report of 1852–3 the Common Law Commissioners remarked that it was 'painful to contemplate the amount of injustice which must have taken place under the exclusive system of the English law'.[1] They referred to what any observer in the middle of the nineteenth century would have recognised as the outstanding feature of the English law of evidence as it operated in the superior courts of common law: the extent to which it prevented potential witnesses from giving testimony. Persons who might have been able to give useful evidence could be barred in a variety of circumstances. A witness with criminal convictions might be excluded, as might one who was unable for reasons of conscience to take a Christian oath. Those accused in criminal proceedings could not go into the witness box in their own defence. Persons, including the parties and their spouses, who had any pecuniary interest in the outcome of a civil action were not allowed to testify in that action. By 1852, the abolition of these restrictions had just begun, and it took until the end of the century to finish the job.

By the middle of the nineteenth century, English evidence law was becoming exclusive in another way. An observer might have reckoned that once a suitably disinterested witness had been found who was conventionally religious and without criminal convictions, that person would be allowed to testify without further restraint. But for several decades judicial decisions had been developing restrictions on what even a competent witness could say in court. Evidence of questionable reliability, which would

[1] *Second Report of H. M. Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law* PP 1852–3 [1626] XL, 11.

have been heard for what it was worth a century earlier, was frequently excluded. This feature of evidence law was to become even more pronounced and would not retreat until the second half of the twentieth century.

The increasing restrictions on competent witnesses were reflected in the professional literature. For much of the eighteenth century there was no serious rival to a small work on evidence written by Sir Jeffrey Gilbert,[2] and posthumously published in 1754. Just over half of this book dealt with what we would now recognise as principles or rules of evidence law, and of this part by far the larger portion was devoted to the evidence of written instruments such as deeds, affidavits, writs, and even Acts of Parliament. The remainder of the work was a digest, which contained information about what it was proper or improper to prove in relation to the various issues that might be pleaded in particular actions. For example, pages were devoted to the learning on such pleas as *non est factum* and *non assumpsit*, and of not guilty in ejectment, trespass, and trover. In effect, this amounted to a miscellany of substantive law.[3] By the 1850s Gilbert's work had been superseded by new treatises, of which the most popular were written by Peake, Phillipps, Starkie, and Best.[4] All these writers, save Best, began by producing a work that was, like Gilbert's, to a large extent a digest of substantive law. Peake's work never changed this pattern but ultimately Phillipps and Starkie shed their digests in order to concentrate on providing an adequate account of a rapidly developing subject.[5]

A visit to the courts presided over by the common law judges

[2] Sir Jeffrey Gilbert (1674–1726) held judicial appointments in Ireland and then, from 1722, was a Baron of the English Court of Exchequer, becoming Chief Baron in 1725. The treatises that appeared under his name were all published posthumously, that on evidence being first published in Dublin in 1754. The last edition, by J. Sedgwick, was published in London in 1801. See the entry by John H. Langbein in A. W. B. Simpson, ed., *Biographical Dictionary of the Common Law* (London, 1984), p. 206; William Twining, 'The Rationalist Tradition of Evidence Scholarship', in *Rethinking Evidence* (Evanston, Ill., 1994), pp. 35–8.

[3] See, e.g., in the discussion of assault, the well-known example of the man who lays his hand on his sword, declaring that were it not assize time he would tell the plaintiff more of his mind (Sir Jeffrey Gilbert, *Law of Evidence*, 3rd edn (London, 1769), p. 256).

[4] See ch. 2, pp. 14–25, and Twining, *Rethinking Evidence*, pp. 42, 45–7, 48–9.

[5] See, e.g., the advertisement in the 4th edition of Thomas Starkie's *A Practical Treatise* (London, 1853).

in the 1850s would have revealed a procedural formality that had developed alongside the formal rules of evidence and was particularly marked in criminal trials. Defendants in criminal trials in both the eighteenth and nineteenth centuries were incompetent as witnesses in their own defence. But an eighteenth-century defendant, particularly one in the first half of that century, could still take an active part in the proceedings, and was expected to do so.

The presence of counsel on both sides was unusual for much of the eighteenth century, and consequently the judge had far more control over the proceedings than when he shared control with other professional lawyers: he would intervene frequently to examine prosecution witnesses and the accused; he could talk informally with jurors during the course of the trial; he could advise them on the verdict that should be returned, discuss the grounds of the verdict with them after it had been given, and, if need be, require them to deliberate further. This close contact between judge and jury meant that there was little need for the judge to become concerned with formal directions designed to protect the defendant, or to worry about the quality of evidence admitted. If the jury appeared to be going astray, the judge could correct them. However, by the middle of the nineteenth century this atmosphere of informality had been absent for some decades. For reasons that are discussed in chapter 5, by that time counsel was playing a larger part in criminal trials, with the judge taking a more passive role, and the defendant having scarcely any part to play at all. But, because there was less opportunity for ad hoc guidance, greater care had to be taken to exclude evidence that jurors might not be able to assess accurately. Whether evidence was admissible at all and, if admissible, what should be said about it in the summing up were questions that began to assume some importance. In criminal trials, because of the absence of an effective appellate system, this area of law remained in an embryonic state. In the civil courts, where there was for a time a surfeit of appellate courts,[6] the opportunity nevertheless existed for the growth of a new body of rules dealing with these questions.

While the common law courts were building up new evidential

[6] A. H. Manchester, *A Modern Legal History of England and Wales 1750–1950* (London, 1980), pp. 171–7.

barriers, Parliament was breaking down the old ones: from the 1850s onwards we can see the gradual collapse of the old restrictions based on competency. What brought about these changes? One question that has to be considered is whether there was a sharp division between lawyers and politicians. Was the victory for evidence law reform in Parliament counterbalanced by the victory in the courts of an essentially conservative profession? We cannot progress far with questions such as this without taking into account the figure of Jeremy Bentham and the tradition concerning the influence that he had on the evidence reforms of the nineteenth century.[7]

'BENTHAM'S IMMENSE INFLUENCE'

In 1861, Maine wrote of 'Bentham's immense influence in England during the past thirty years',[8] and twenty years later expressed the opinion that Bentham and his supporters had 'suggested and moulded the entire legislation of the fifty years just expired'.[9] 'Bentham's immense influence' soon became a commonplace, as can be seen from a students' handbook published in 1875, which Dicey acknowledged as an influence on his own writings. In this work, Wilson wrote:

> Generally speaking, legislation has in all countries been directed rather at symptoms than at causes, and has been quite as likely as not to open a new sore while closing an old one. That the legislation of this century has been in some degree an exception, that amidst all its shortcomings and inconsistencies there is traceable something which is not mere quackery, something like a clear perception of the true conditions of health in the body politic, is due mainly to the presence of one new element – to the faithful labours, prolonged over more than half a century, of one man who dared to sit still and think, while others were acting at random, who dared to believe that law is capable of scientific treatment. What Socrates did for

[7] On Bentham generally see Elie Halévy, *The Growth of Philosophic Radicalism*, trans. Mary Morris (London, 1928); Ross Harrison, *Bentham* (London, 1983); John Dinwiddy, *Bentham* (Oxford, 1989). On Bentham and evidence law, see William Twining, *Theories of Evidence: Bentham and Wigmore* (London, 1985).

[8] Sir Henry Sumner Maine, *Ancient Law*, new edn, with notes by Sir Frederick Pollock (1861, London, 1930), p. 90.

[9] Sir Henry Sumner Maine, 'Radicalism Old and New', *St James's Gazette*, 25 January 1881, quoted in William Thomas, *The Philosophic Radicals: Nine Studies in Theory and Practice 1817–1841* (Oxford, 1979), p. 6.

moral philosophy, what Adam Smith did for political economy, that Bentham did, so far as England is concerned, for jurisprudence.[10]

Similar claims were made in entries in the *Encyclopaedia Britannica* and *Dictionary of National Biography*.[11]

It was in this intellectual context that Dicey wrote *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*. In this work he argued that from about 1825 onwards the teaching of Bentham had found ready acceptance among 'thoughtful Englishmen' because 'when it became obvious to men of common sense and of public spirit that the law required thoroughgoing amendment, the reformers of the day felt the need of an ideal and of a programme'.[12] But Dicey weakened his argument and created problems of falsifiability by the broad interpretation he put on 'Benthamism' and 'Benthamite doctrine'. His contention was that, although the men who had guided the course of legislation 'were in many instances not avowed Benthamites', and 'some of them would have certainly repudiated the name of utilitarians', nevertheless they

> were all at bottom individualists. They were all, consciously or unconsciously, profoundly influenced by utilitarian ideas ... they were

[10] Sir Roland K. Wilson, *The History of Modern English Law* (London, 1875), pp. 278–9. The book was one of a series entitled 'Historical Handbooks' under the general editorship of Oscar Browning. Dicey acknowledged Wilson's work as an influence on his own writings: see the preface to the first edition of A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (London, 1905).

[11] *Encyclopaedia Britannica* 9th edn, s.v. 'Bentham, Jeremy', by T. E. Holland; *Dictionary of National Biography*, s.v. 'Bentham, Jeremy', by Sir John MacDonnell. The latter article referred to 'the abolition of arbitrary rules excluding from the cognisance of juries facts material for them to know', and to the passing of legislation whereby 'the legislature approached step by step towards [Bentham's] principle that no class of witnesses should be incompetent and no species of evidence excluded, but that every fact relevant to the inquiry should be admitted for what it is worth'. According to MacDonnell, while zealous disciples of great ability such as Brougham, Romilly, Horner, and Macintosh had assisted the work of legal reform, the originating spirit had been that of Bentham. For a similar approach see John Forrest Dillon, 'Bentham's Influence in the Reforms of the Nineteenth Century', in *Select Essays in Anglo-American Legal History*, compiled and edited by a committee of the Association of American Law Schools (Cambridge, 1907), vol. I, pp. 492–515.

[12] Dicey, *Law and Public Opinion*, 2nd edn (London, 1914), p. 168. In this he followed Maine, who had been of the opinion that the secret of 'Bentham's immense influence' had been his success in placing before the nation 'a distinct object to aim at in the pursuit of improvement' (Maine, *Ancient Law*, 1930 edn, p. 90).

utilitarians, but they accepted not the rigid dogmas of utilitarianism, but that Benthamism of common sense which, under the name of liberalism, was to be for thirty or forty years a main factor in the development of English law.[13]

The extent of Bentham's role was allowed to go unrevised by Holdsworth, who endorsed and explained a famous observation of Brougham in these words:

> Bentham was the first English lawyer to think out a comprehensive set of philosophical principles upon which reforms in the law ought to be made. In the light of these principles he devoted his long life to the production of detailed programmes of reform in the subject matter of the law, in the form of its statement, in the machinery of its enforcement, in the institutions of the state; and he insisted on the duty of the Legislature to make all these reforms by direct legislation. It is for these reasons that Brougham could truly say that 'the age of law reform and the age of Jeremy Bentham are one and the same'.[14]

This left open the extent to which Bentham's work had affected particular reforms in the law, but elsewhere Holdsworth stated that in the period 1833–75 the legislative changes in the law of evidence, 'though not extensive, were almost as important, as those made in the law of civil procedure and pleading, *for, as we have seen, Bentham had paid as much attention to evidence as to procedure and pleading*'. The words emphasised show that Holdsworth assumed a connection between Bentham's writings on procedure and evidence and the enactment of reforming legislation. In another passage, after stating that some of Bentham's best work had been done on evidence, Holdsworth continued, 'and *as a result of it* important changes in the law had been made by the Legislature'.[15]

[13] Dicey, *Law and Public Opinion*, 2nd edn, pp. 169–70; see also p. 177. Dicey extended still further the scope for Benthamism by suggesting that it possessed a latent 'despotic or authoritative element', and that between 1868 and 1900 changes took place that brought this into prominence. He concluded that 'English collectivists' had 'inherited from their utilitarian predecessors a legislative doctrine, a legislative instrument, and a legislative tendency pre-eminently suited for the carrying out of socialistic experiments' (ibid., pp. 308, 310).

[14] Sir William Holdsworth, *A History of English Law*, (London, 1922–66) vol. XIII, p. 42; H. Brougham, *Speeches of Henry Lord Brougham upon Questions Relating to Public Rights, Duties & Interests; with Historical Introductions, and a Critical Dissertation upon the Eloquence of the Ancients* (Edinburgh, 1838), vol. II, pp. 287–8.

[15] Holdsworth, *History of English Law*, vol. XV, pp. 138, 307 (my emphases).