Radcliffe and Cross

The English Legal System

Sixth edition

edited by G. J. Hand and D. J. Bentley

Butterworths

RADCLIFFE AND CROSS

THE ENGLISH LEGAL SYSTEM

SIXTH EDITION

EDITED BY

G. J. HAND

of King's Inns, Dublin, Barrister; Professor of Legal History, University College, Dublin; Professor of Law, European University Institute, Florence

AND

D. J. BENTLEY

of Lincoln's Inn, Barrister; Professor of Law, University of East Anglia

FOREWORD BY

LORD CROSS OF CHELSEA

A Privy Councillor and an Honorary Fellow of Trinity College, Cambridge; a Lord of Appeal in Ordinary from 1971 to 1975

LONDON

BUTTERWORTHS

1977

ENGLAND: BUTTERWORTH & CO. (PUBLISHERS) LTD.
LONDON: 88 KINGSWAY WC2B 6AB
AUSTRALIA: BUTTERWORTHS Pty LTD.
SYDNEY: 586 PACIFIC HIGHWAY, CHATSWOOD, NSW 2067
ALSO AT MELBOURNE, BRISBANE, ADELAIDE AND PERTH
CANADA: BUTTERWORTH & CO. (CANADA) LTD.
TORONTO: 2265 MIDLAND AVENUE, SCARBOROUGH M1P 4S1
NEW ZEALAND: BUTTERWORTHS OF NEW ZEALAND LTD.
WELLINGTON: 26/28 WARING TAYLOR STREET, 1
SOUTH AFRICA: BUTTERWORTH & CO. (SOUTH AFRICA) (Pty) LTD.
DURBAN: 152/154 GALE STREET
USA: BUTTERWORTH & CO. (PUBLISHERS) INC.
BOSTON: 19 CUMMINGS PARK, WOBURN, MASS. 01801

ISBN Casebound: 0 406 64703 8
Limp: 0 406 64704 6

RADCLIFFE AND CROSS

THE ENGLISH LEGAL SYSTEM

First Edition . . . . . *May* 1937
Reprinted . . . . *February* 1939
Reprinted . . . . *October* 1941
Reprinted . . . . . *August* 1943
Reprinted . . . . *February* 1944
Second Edition . . . . . *July* 1946
Reprinted . . . . . *June* 1948
Reprinted . . . . . *April* 1951
Third Edition . . . . . *April* 1954
Reprinted . . . . . *April* 1958
Reprinted . . . . . *June* 1960
Reprinted . . . . . *July* 1962
Fourth Edition . . . . . *April* 1964
Reprinted . . . . . *August* 1968
Reprinted . . . . *December* 1969
Fifth Edition . . . . . *June* 1971
Reprinted . . . . *January* 1975
Sixth Edition . . . . *May* 1977

FOREWORD

WHAT Geoffrey Radcliffe and I aimed to write when we were planning this book was not an ordinary students text book setting out succinctly the facts which an examinee should know in order to do well in his examination but a continuous, a fairly detailed and, above all, a readable account of the development of our legal system from the earliest times to the present day which anyone interested in the law and history of England might enjoy reading for its own sake. Probably many of those who have had to study the book in the course of the last forty years have found it boring enough, but I hope that it has given pleasure to some of its readers. When I was asked in 1963 to prepare a fourth edition I realised that my knowledge of recent work on English Legal History was far too slight for me to undertake the revision of the historical part of the book and I placed the editing of the first fourteen chapters in more competent hands. I continued, however, to edit the later chapters and even added a final chapter entitled "Looking Ahead." But when I was told, in 1975, that a sixth edition would soon be needed I decided that the time had come for me to give up editing even the second half of the book. I was about to retire and I thought that a younger lawyer would be more in touch with current thinking about our legal system and less unsympathetic to radical criticisms of it than an ageing ex-member of the legal "establishment" was likely to be. So I have taken no part in the preparation of this edition—for which the first part of the book has been revised—as it was for the fifth edition—by Dr. Hand and the second part by Professor Bentley. They have made many improvements and in later editions will no doubt make many more. Inevitably as time passes more

and more of the original bricks will be replaced by newer and better materials; but I hope and believe that the general character and structure of this book will be preserved and I wish "Radcliffe and Cross" continued life and prosperity under its new management.

GEOFFREY CROSS

March, 1977

PREFACE TO THE SIXTH EDITION

THROUGHOUT his long and distinguished judicial career, Lord Cross remained actively concerned with new editions of this work of his more academic days. Although Lord Cross has not taken part in the preparation of the present edition of *Radcliffe and Cross*, the judgment and balance of the original authors have deeply impressed themselves on the present editors, themselves of a generation hardly arrived in the world when the first edition appeared. It remains a work founded on the belief that institutions are best introduced through their history, and that the law is a valuable and civilised technique for the regulation of human affairs.

The process of revision of the historical chapters in the light of modern scholarship, begun by the late Mr. Derek Hall, has continued under Professor Hand. He wishes to thank Mr. J. M. Kaye of the Queen's College, Oxford, and Mr. Patrick Wormald of All Souls' College and the University of Glasgow, for their generous help with certain historical matters, but he alone is responsible for the wording of those chapters and for errors which may be found in them.

We have rearranged a good deal of material within the book to bring out as clearly as possible the effect of the Courts Act 1971 on the structure and working of the legal system. Chapter XXII (The Legal System and the State) has been revised in an attempt to keep up with changing judicial attitudes; the brief account there of the French system has also been brought up to date. As in the fifth edition, the last chapter seeks to indicate some "pressure points" where controversy exists and change may come. No doubt the debate will be extended when the Royal Commission on Legal Services reports. At the

time of writing, although there is a devolution bill before Parliament, its fate is by no means certain ; and a United Kingdom Bill of Rights is still more a matter for speculation (see p. 410). We have therefore resisted the temptation to discuss the potential constitutional jurisdiction arising from such ventures.

The editors would like to thank Mr. Nicholas Patten, of Lincoln's Inn, for a new index. They are grateful as well to their publishers for tolerating so much revision of the text, and for allowing amendments in proof to take account of the *Judicial Statistics* for 1975.

G.J.H.
D.J.B.

February, 1977

PREFACE TO THE FIRST EDITION

THIS book makes no claim to embody the results of any original research. Its purpose is to supply a want, which we have felt as teachers, of a book which should contain within a reasonable compass at once a short history of our legal institutions and an account of the existing organisation of our courts of law.

We have not thought it desirable in a book intended for students beginning the study of the law to encumber the text with a mass of references to the authorities. Our indebtedness to the labours of such writers as Maitland and Sir William Holdsworth, and to the great mass of material published by the Selden Society since its first volume appeared more than fifty years ago, will be apparent on every page to those who are already familiar with the subject.

Our chief difficulty has been that of selection. We trust we have included everything about the past history and present constitution of our courts which anyone beginning the study of our substantive law ought to know. We hope that what else is added will not be found unprofitable as showing those who will help to shape the professional opinion of lawyers in the future what causes have helped or hindered the development of our law in the past.

Dr. Radcliffe wishes to add that though the book has been planned, and revised, in common, Mr. Cross has contributed by far the larger share to its actual execution.

G. R. Y. R.
G. C.

April, 1937

CONTENTS

CONTENTS

1

THE ANGLO-SAXON PERIOD

A GENERAL history of England must include some account of its early inhabitants and of their conquest and rule by Rome, but the historian of the English legal system has no need to push his enquiry so far back into the past, for though England was for more than three centuries a province of the Roman Empire, and, as such, governed by the Roman Law the Anglo-Saxon invasions of the fifth century A.D. destroyed all traces of the old legal order and replaced it with institutions which were, in their origin, purely Germanic. At various stages in its history English Law was deeply influenced by ideas derived from Roman jurisprudence, but this was due in part to the return to England of a measure of Roman Law embedded in the Canon Law of the Church, and in part to the study of Roman Law itself by English judges, and is not at all attributable to any surviving traces of its old dominion here.

Our starting place, then, is the invasion of England by the Anglo-Saxons, and our first period stretches from that date to the Norman Conquest. It is a long period—from the coming of the English to William the Conqueror there is as long an interval as between William the Conqueror and William III—but our knowledge of the law which our ancestors brought with them from Germany and of its development among them here in those early centuries is very scanty, and much of what we do know is of purely antiquarian interest. All that can be attempted in a book of this sort is to give a short sketch of the history of the Anglo-Saxon period and a description of those features in its legal system which must be borne in mind if the work of the Norman and Angevin kings in laying

the foundations of our modern legal order is to be appreciated.

The Anglo-Saxons did not invade this country as a united people, but as a number of separate tribes. Gradually in the course of the seventh and eighth centuries, through conquest or the intermarriage of ruling families, larger units began to emerge—such as the kingdoms of Wessex in the south, of Mercia in the Midlands, and of Northumbria in the north. Meanwhile, in these centuries the English were converted to Christianity by missionaries from the Continent and received from them a first faint contact with the traditions of Roman civilisation, which had been to some degree preserved by the Christian Church. It was under this influence that English tribal chieftains came to reduce into writing their rude attempts at legislation and to employ written conveyances in their grants of lands to their retainers ; it was from the Church, too, that men learnt to dispose of their property by will. Then in the ninth century there came fresh invaders, the Danes, who ousted the Anglo-Saxons from the north-east coast of England and settled there themselves. Alfred, king of Wessex (871–899), headed the English resistance to their further advance, and in the course of the tenth century Alfred's son and grandson succeeded in merging the Danish districts—" the danelaw "—in the rest of England and in uniting the whole country into one kingdom. It is with the legal system as it existed in the united Anglo-Saxon state in the last century before the Norman Conquest that the rest of this chapter is concerned.

The England of the tenth century was divided into shires, though the northernmost parts of the country were not " shired " until after the Norman Conquest. But the oldest division of local government in the Anglo-Saxon system appears to have been a lesser one. In the tenth century, perhaps under continental influence, the division became known as the Hundred, though some features of its court were certainly older. Later still, and

in some parts of England, the unit was actually assessed at a hundred hides—the hide was a unit of land, originally the amount considered necessary for the sustenance of a peasant household. Perhaps because of this economic origin, both the amount of land in a hundred and the number of hundreds in a shire varied very much. Each hundred was itself made up of a number of "townships" or "vills."[1] Though many English villages have kept through the centuries the name of an Anglo-Saxon township, the manner of life of their inhabitants and their law and its administration have been completely transformed. An Anglo-Saxon township was a little community which was often separated from its neighbours by a belt of uncleared woodland, and lived an isolated existence with very little interference from any central authority. Agriculture was the livelihood of almost every man. Commerce in the countryside was primarily a matter of cattle-sales, though trade was nevertheless significant enough in larger centres to call for modest regulation in the laws. In such conditions there are few subject-matters of litigation. Injury to person and property and the simplest contracts of sale or loan make up the bulk of it, together with the less frequent but weightier disputes as to the ownership of land, and we shall not be surprised to find that the law and its administration are alike simple.

The law courts of the Anglo-Saxons corresponded to the territorial divisions of the country. The township indeed was, it seems, too small a unit to have a law court of its own, but once a month a court was held in each hundred and two or three times a year a court of the shire assembled. It is important to remember that these local courts were not staffed by professional judges

[1] "Township" was the Anglo-Saxon word. "Vill" is derived from the Latin "villata." It must be remembered that "town," as the widespread use of the suffix "ton" in place-names shows, did not denote (as it does to-day) a centre of population. A town in the modern sense was likely to be called a "borough" in the Middle Ages.

administering a law of which they had made a special study, but were rather in the nature of public meetings which assembled to transact any public business that there was to be done, including incidentally the judging of cases. The transaction by autonomous communities of all their business—legislative, administrative and judicial—through a single organ and the application to that organ of government of the name "court" run through the whole history of the Middle Ages and were, as we shall see later, of importance in national as well as local institutions.

The shire court, which will become the "county" court after the Norman Conquest, was the gathering in which royal power encountered more ancient popular institutions. It is first expressly mentioned in the reign of Edgar (957–975). Under later kings it consisted, at least nominally, of the free men of the shire; the adjective is important, for in Anglo-Saxon times a large part of the population was not wholly free in status. Later there will be the refinement of owing "suit" to the county court because of holding a particular piece of land.[1] In effect, however, the court was conducted by royal officials. At first the head was the alderman, later the earl. But, with a tendency to group shires into the care of a single alderman or earl, a subordinate official, the shire-reeve (sheriff) came to the fore. The shire-reeve seems to have developed from the king's reeve, the local official who looked after various interests of the king in a given area. The bishop, though not technically a royal official, should also be there in the Anglo-Saxon period; and his presence is a reminder that Anglo-Saxon society did not know as

[1] The words "suit" and "suitors" have undergone a distinct change of meaning. Derived from the Latin "secta" they referred originally to the privilege of following and attending the court in order to take part in its proceedings as a doomsman or judge: a privilege which came to be regarded as an onerous obligation, so that "suit of court" became a recognised feudal burden. Later the word "suitor" became transferred to a person who attends the court in the capacity of a litigant.

clear a distinction between Church and State as was to become familiar under the Normans.

The sheriff had important functions in the hundred also. In the later Anglo-Saxon period the hundred came to the fore as the unit of police and public order. It kept the peace. Its manner of doing so has led to its being called "lynch law legalised"[1]; and though the anachronism of the phrase is unhappy it makes a valuable point. The hundred court met under the presidency of the hundred-reeve, the hundredor. Sometimes, however, the shire-reeve came to the hundred and in this practice there was a measure of closer control.

In the courts of Anglo-Saxon England king and people co-operated under the law. The medieval idea of law and law-making was markedly different from either that of classical times or that we know to-day. Law was primarily the custom of the community. At first it was insisted upon, though, as society grew more complex, perhaps with less conviction, that this law could not be added to, it could merely be declared and clarified and the details of its administration regulated. "The king derived new law from the revelation of an existing law, in which all new laws were already latent but not formulated."[2] King and people alike were under the law and the king needed the co-operation of his people. When the Northumbrian king, Edwin, was considering the adoption of Christianity in 627, so the historian Bede tells us, he first discussed the matter "with his principal advisers and friends," "his wise men," his *witan*.[3] Victorian historians often yielded to the temptation to see in a meeting of these wise men (a *witenagemot*) a kind of forerunner of the Parliament of modern times. Such views are now substantially discredited. The *witan* seems to have been made up of members of the royal

[1] J. E. A. Jolliffe, *Constitutional History of Medieval England* (4th ed., 1961), p. 121.

[2] P. E. Schramm, *A History of the English Coronation* (1937), p. 179.

[3] Bede, *Historia ecclesiastica*, II.13.