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).

Similarly, in a collection of essays published in 1948, Keeton and Marshall attributed to the cogency of Bentham's arguments the progressive abandonment of the 'best evidence rule', and claimed that his work had been 'directly responsible for the removal of disabilities due to the form of the oath'.[16]

The extent of Bentham's influence was vigorously questioned in the context of administrative reform in the debate on the 'Victorian revolution in government'.[17] Despite the scepticism generated by this debate, as late as 1982 Hart maintained the traditional view of Bentham's influence on nineteenth-century law reform when he alleged that 'Bentham's attack inspired the great statutory reforms of the law of evidence of 1843, 1851, and 1898'.[18] More recently, Landsman claimed that

> Bentham's ideas had a profound impact on the development of the rules of evidence. His work significantly advanced the process that led to the rejection of virtually all competency exclusions.[19]

Thus the story of evidence law in the nineteenth century has traditionally been that of one man and the legislation that his writings inspired. I shall argue that this is a misleading story and that there is another that is both more complex and more reliable. In this story Bentham has a part to play, but it is not the only, nor even the leading, part. No consideration of Bentham's role can

[16] G. W. Keeton and O. R. Marshall, 'Bentham's Influence on the Law of Evidence', in G. W. Keeton and G. Schwartzenberger, eds., *Jeremy Bentham and the Law* (London, 1948), pp. 86, 88.

[17] On this debate, and for references to earlier contributions to it, see generally Stephen Conway, 'Bentham and the Nineteenth-Century Revolution in Government', in Richard Bellamy, ed., *Victorian Liberalism: Nineteenth-Century Political Thought and Practice* (London, 1990), pp. 71–90.

[18] H. L. A. Hart, 'The Demystification of the Law', in *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford, 1982), p. 31. This essay was first published in 1973 but appeared substantially unchanged in Hart's 1982 collection.

[19] Stephan Landsman, 'From Gilbert to Bentham: the Reconceptualization of Evidence Theory', *Wayne Law Review* 36 (1990), 1149–86. See also Robert Stewart, *Henry Brougham 1778–1868: His Public Career* (London, 1986), p. 234. For a more cautious assessment, see Dinwiddy, *Bentham*, p. 117; David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge, 1989), pp. 3–4, 122–44, 179–98. In a radical criticism, T. S. Midgley has argued that whatever influence Bentham had was solely on a tradition of legal historiography, and not on the upsurge of legal reform in the nineteenth century (T. S. Midgley, 'The Role of Legal History', *British Journal of Law and Society* 2 (1975), 153, 158).

begin, however, without some introduction to his ideas on adjective law, and it is necessary to turn now to this subject.[20]

BENTHAM ON ADJECTIVE LAW

In Bentham's view, the proper end of substantive law was 'the creation and preservation of the greatest happiness of the greatest number'. The proper end of adjective law, including the law of evidence, was to give effect to substantive law. But law of all kinds had been diverted to serve various 'sinister interests'. Bentham believed that legislation, instead of being designed to secure the greatest happiness of the greatest number, was designed to secure the creation and preservation of the greatest quantity of happiness to those few persons who had the powers of government, and to their connections. Further, judges had made their own sinister interests the actual direct ends of their exercise of judicial authority. Other members of 'the governing body' had jumped on the bandwagon and as 'sinecurists or over-paid placemen, or holders of needless places' had been allowed to share in the 'fruits of scientifically and diligently cultivated delay, vexation and expense'. In pursuit of their true object the judges had to maintain some appearance of justice, but it was for this reason alone that any justice was to be found at all. Most affected by the sinister interests of the judiciary had been procedural law, and within that branch it was evidence law that had suffered most.

Any legislator, Bentham argued, had duties in relation to evidence. In the first place he had a duty to ensure, so far as possible, that there was sufficient evidence to support every right and duty that might be litigated. The results of litigation should not depend on the hazard of being able to find, after the event, adequate oral testimony to support the right or duty in question. A system of 'pre-appointed' evidence should be developed, by

[20] Bentham's main writings on procedure and evidence are to be found in the following works, which are indicated by short title and date of printing: *Scotch Reform* (1807), *Introductory View of the Rationale of Evidence* (1812), *Swear Not At All* (1813), *A Treatise on Judicial Evidence* (1825), *Rationale of Judicial Evidence* (1827), *Principles of Judicial Procedure* (1843). For fuller bibliographies see Halévy, *Growth of Philosophic Radicalism* and Harrison, *Bentham*.

which rights and duties could be recorded before any question of their being litigated arose.

Secondly, the legislator should ensure that no evidence was excluded, except where this was required to avoid preponderant delay, vexation, and expense.[21] Bentham envisaged a utilitarian calculation. There might be circumstances in which the harm from delay, vexation, or expense would be greater if a party were permitted to adduce a particular item of evidence than if the evidence were excluded. But apart from this consideration, nothing justified exclusion. In particular, evidence should not be excluded simply because too much weight might be attached to it. The legislator, instead of using exclusion to reduce the risk of misdecision, should provide guidelines to assist triers of facts in assessing the materials presented to them.

In Bentham's eyes, the exclusion of evidence was not just an error; it was a fundamental part of a corrupt system of judicial procedure. It was the judges who had developed adjective law, and the system which had emerged was one in which suitors paid fees for items of judicial labour. This was the worst of all possible developments. While a legislator operated by way of rules laid down in advance, judges laid down no such rules. What was thought right, or was pretended to be thought right, was done to suit each occasion. It was left to suitors to frame whatever rules for guidance that they could from their observation of what judges did. In this way there developed what Bentham called the 'technical' system of procedure.[22] Bentham argued further that, because of the system for paying judges, the very people who were responsible for developing adjective law had a personal interest in making it as obscure as possible. For this reason he referred to the system then in existence as the 'fee-gathering' system.

Bentham looked for an alternative model of procedure and found one in the institution of the family. The way in which facts were inquired into and justice administered within the family

[21] Bentham used 'vexation' to refer to any evil produced by the law but not directly intended. He compared vexation to punishment, the latter being directly intended (*Rationale of Judicial Evidence* in *Works*, vol. VII, p. 345).

[22] From the Greek *technē*, meaning skill, or art. Because there were no rules laid down 'in determinate words', whatever rules there might be could not be understood, or guessed at, without art (*Rationale of Judicial Evidence* in *Works*, vol. VII, p. 197).

Bentham called the 'natural' or 'domestic' mode of procedure. A domestic tribunal operated without forms or rules, but, according to Bentham, had no fewer safeguards against misdecision than the technical system. Indeed, the technical system was more likely to lead to misdecision through its exclusion of relevant evidence in an inquiry. There was no witness of whom it could be said with certainty that his testimony would be untrue throughout, so as to justify a judge in refusing to hear it. Nor was there any kind of interest that would inevitably overpower a witness so as to make it certain that his testimony was bound to be untrue.[23]

BENTHAM AND INFLUENCE

A classic example of law reform inspired by Bentham is to be found, not in England, but in the North American state of Maine. John Appleton, a justice of the supreme court from 1852 until 1862 and then Chief Justice until his retirement in 1883, was an enthusiastic follower of Bentham and a supporter of evidence law reform. He wrote a number of articles in legal periodicals on the subject, and in 1860 published them in a collection entitled *The Rules of Evidence Stated and Discussed*.[24]

In the preface he acknowledged that he had read with great interest 'the masterly work of Bentham on the subject of Evidence'. He continued: 'But as that is not readily accessible, and is so voluminous, it occurred to me, that a careful examination of the more important rules of law, as to the admission and exclusion of evidence ... would not be without interest to the legal profession and would be of utility to the public.' He was careful to emphasise that he regarded his task as one of spelling out Bentham's ideas and their implications. 'In what I have done, I have only endeavored to apply the reasoning and principles of Bentham, of which I have made free use, to the law as found in the treatises of jurisconsults and the decisions of the courts.'[25]

Appleton was not content merely with writing. He campaigned,

[23] *Introductory View of the Rationale of Evidence*, in *Works*, vol. VI, pp. 5–14; *Rationale of Judicial Evidence* in *Works*, vol. VII, pp. 197–9.
[24] John Appleton, *The Rules of Evidence Stated and Discussed* (Philadelphia, Penn., 1860).
[25] Ibid., pp. iii–iv.