A.H. Manchester

Sources of English Legal History

1750-1950

Butterworths

Sources of English Legal History

Law, History and Society in England and Wales 1750–1950

A. H. Manchester, MA, LL M, Ph D

Senior Lecturer in Law
University of Birmingham

London
Butterworths
1984

England	Butterworth & Co (Publishers) Ltd, 88 Kingsway, LONDON WC2B 6AB
Australia	Butterworths Pty Ltd, SYDNEY, MELBOURNE, BRISBANE, ADELAIDE and PERTH
Canada	Butterworth & Co (Canada) Ltd, TORONTO Butterworth & Co (Western Canada) Ltd, VANCOUVER
New Zealand	Butterworths of New Zealand Ltd, WELLINGTON
Singapore	Butterworth & Co (Asia) Pte Ltd, SINGAPORE
South Africa	Butterworth Publishers (Pty) Ltd, DURBAN
USA	Butterworth Legal Publishers, Mason Division, ST PAUL, Minnesota Butterworth Legal Publishers, SEATTLE, Washington, BOSTON, Massachusetts; and AUSTIN, Texas D & S Publishers, CLEARWATER, Florida

---

Manchester, A. H.
Sources of English legal history 1750–1950.
1. Law—England—Sources
I. Title
344.2 KD570

ISBN 0 406 51659 6

Typeset by Phoenix Photosetting, Chatham

Printed and bound in Great Britain by
Robert Hartnoll Ltd. Bodmin, Cornwall

Sources of English Legal History 1750–1950

Preface

This book is intended to complement my narrative text *Modern Legal History*. It surveys 'those legal institutions and those areas of law which were of major significance and which experienced change over a period of two hundred years'. There is an emphasis on legal change and on law reform. Inevitably, therefore, there is a bias towards the nineteenth century: it was during the middle years of that century that public and professional concern regarding law reform reached its peak. Inevitably, too, these documents do not focus solely upon the nuts and bolts of legal institutions or upon 'black letter' law, although such factors are certainly of the greatest importance. It is proper to concern ourselves not only with accurate accounts of the nature of legal institutions and of the law but also with how and why legal change occurred, or did not occur. Of course, any such collection of documents must be highly selective and cannot form a connected narrative save in a somewhat superficial sense. Law students in particular must beware of using the extracts which follow as authorities in the same fashion as they might use an extract from a leading case in a law report: each extract must be evaluated critically and placed in context.

I hope that the extracts offered fulfil a number of functions. First, I hope that each extract is of some interest in its own right. Second, I hope that they will contribute to a wider understanding of the range and nature of the sources which are available, although I am able to do no more than hint at the variety and extent of local sources. Above all I hope that they will encourage more students themselves to embark upon research and writing in this exciting new field of legal history.

I thank my colleagues Mrs V. Edwards and Mr P. J. Cook for reading several of the chapters in the draft and for making a number of helpful comments. I am obliged also to Miss Gillian Jones and Miss Caroline Cole who prepared the typescript. Finally I thank my family for their forebearance.

A. H. Manchester
April 1984

Faculty of Law
University of Birmingham
Birmingham B15 2TT

Table of statutes

References in this Table to '*Statutes*' are to **Halsbury's Statutes of England (Third Edition)** showing the volume and page where the annotated text of the Act will be found. Page references in bold type indicate where the Act is set out in part or in full.

List of cases

Contents

CHAPTER 1

Introduction

1.1 Introduction

1.2 (i) Adam Smith on securities to liberty (1763)
(ii) Adam Smith on property, inequality and civil government (1805)

1.3 Paley sets out the first principles of the administration of justice (1785)

1.4 Blackstone completes his *Commentaries* by praising the legal system (1795)

1.5 A radical reformer calls for speedy and inexpensive justice (1820)

1.6 A Select Committee considers some of the effects of the dramatic growth of population: remedial sanitary regulations may interfere with private property (1840)

1.7 Mr Slaney tells the Commons of the condition of the working classes with particular reference to an increase in crime: he receives an answer (1850)

1.8 Engels describes conditions in the great towns: he finds signs of social conflict everywhere (1845)

1.9 Law reform, the power of attorneys and compensation (1844)

1.10 The Times advocates law reform (1850)

1.11 The Lord Chancellor tells Parliament that the Government favours law reform (1852)

1.12 A law magazine comments on the increased enthusiasm for law reform—and its incompleteness (1852)

1.13 (i) Bentham rejects partial amendment and judicial reform (1775)
(ii) Bentham's opening remarks on the principles of legislation (1802)

1.14 Collier tells the Commons that the administration of the law is behind the times (1857)

1.15 Lord Brougham delivers the inaugural address to the National Association for the Promotion of Social Science: he includes references to the achievement of the Law Amendment Society (1857)

1.16 Napier tells the Social Science Association that the creation of a separate department of public justice is essential to real law reform. There is some dissent (1862)

1.17 Winfield on law reform and community responsibility for the present law (1928)

1.1 INTRODUCTION

It is impossible to overestimate the number and the variety of the social, economic and other factors which contributed to legal change during the period 1750–1950. Of course, not all the commentators of the day were convinced of the need for change, or, at all events, for radical change. Among the conservative supporters of the status quo no writer was more influential than Paley. It was scarcely surprising, therefore, that when Paley set out principles for the impartial administration of justice he listed criteria which, conveniently enough, the legal system appeared already to satisfy (1.3).

Even Adam Smith had little criticism to make of the legal system when, in setting out securities to liberty from abuses of executive power, he emphasised judicial independence and the establishment of courts of justice (1.2(i)). Yet Smith comments perceptively on the relationship between property and government (1.2(ii)). Of course the distinguished commentator and judge, William Blackstone, praised the legal system in glowing terms (1.4), albeit leavened with occasional moderate criticism.

Yet harsh new facts alone made some change inevitable. By way of brief illustration of that point we can take the rapid increase in the population of the cities during the first half of the nineteenth century. New sanitary regulations were seen to be a necessity. Similarly, if the deplorably bad housing conditions endured by so many of the population were to be raised to an acceptable standard, new building regulations would be required (ch 13, below). Inevitably such regulations heralded legislative interference with traditional rights of private property in law (1.6)—and this in a country which some historians have seen as traditionally wedded to the concept of property. In those same conditions both the reformer, Slaney (1.7), and the far more radical Engels (1.8), saw the seeds of crime and an even more general social conflict. Other changes in the legal system also appeared to be inevitable, even to moderate opinion. For example in 1833 Commissioners pointed out that the rapid increase of population, wealth and commerce had given rise to extensive credit and thus increased the claims on public justice (5.3). Changes in the system of courts and their procedure would surely be needed as a result.

We must take note also of the efforts, and possible influence, of those who sought to reform the legal system. Few were more radical than the great law reformer and legal philosopher, Jeremy Bentham. Bentham argued from first principles. For Bentham the public good ought to be the object of the legislator; general utility was to be the foundation of his reasonings (1.13(ii)). By the mid-nineteenth century there was also a widespread public demand, often associated with Benthamite ideas and influence, for greater efficiency in public institutions which augured well for necessary reforms. It was scarcely surprising, therefore, that in 1850 *The Times* should advocate law reform (1.10. Cf. 1.11 and 1.12). The most satisfactory method of law reform was another matter. It was Jeremy Bentham's awareness of the failure of Lord Mansfield to achieve lasting reforms through judicial means which persuaded Bentham of the folly of both partial amendment and judicial reform (1.13(i)). For Bentham legislation was to be the agency of reform (1.13(ii)). Yet by the mid-nineteenth century there was a widespread belief that too little had been achieved (1.14). At that time the arch reformer Henry Brougham stressed the importance of steering a middle course in seeking change (1.15). It was a far cry from Bentham's radical approach. This was to

be the age of the pressure group, of the committee, of consensus—and of the power of vested interests (1.9).

Of course there were some notable reforming successes, especially in the mid-nineteenth century. Yet during the final quarter of the nineteenth century and the first half of the twentieth there was little consistent and purposeful law reform. Some historians would dispute that view strongly. Certainly there was some interest in law reform (1.17 and 1.18) and some useful measures. There was, however, little suggestion of urgency (1.19 and 1.20) in the approach to questions of reform. Whether that approach was satisfactory—in the light of the social, economic and political factors which influenced the law during the twentieth century—is a question upon which historians may offer widely differing opinions.

1.2(i) ADAM SMITH ON SECURITIES TO LIBERTY (1763)

The revenues at present consist chiefly of three branches, to wit, first, the civil list, which is entirely consumed in the maintenance of the royal family, and can give the king no influence, nor hurt the liberty of the subject; secondly, the annual land and malt taxes, which depend entirely on the parliament; thirdly, the funds mortgaged for paying off the public debts, such as the taxes on salt, beer, malt, &c., levied by the officers of custom and excise. These the king can by no means touch: they are paid to the court of exchequer, which is generally managed by people of interest and integrity, who possess their offices for life and are quite independent of the king. Even they can pay nothing but to those appointed by parliament, and must have the discharge of the public creditor. The surplus of the mortgages goes into what is called the sinking fund for paying the public debt, [which] secures the government in the present family, because if a revolution were to happen, the public creditors, who are men of interest, would lose both principal and interest. Thus the nation is quite secure in the management of the public revenue, and in this manner a rational system of liberty has been introduced into Britain. The parliament consists of about 200 peers and 500 commoners. The Commons in a great measure manage all public affairs, as no money bill can take its rise except in that House. Here is a happy mixture of all the different forms of government properly restrained, and a perfect security to liberty and property.

There are still some other securities to liberty. The judges appointed for the administration of justice are fixed for life, and quite independent of the king. Again, the king's ministers are liable to impeachment by the House of Commons for mal-administration, and the king cannot pardon them. The Habeas Corpus Act, by which the arbitrary measures of the king to detain a person in prison as long as he pleased is restrained, and by which the judge who refuses to bring a prisoner to his trial if desired within forty days is rendered incapable of any office, is another security to the liberty of the subject. The method of election, and placing the power of judging concerning all elections into the hands of the Commons, are also securities to liberty. All these established customs render it impossible for the king to attempt anything absolute.

Besides all these, the establishment of the courts of justice is another security to liberty.

[Adam Smith *Lectures on Justice, Police, Revenue and Arms* (1763) ed E. Cannan (1956).]

1.2(ii) ADAM SMITH ON PROPERTY, INEQUALITY AND CIVIL GOVERNMENT (1805)

OF THE EXPENCE OF JUSTICE

THE second duty of the sovereign, that of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty

of establishing an exact administration of justice, requires two very different degrees of expence in the different periods of society.

AMONG nations of hunters, as there is scarce any property, or at least none that exceeds the value of two or three days' labour; so there is seldom any established magistrate, or any regular administration of justice.

Men may live together in society with some tolerable degree of security, though there is no civil magistrate to protect them from the injustice of those passions. But avarice and ambition in the rich, in the poor the hatred of labour and the love of present ease and enjoyment, are the passions which prompt to invade property, passions much more steady in their operation, and much more universal in their influence. Wherever there is great property, there is great inequality. For one very rich man, there must be at least five hundred poor, and the affluence of the few supposes the indigence of the many. The affluence of the rich excites the indignation of the poor, who are often both driven by want, and prompted by envy, to invade his possessions. It is only under the shelter of the civil magistrate that the owner of that valuable property, which is acquired by the labour of many years, or perhaps of many successive generations, can sleep a single night in security. He is at all times surrounded by unknown enemies, whom, though he never provoked, he can never appease, and from whose injustice he can be protected only by the powerful arm of the civil magistrate continually held up to chastise it. The acquisition of valuable and extensive property, therefore, necessarily requires the establishment of civil government. Where there is no property, or at least none that exceeds the value of two or three days' labour, civil government is not so necessary.

[Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* vol 3 (11th edn, 1805) pp 71–2.]

1.3 PALEY SETS OUT THE FIRST PRINCIPLES OF THE ADMINISTRATION OF JUSTICE (1785)

The first maxim of a free state is, that the laws be made by one set of men, and administered by another; in other words that the legislative and judicial characters be kept separate. When these offices are united in the same person or assembly, particular laws are made for particular cases, springing oftentimes from partial motives, and directed to private ends: whilst they are kept separate, general laws are made by one body of men, without foreseeing whom they may affect; and, when made, must be applied by the other, let them affect whom they will.

The next security for the impartial administration of justice, especially in decisions to which government is a party, is the independency of the judges. As protection against every illegal attack upon the rights of the subject by the servants of the crown is to be sought for from these tribunals, the judges of the land become not unfrequently the arbitrators between the king and the people, on which account they ought to be independent of either; or, what is the same thing, equally dependent upon both; that is, if they be appointed by the one, they should be removable only by the other. This was the policy which dictated that memorable improvement in our constitution, by which the judges, who before the Revolution held their offices during the pleasure of the king, can now be deprived of them only by an address from both houses of parliament; as the most regular, solemn, and authentic way, by which the dissastisfaction of the people can be expressed. To make this independency of the judges complete, the public salaries of their office ought not only to be certain both in amount and continuance, but so liberal as to secure their integrity from the temptation of secret bribes; which liberality will answer also the further purpose of preserving their jurisdiction from contempt, and their characters from suspicion; as well as of rendering the office worthy of the ambition of men of eminence in their profession.

A third precaution to be observed in the formation of courts of justice is, that the

number of the judges be small. For, beside that the violence and tumult inseparable from large assemblies are inconsistent with the patience, method, and attention requisite in judicial investigations; beside that all passions and prejudices act with augmented force upon a collected multitude; beside these objections, judges, when they are numerous, divide the shame of an unjust determination; they shelter themselves under one another's example; each man thinks his own character hid in the crowd: for which reason, the judges ought always to be so few, as that the conduct of each may be conspicuous to public observation; that each may be responsible in his separate and particular reputation for the decisions in which he concurs. . . .

A fourth requisite in the constitution of a court of justice, and equivalent to many checks upon the discretion of judges, is, that its proceedings be carried on in public, apertis foribus; not only before a promiscuous concourse of bystanders, but in the audience of the whole profession of the law. The opinion of the bar concerning what passes, will be impartial, and will commonly guide that of the public. The most corrupt judge will fear to indulge his dishonest wishes in the presence of such an assembly: he must encounter, what few can support, the censure of his equals and companions, together with the indignation and reproaches of his country.

Something is also gained to the public by appointing two or three courts of concurrent jurisdiction, that it may remain in the option of the suitor to which he will resort. By this means a tribunal which may happen to be occupied by ignorant or suspected judges, will be deserted for others that possess more of the confidence of the nation.

But, lastly, if several courts co-ordinate to and independent of each other, subsist together in the country, it seems necessary that the appeals from all of them should meet and terminate in the same judicature; in order that one supreme tribunal by whose final sentence all others are bound and concluded, may superintend and preside over the rest. This constitution is necessary for two purposes:— to preserve an uniformity in the decisions of inferior courts, and to maintain to each the proper limits of its jurisdiction. Without a common superior, different courts might establish contradictory rules of adjudication, and the contradiction be final and without remedy; the same question might receive opposite determinations, according as it was brought before one court or another, and the determination in each be ultimate and irreversible. A common appellant jurisdiction prevents or puts an end to this confusion. For when the judgments upon appeals are consistent (which may be expected, whilst it is the same court which is at last resorted to), the different courts, from which the appeals are brought, will be reduced to a like consistency with one another—moreover, if questions arise between courts independent of each other, concerning the extent and boundaries of their respective jurisdiction, as each will be desirous of enlarging its own, an authority which both acknowledge can alone adjust the controversy. Such a power, therefore, must reside somewhere lest the rights and repose of the country be distracted by the endless opposition and mutual encroachments of its courts of justice.

[W. Paley *Moral and Political Philosophy* (1785) pp 123–5.]

1.4 BLACKSTONE COMPLETES HIS COMMENTARIES BY PRAISING THE LEGAL SYSTEM (1795)

We have seen, in the course of our inquiries, in this and the former volumes, that the fundamental maxims and rules of the law, which regard the rights of persons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wisdom of ages: that the forms of administering justice came to perfection under Edward the first; and have not been much varied, nor always for the better, since: that our religious liberties were fully established at the reformation: but that the recovery of our civil and political liberties was a work of longer time; they not