

LAWYERS AND
THE MAKING OF
ENGLISH LAND LAW
1832—1940

J. STUART ANDERSON



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Preface

THIS is a study spanning three sorts of concern. One is law-making. The land law in my title is predominantly land transfer law, with a good dash of ownership thrown in. Legal change came through statute, and this book addresses the conception, formulation, frustrations, and enactment of that form of legal process. Land use law is wholly omitted because its genesis was different; judges played an important part there. Here they are virtually absent, just an occasional extra-judicial pronouncement reminding us of their existence. It is planned and purposive legal change (and resistance to it) which features here, not the outcomes of the accidents of litigation, however significant the pattern they can be made to fit.

A central concern is thus with the law-makers themselves. The law of real property was tough law, always the preserve of specialists. Its reformulation, for whatever purpose and at whosoever behest, had to involve them. The book looks at them and their kin, but within an examination of the structure of the legal professions and its effect upon law-making. Shortly before the start of my chosen period it would have been legal profession, singular; and the bar would have been meant. Attorneys were tradesmen; and for some quite long time after they had constituted themselves a profession the name stuck. Whether it was just a derogatory name, or whether there was something in the claim that solicitors' 'qualifications', and hence their entry to the hall of the professions, applied to just part of their work is a theme running throughout the book. If Harold Perkin's *The Rise of Professional Society* had appeared before the bulk of the text had been completed I would have pointed some of my arguments more than I did. I hope that what I have to say about the formation of the solicitors' profession as such, the tensions within it between London and the north of England, its relation to barristers (as will be seen, 'barristers' is more apt than 'the bar') in cooperating and competing over the management of legal change

will add to his analysis. This is the book's second sort of concern.

One small corner of professional formation needs early mention. The body that ends this book under the grand name of The Law Society first appeared in the 1820s as the Law Institution, but from 1833 called itself the Incorporated Law Society, or, more formally, but very rarely, The Incorporated Law Society. It was managed by a committee which at first was called just that, but which later became the Council, especially to its members. To some outsiders and to critics it became instead 'the council', the small 'c' denoting unwillingness to accept that oligarchic group's pretensions to professional leadership. In writing of it I have used the formal name consistently for the later period, when its position was generally accepted, but more usually the descriptive small 'c' for the earlier, in an attempt to capture more accurately the contemporary nuances. On the other hand, since nothing turned on it, I have simplified to 'the Incorporated Law Society' until 1903, with The Law Society thereafter.

I have divided the text roughly in the 1870s because thereafter the presence of the state was much more obviously felt, which is at least suggestive of a qualitative change. I am inclined to think that that was not permanently so, and that that is what at root divides me from Avner Offer's pioneering work on the period after 1870.¹ I admire his vision and owe him a great debt, not in any way reduced by what must seem like congenital inability to agree with him. At times this may seem wilful, since in his text itself there are numerous counter-indications which could be used to construct conclusions quite different from his own. Yet what he means as his conclusions cannot be mistaken, so forcefully are they drawn. It is these that I have used. If I have misrepresented his analysis, I am sorry. The earlier section of the book is new territory.

Like Dr Offer I have relied in part upon Departmental papers in the Public Record Office, though only for the later chapters, where much of the significant activity happened in private. My

¹ 'The Origins of the Law of Property Acts, 1910–1925', (1977) 40 *MLR* 505; *Property and Politics, 1870–1914* (1981).

main source however cannot easily be classified in historians' terms as either primary or secondary. It is the professional press. This is a massive archive of professional activity and opinion, containing details by the hundred not available elsewhere and in the aggregate conveying an unrivalled picture of a profession in the process of self-formation. It cemented loyalties, purveyed values, relayed news, caused disputes, resolved them, and made things happen. It itself was a constitutive agent of the profession, for solicitors in particular. Sadly its indexes were never meant to bear that burden, and the volumes must be read entire, advertisements and all, and in sequence if their value is to be realized. I have found the *Solicitors' Journal* the most fruitful, with *The Law Times* an honourable second.² Each ran at about 800 pages of text per year, indexes and advertisements extra. The *Law Journal*³ was of similar size. There may be private correspondence and diaries which will illuminate murky corners left by these three, but they will certainly be few and the light scarcely needed. This study only just begins to exploit the richness that historians of the professions can find there. Lawyers, academic lawyers in particular, who believe that the scholarly periodical tradition began with the *Law Quarterly Review*⁴ should think again—there is a wealth of material in these weekly professional papers that is quite indistinguishable from the later journals.

Some small fragment of it is discussed when this study reaches its third major concern, addressed particularly to students of modern land law inquisitive about the origin of their texts. Towards the end of the book I offer an account of the compilation of the 1925 legislation which covers many of the problems with which they will be familiar. Before that, however, they will find discussion of a much wider range of possibilities strung over a long period—indeed, for virtually the entire span covered by this book there were far-reaching proposals for systematic rewriting of real property law extant. They came to very little, and I offer explanations of why. Non-lawyers will no doubt skip much of my discussion of

² The *Solicitors' Journal* began in 1857, replacing the *Legal Observer*, which first appeared in 1830. See further pp. 98–106 below. *The Law Times* was first published in 1843.

³ First published 1866.

⁴ First published 1885.

texts. At one point in particular that would be a mistake. The Conveyancing Acts of the early 1880s are no doubt technical stuff, but they are the very ideal-type of law-making by and for a profession, carrying a significance far beyond their dry appearance.

Much of the book concerns title registration, reflecting its dominance of professional and political thinking over long periods. I have tried to show that it was not one issue but many, a point which I think Dr Offer rather missed. Like him, however, I found that its origin lay not in 'the land question' but in 'law reform', which I analyse at some length and relate to the evolution of the legal professions. This sets up the central tension: law reform is a good for the professions, but reform of these particular laws is, as it were, reflexive—they concern not just land but lawyers too; every reform of the land laws by lawyers was also self-reform. Every reform of the land laws from 'outside' was a reform of the profession from outside and a diminution of its claims over law reform itself. But the land laws were from time to time a matter of high political controversy. So how was change to come, and whose changes were they to be?

List of Abbreviations

| | |
|--------------------------------|---|
| A.-G. | Attorney-General |
| APLS | Associated Provincial Law Societies |
| BLL | Bodleian Law Library |
| DNB | <i>Dictionary of National Biography</i> |
| EHR | <i>English Historical Review</i> |
| HCD | House of Commons Debates |
| HCP | House of Commons Papers |
| HLD | House of Lords Debates |
| HLP | House of Lords Papers |
| <i>Hist. Jo.</i> | <i>Historical Journal</i> |
| ILS | Incorporated Law Society |
| <i>Jo. Leg. Hist.</i> | <i>Journal of Legal History</i> |
| LA | Law Association |
| LAS | Law Amendment Society |
| <i>Law Jo.</i> | <i>Law Journal</i> |
| <i>Law Mag. & Law Rev.</i> | <i>Law Magazine and Law Review</i> |
| <i>Law Rev.</i> | <i>Law Review</i> |
| <i>Law Soc. Gaz.</i> | <i>Law Society's Gazette</i> |
| <i>Leg. O.</i> | <i>Legal Observer</i> |
| LQR | <i>Law Quarterly Review</i> |
| LS | Law Society |
| LT | <i>Law Times</i> |
| Manchester LA | Manchester Law Association |
| M&PLA | Metropolitan and Provincial Law Association |
| MLR | <i>Modern Law Review</i> |
| PD | Parliamentary Debates |
| PRO | Public Record Office |
| <i>Proc. Brit. Acad.</i> | <i>Proceedings of the British Academy</i> |
| S.-G. | Solicitor-General |
| <i>Sol. Jo.</i> | <i>Solicitors' Journal</i> |
| SR&O | Statutory Rules & Orders |

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PART I

1832-1875

