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Jeremy Bentham and the Real Property Commission of 1828 — Source link

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JEREMY BENTHAM AND THE REAL PROPERTY COMMISSION OF 1828

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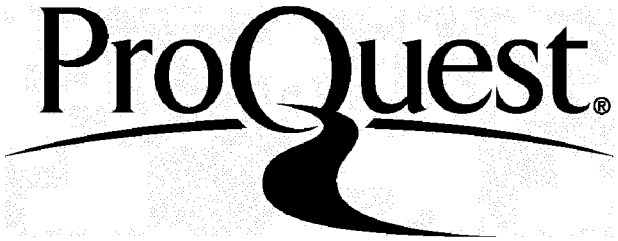
submitted for the degree of Ph. D.

at University College, University of London



JEREMY BENTHAM AND THE REAL PROPERTY COMMISSION OF 1828

Between 1829 and his death in 1832 Jeremy Bentham undertook considerable work for the Real Property Commission which had been appointed in 1828 to recommend reforms for land law. This thesis makes an examination of Bentham's contributions to the Commission using a variety of historical material, including unpublished manuscripts.

Bentham's work falls into three categories. In the first fall the brief replies Bentham made to the questions on various topics sent to him by the Commissioners. In the second category can be put the more lengthy and descriptive plans to set up a Register of Title to property. The third category consists of writing that Bentham did not prepare in response to requests from the Commissioners.

The existence of this third category allows a conclusion to be drawn that Bentham had his own hidden agenda, which was the systematic, comprehensive, utilitarian reform of property law. Bentham drafted a 'philosopher's tree' of principles applicable to property, which provided the common law with an analytical device to begin the utilitarian codification of property law. He also drafted a table of incorporeal hereditaments setting out rights and obligations in land, which replaced historically derived concepts of property with a rationally based system of rights and obligations.

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I Fractional positive right of occupation: viz

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Correspondent Subject-matters corporeal

1. ~~[illegible]~~ Im-Moveable another's subject matter, ~~the~~ ~~[illegible]~~ ~~[illegible]~~ right-holder with or ~~[illegible]~~ without his Agents and Authorised.

2. Immoveable subject matter, another's Land. ~~[illegible]~~ Moveable subject matter the water flowing on or derivable from the land. Beneficing the incorporeal right holder

3 Immoveable ~~Land~~ subject matter, another's Land Moveable, ~~[illegible]~~ subject matter, abstractible Mineral Bodies, portions of the substance of the land. (18*) Beneficed ~~another~~

4. Immoveable ~~Land~~ subject matter, another's Land Moveable ~~[illegible]~~ subject matter vegetables on the surface: abstractions ~~[illegible]~~ Beneficing the incorporeal right-holder: abstracting for ownership.

5. Immoveable subject matter another's land: ~~[illegible]~~ ~~[illegible]~~ ~~[illegible]~~ subject matter moveable, vegetables on the surface, or underground: Beneficing in case of ~~[illegible]~~ Gleaning, the

6. Immoveable subject matter, another's Land. Moveable, vegetables, on or under the surface: beneficing ~~[illegible]~~ the incorporeal rightholder: abstractors, himself and his Agents (32*)

7. Immoveable subject matter, another's lands. Moveable subject matters, vegetables on or under the surface, in conjunction with the adhering portions of the aggregately immoveable be-moveable soil: abstractors ~~[illegible]~~, the incorporeal-right-holder, himself and his Agents

in case of gleaning [illegible] right-holder ... abstractors, his own ... in case of Estovers, he, his Agents and the incorporeal right-holder

Incorporeal Hereditaments. Left of — from J. Tyrrell Committ of Inquiry.

Subject-matters incorporeal, continued	Correspondent Subject-matters corporeal continued
8. Common of Piscary (34) (18) fishery	8. Immoveable subject matter another's land. Moveable subject matters, animals existing and moving under the surface: beneficiary, the incorporeal-right-holder abstractor, himself: with or without his Agents.
9 Rights of Chase (15) Free-Warren (17) Leare	9. Immoveable subject matter another's land: Moveable subject matters, animals four footed or winged, existing and moving, over the surface; beneficiary, the incorporeal-right-holder: abstractor himself, with or without his Agents and Authorizees
10. Rights to Stand (40) Add rights of stand-ing on grounds, or stand-ing or sitting in edifices employed for exhibitions of any sort.. Libraries Museums. Lecture Rooms, Concert Rooms. Drawing-Rooms Chambers.	10. Immoveable subject matter another's edifice. Incorporeal right-holder: beneficiary himself and his authorizees.
11. Rights to Light (38)(a)	11. Immoveable subject matter another's edifice, or by possibility land: by vis. lofty vegetables means of trees grow-ing on it. Incorporeal right holder and beneficiary the occupier of the edifice into which the admission of the light is desired by inhibition of the obstruent erection.

Subject matters incorporeal	Correspondent Subject-matters corporeal
12. Royal fish: (19) i.e. rights of fishery subject matter limited to particular species of fish	12. Immoveable subject matter, another's land, or the beneficiary his own. Moveable subject matter, animal existing and moving under the surface: The incorporeal right-holder and beneficiary, the person to whom any person who has in his hands the abstractor of any animal of that species in that place is under obligation to transfer, not bearing towards him the relation either of Agent or Authorizee.
13. Tithes (42)	13. In the case of prædial tithes, Immoveable, subject matter, another's land: Moveable subject matters, vegetables on or under the surface: beneficiary, the incorporeal right holder himself: abstractor, himself, with his Agents and Authorizees. In the case of personal tithes, the corporeal subject matter is Money: which

38 (a)

Note, this is but one instance of the class of rights which may be denominated Rights by inhibition or say interdiction: the benefit having for its efficient cause a service of the negative kind rendered by the party burthened: say the onerated or onerée. their service consisting in abstaining from making this or that ...

38 (a) continued

use of a subject matter in other respects his own. Nuisances, a juridical term in familiar use, — is the appellation by which the acts by the exercise of which the use in question is made may be denominated.

To this head may be referred those operations which being or specially offensive to the several senses are commonly ... in

38 (a) continued

in search of Houses situate in Towns.

So also, those malificent acts which have for the subject matter of their maleficence the body or mind of the party offended against.

38 (a) continued

as to which see Penal Code Offences severally. Class Offences affecting person. So also acts the maleficence of which consists in contributing to give existence or increase to Calamities or Casualties: as to which see Constitutional Code Ch. XI Ministers collect...

Left margin (continuation column): Court ... matters ... Moveable another's ... subject ... Moveable ... incorporeal right ... abstractor ... beneficiary ... incorporeal ... abstractor, himself ... (32*) subject matter, another ... Moveable ... surface, ... with the ... incorporeal right-holder ... his Agents

Right margin (vertical): ... Offences ... Class ... Ministers ... subject matter ... So also those acts the maleficence of which ... in the case of ... by the agent ...

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Dispatch Court

1830. Aug. 17.

Incorporeal Hereditaments — List of — from J. Tyrrell, Commiss.r of Inquiry.

Bentham's — Elucidations. ~~Ord. Item~~ — Order transposed

Subject-matters incorporeal.	Correspondent Subject-matters Corporeal.	Subject-matters incorporeal	Correspondent Subject matters Corporeal.
I. Fractional positive right of Occupation: viz.		6. Common of Estovers (32.) Add and Quasi Estovers.	6. Immoveable subject matter, another's land. Moveable, vegetables on or under the surface: benefitee, the incorporeal rightholder: abstractors, himself & his agents. (32.)
1. Rights of Way (36.)	1. Immoveable Subject matter, another's land. Benefitee Incorporeal rightholder, with or without his agents and Authorizees.	7. Common of Turbary. (33.) Add and Quasi Turbary.	7. Immoveable subject matter, another's land. Moveable subject matters, vegetables on or under the surface, in conjunction with the adhering portion of the aggregately immoveable soil: benefitee, the incorporeal rightholder: abstractors, himself & his agents.
2. Rights of Water (27.)	2. Immoveable subject matter another's land. Moveable subject matter the water flowing on or derivable from the land. Benefitee, the Incorporeal Right holder.		
3. Mineral Rights. (18) [illegible] considered [illegible] corporeal [illegible]	3. Immoveable subject matter, another's land. Moveable subject matters abstractible mineral bodies, portions of the substance of the land. (18.) Benefitee the Incorporeal Right holder.	8. Common of Piscary (34.) (18.) Fishery.	8. Immoveable subject matter another's land. Moveable subject matters, animals existing and moving under the surface: benefitee, the incorporeal right holder: abstractor himself with or without his agents.
4. Commons: of Pasture. ☞ Add and Quasi Commons: viz. rights of abstraction in reference to vegetable matters of all sorts (31.)	4. Immoveable subject matter, another's land. Moveable subject-matters vegetables on the surface — Benefitee the Incorporeal right holder: abstracting his	9. Rights of Chase (15.) Add Free Warren (17.) Quære	9. Immoveable subject matter, another's land: Moveable subject matters, animals, four-footed or winged, existing and moving, on or over the surface: benefitee, the incorporeal right holder: abstractor, himself, with or without his agents and authorizees
5. Common of Gleanage (31.)* ☞ Add, and Quasi Gleanage. ☞ Add Tithes of the produce of land (42.)	5. Immoveable subject matter, another's land. Moveable subject matters vegetables on the surface, or underground. Benefitee, in case of gleaning, the incorporeal rightholder; in case of gleaning, abstractor, he alone: in case of Tithes, he, his agents, and authorizees		

[illegible] 7. L.

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7

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1830. Aug. 17.

For Civil Cote. Real Property Commission, or Equity Dispatch Court

Tyrrel's List.

I. Seignories – or Manors.

II. Franchises: viz.

1. To hold Courts: viz.

2 (a)

(a) Courts Leet.

3.

(b) View of Frank pledge.

4.

(c) Cognizance of Pleas.

5.

(d) Bailewicks & Votes on Elections.

2. Rights to

6.

(a) Penalties.

7.

(b) Forfeitures.

8.

(c) Deodands.

9.

(d) Goods of Felons &c.

3. Rights to Unclaimed Goods: viz.

10.

(a) Treasure Trove.

11.

(b) Waifs.

12.

(c) Estrays.

13.

(d) Wrecks, &c.

4. To Sporting Rights: viz.

14.

(a) Forests.

15.

(b) Chace.

16.

(c) Parks.

17.

(d) Free Warrens.

18.

(e) Fishery, &c. (a) See 34.

19.

(f) Royal Fish.

Tyrrel's List

II. Franchises – Continued.

20.

5. To be a Corporation as a County Palatine, Cinque Port, &c.

21.

6. To take Tolls &c. by means of

22.

(a) A Market.

23.

(b) A Fair.

24.

(c) A Ferry.

25.

(d) A Bridge.

26.

(e) A Canal.

27.

(f) A Wharf &c.

III. Rents: viz.

28.

(a) Rent Service.

29.

(b) Rent Charge.

30.

(c) Rent Seek.

IV. Commons: viz.

31.

(a) Of Pasture. (a)

32.

(b) Of Estovers. (a)

33.

(c) Of Turbary.

34.

(d) Of Piscary.

See 18.

35.

e. Of Foldage.

Tyrrel's List.

V. Easements: viz. Rights of

36.

(a) Way.

37.

(b) Water.

38.

(c) Light. (a)

39.

(d) To have fences repaired.

40.

(e) Rights to Pews. (a)

41.

6. Advowsons and Patronage in general.

42.

7. Tithes.

43 (a)

8. Annuities

44 (a)

9. Corodies – or Pensions.

45.

10. Offices.

46.

11. Dignities

Inco

Bent

Subje

in

1. Fra

right

viz.

1. Rig

2. Rig

3. Mis

4. Cor

5. Cor

8

1830 July 3 Principles applicable to Real Property

All pervading principle the Greatest Happiness Principle, to which the principles immediately subordinate are either Matter-regarding including the

Disappointment-minimising (Subservient) To which are subordinate the

- Notoriety maximising. Subordinate to it are the
  - Appropriate-notification-maximising
  - Falsehood-excluding-promoting
  - Complication-minimising or say Unsatisfaction maximising. Subservient to whatever the Law forms maximising
- Registration maximising
- Fraudulent insolvency obviating
- Occupation continuing
- Intent effectuating. This is also subordinate to the value-maximising principle

Value maximising to which are subordinate the (Subservient)

- Expense minimising viz
  - 1 Of communication
  - 2 Of (non-contestation?)
- Transfer facilitating
- Power of disposal maximising
- Property equalising or say Excessive accumulation obviating
- Division maximising

These two principles are also subordinate to the Aristocratical influence restraining & to the Sense of relative indigence restraining principle and antagonising with the Over-population restraining. Importance of reconciliation the Colonisation principle

Subservient to the Uniformity maximising

Property equality Division maximising.

1 Aristocratical influence restraining
2 Sense of relative indigence restraining (To stand on subsistence)
3 Salutary education favoring
4 Paternal influence encouraging
5 Family depletion minimising or say Family augmentation favoring
6 Over population restraining
7 Maleficence inhibiting

or

Form-regarding including the

- Legislative anticipation effecting
- All comprehensiveness promoting
- Useless multiplication restraining
- Uniformity promoting

Principles employed by Tyrrell
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2. Alienation facilitating 135 350
3. Family settlement favouring 149
4. Paternal power favouring 150
5. Uniformity maximising 151
6. Simplification 270

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1830 July 3 Principles applicable to Real Property.

All pervading principle the Greatest-Happiness Principle

to which the principles immediately subordinate are either

Matter regarding including the

Eutexiopic

- Disappointment minimizing to which are subordinate the
  - Notoriety maximizing
    - Subordinate to it are the
      - Appropriate notification maximizing
      - Falsehood exclusion promoting
      - Complication minimizing
  - Registration maximizing
  - Fraudulent Insolvency obviating
  - Occupation continuing.
  - Intent effectuating. This is also subordinate to the value maximizing principle
- Value maximizing to which are subordinate the
  - Expence minimizing
  - Transfer facilitating
  - Power of disposal maximizing
  - Property equalizing or say excessive accumulation obviating
    - These two principles are also subordinate to the aristocratical influence restraining and to the sense of relative indigence restraining principles and antagonizing with the over population restraining Instrument of reconciliation the Colonization principle
  - Division maximizing
- Aristocratic influence restraining
- Sense of relative indigence restraining
- Salutary education favoring
- Over population restraining
- Maleficience inhibiting

10

or

Form regarding

Eidoscopic

- Legislative anticipation effecting
- All comprehensiveness promoting
- Useless multiplication restraining
- Uniformity promoting
- Clearness maximizing
- Conciseness maximizing
- Correctness maximizing

INTRODUCTION

Jeremy Bentham was occupied with land law reform late in his life, writing between 1826 and his death at the age of eighty four in 1832. Reform of English land law was clearly one of his last major interests, but one that has not received much attention in the past. Elie Halevy[1] mentions Bentham's connections with the Royal Commission set up in 1828 to examine real property law, but briefly. Halevy concluded his examination of the growth of philosophic radicalism with a discussion of the influence of the philosophical radicals on government policy. Bentham's contribution to the Royal Commission is mentioned in this connection. Several writers who have commented on the property writings in the course of investigations with different central concerns have been quick to dismiss the work.[2] Recent Bentham scholarship has investigated Bentham's early writing on property[3] and, importantly, Bentham's theory of distributive justice, to be found in his civil writings which include property writings.[4] But this did not include a consideration of the content and extent of Bentham's late writing on property. A recent major study of early nineteenth century common law examined the work of the Real Property Commission, to which Bentham contributed, but in terms of a post-Bentham 'key test for Benthamism'.[5] What is described as a Benthamic debate about codification of property law is

examined, but Bentham's contributions to the Commission do not form part of the discussion. The neglect of Bentham's late writing on property is no doubt in part due to the fact that his late work generally has received less attention to date than his earlier work.

1

It has not helped that only two pieces of Bentham's work on land law were published, one of which was Humphreys' book on land law reform, Observations on the Actual State of the English Laws of Real Property with the Outline of a Code.[6] published in the Westminster Review[7] in 1826, and after Bentham's death republished by John Bowring, Bentham's literary editor, in his collected works.[8] In addition part of Bentham's contribution to the work of the Royal Commission on Real Property was published by the Commissioners in an Appendix to the Third Report of the Commission in 1832[9] and again republished by Bowring in his collected works as 'An Outline of a Plan of a General Register of Real Property'.[10]

These works were written for specific purposes, and are therefore restricted in their subject matter. As a result they give only an imperfect indication of the extent of Bentham's thoughts on the reform of this part of English law. All the rest of Bentham's late writing on property law remains in manuscript. The main objective of

this thesis is to uncover the fuller story of Bentham's writings on property law between 1826 to 1832. I will argue that Bentham contributed much to the debates on property law reform that took place in the early nineteenth century among lawyers and others. In these years 'law reform was the great cause'[11] that occupied the attention of thinking people throughout the country, and property law reform was an important part of this great debate. Bentham took his place among other lawyers on the public stage provided by periodicals[12] and the Real Property Commission as a proponent of systematic utilitarian reform. The form and content of his contributions to the debate will be examined in the main part of the thesis, but first the debate itself and its historical background need to be examined in order to understand the part that Bentham played.

2

A. W. B. Simpson[13] writes that it is difficult in a short account of land law to give any convincing impression of the extreme complexity achieved by the beginning of the nineteenth century. Of course other branches of law were also perceived as being in need of attention. For example the defects of the penal law, or the procedure and delays of the nineteenth century Court of Chancery which still live on in the popular imagination. But land law presented particular problems.

The difficulty encountered in alienating land and providing a purchaser with a good title economically was most often cited as a problem in urgent need of reform. In 1807 William Godwin moved his family from the Polygon in Somers Town to 41 Skinner Street, a newly built well appointed house. In the following year he stopped paying his rent and paid no rent for several years because he did not know to whom the rent was due. While the claimants tried to unravel the complex legal title, Godwin made the most of the situation and resisted pressure to pay up.[14] That the impecunious Godwin was able to take advantage of such a ludicrous state of affairs neatly illustrates that the laws for the transfer of property were indeed in dire need of reform, although here with a fortunate result for Godwin.

The elaborate technical difficulties encountered in early nineteenth century land law are not in themselves sufficient reason to explain demands for reform. After all, it is quite possible for a nation to be satisfied with a complex system of property law because this is not considered to cause an unacceptable degree of difficulty. Alternatively a complex system of property law could be left intact because it suited powerful interests who could successfully impose their will on the rest. The complex reasons for the appearance of reform movements of any sort form another discussion which is not entered into here. However the factor usually regarded as giving rise to

demands for reform in nineteenth century England was the increased pace of industrialisation. Against this background F. M. L. Thompson has described the story of land reform as a struggle for power.[15] At the beginning of the industrial period power rested more or less entirely with the landed classes, 'and there it remained far into the rise of modern society, and it was a prime purpose of those outside the charmed circle to bring this state of affairs to an end'.[16] It has been said that, of all the reform movements of the nineteenth century, the land law reform movement of the mid nineteenth century did not succeed in most of its objectives and remains forgotten, leaving no monuments to its success.[17] F. M. L. Thompson argues that the English Land Question and the lack of dramatic reforms stemming from it are both central to any understanding of nineteenth century political history. However it is argued that there was not one 'land question' but several, and following from this, several reform movements that sprang up to deal with the perceived problems at different times and with different demands, covering a wide spectrum of society and opinion.

Popular radical demands for land reform in the late eighteenth century followed the publication of Thomas Paine's book Rights of Man in 1791.[18] Part two of the book appeared in 1792 and contained controversial plans for the redistribution of property and a property tax to fund welfare provisions for the poor. Paine only managed to escape government prosecution by departing rapidly for

France. Paine's book was bought and read in Constitutional Societies across the country.

Thomas Spence (1750-1814) called for the redistribution and common ownership of land, invoking a political concept with an ancient pedigree that pre-dated the French Revolution.[19] Spence, a schoolmaster from Newcastle upon Tyne, came to London in about 1787 where he lived in great poverty selling saloop, (hot sassifras) religious and radical books such as Thomas Paine's Rights of Man from a stall at the corner of Chancery Lane and Holborn and eventually from a wheelbarrow. He wrote and sold a periodical, 'Pigs' Meat', (a reference to Burke's derogatory comments on the 'swinish multitude'), and was a member of the London Corresponding Society. He was arrested several times during the 1790s and after his death his followers under Thomas Evans, formed Spencean Societies, coining the phrase 'the land is the people's farm' which was used later by the Chartists.[20] Spencean land reform was discussed by the constitutional debating societies and in the 1840s influenced the Chartists' Land Plan which called for the redistribution of land to give every man a few acres to cultivate. Spence's ideas form part of a continuous English radical agrarian tradition[21] and dissatisfaction and outrage at the ferocious Game Laws also fuelled much popular unrest.

Popular agitation for land law reform continued later in the century. There is a connection between land law

reform movements and the movement for the abolition of the Corn Laws, for the former became important when the Corn Laws had been repealed and the same people, including Cobden and Bright, were involved in both movements. The title Land Law Reform Movement really belongs to this period which lasted from the 1840s until the Settled Land Act in 1882, because those involved saw themselves as engaged in a concerted struggle for reform. The slogan 'Free Trade in Land' was used in pamphlets, and popular books and periodicals.[22] Freehold Land Societies were formed as savings societies with the aim of increasing the number of forty shilling freeholder's who would then quality to vote in parliamentary elections in favour of land reform.[23]

3

While agrarianism and popular discontent with land law was undeniably an important issue in English political and social history in the years following the French Revolution, it was by no means the only agitation for property law reform. F. M. L. Thompson has investigated the campaign for the abolition of primogeniture, the customary rule of succession which passed land to the eldest son on an intestacy,[24] which was finally abolished in 1925. Thompson points out that the agitation for abolition of primogeniture was probably a red herring, because no landowner of substance left the disposition of

his estates on his death to chance but would have drawn up careful settlements during his lifetime. But for the radicals who called for abolition primogeniture symbolised 'the social system of landed estates on which the power and influence of the landed classes was based',[25] which they wanted to dismantle, while for those who argued for its retention the law underpinned the customary behaviour of the landed classes and its abolition would lead to the disintegration of the landed estates and disappearance of the aristocracy which would be damaging for the constitution of the country. Dismantling the system was therefore both the aim and the dire consequence to be avoided at all costs. Also if primogeniture was replaced by equal partibility of an estate among all children this would lead to poor, uneconomic landholdings, with a resulting unwanted drop in land values. Bills for the abolition of primogeniture were regularly introduced into parliament up to the 1860s by a 'wide liberal-radical cohort' who included Cobden and Bright. The first bill was introduced in 1836 by William Ewart who said he based his case for abolition 'on principles of justice "dear to the middle class and democracy of England"'.[26]

If primogeniture was seen by the radical land reformers of the nineteenth century as symbolising the landed power base of the aristocracy, then the same motive led the attack on the strict family settlement, the legal device used by landowners to preserve landed estates

intact. Eileen Spring has charted the course of the campaign against the strict settlement in newspapers and journals in the mid nineteenth century.[27] It was described as legally anachronistic, inhibiting a free market in land and criticised as being the cause of agricultural inefficiency because a limited owner under a settlement could not lease sell or borrow against the settled land. Thus landowners themselves had an interest in reform because of their wish to increase the powers of the tenant for life under a settlement in order to undertake agricultural improvements and to exploit the new industrial wealth.[28]

Inroads were made into the ability of the landed aristocracy to perpetuate their family hold on landed wealth in 1882 when the Settled Land Act gave greater powers to the tenant for life under a settlement including the power to alienate even the manor house itself.[29] But this could alternatively be regarded as a victory for the landowners because they were given the means to exploit their property commercially while retaining the strict settlement. Although several bills were introduced into parliament in 1877, 78 and 1882 to abolish the strict settlement it has lived on, although no longer so popular because of tax and other disadvantages.

It will be apparent that the main movement for land law reform took place after Bentham's death in 1832, although Bentham had many connections with those who were to play a part later. For example Francis Place, the

radical tailor, who would later be important in Chartism, helping to draft the Charter itself, was a frequent visitor to Queen's Square Place, so without doubt Bentham was in touch with radical opinion. Many of the issues that concerned the reformers and were to dominate the campaigns later in the century, such as abolition of primogeniture, were already a source of grievance when Bentham wrote in the 1820s.

4

What led Bentham to become involved with land law reform in 1826? He complained that his time was short and that he had many other pressing commitments. At that time he was also working on the Constitutional Code, part of the planned Pannomion which would consist of a Procedure Code, a Civil Code and a Penal Code. He worked on the Procedure Code from 1823 and F. Rosen writes that this work 'began to fade after 1827'.[30] This neglect of the Constitutional Code began when Bentham turned to property law in 1826, which he saw as part of the Civil Code because the headings on the manuscripts at University College often make reference to the Civil Code Real Property Commission, and sometimes to other related work, such as the Equity Dispatch Court.

In 1826 James Humphreys' book calling for a reform of property law, including a code, was published[31] which led

to a fiercely argued debate among property lawyers, and in 1828 a Royal Commission was appointed to investigate the law of real property and to recommend necessary reforms. This Commission sat for several years and its work engaged the energies and attention of many property lawyers. Bentham was closely involved with these events, both the debates leading on from the publication of Humphreys' book and in the work of the Real Property Commission. He was therefore at the centre of the debates on the reform of English land law taking place among the property lawyers at the time.

The arguments put forward in this debate on reform took a particular form which provides the direct historical context in which Bentham wrote about land law in the 1820s and early 30s. For Bentham the answer to the question about how land law should best be reformed was that it should be codified. Halevy wrote that in the eighteenth century opinion was unfavourable to Bentham's plans for systematic codification of civil and penal law and that he had turned for his audience to other lands where he was more likely to receive a favourable reception.[32] There was simply no demand in England for codification.

How far would we agree with Halevy's assessment of the difficulties Bentham met with in England and how far had this situation changed by the 1820s? Recent work by historians, particularly David Lieberman[33] has uncovered and brought to view the eighteenth century debate on how

to effect reform of the law. Briefly the debate centred around the merits of either codifying the law, which did not have a great deal of support, or for consolidating statute law while leaving judicial law making alone, a method which had many more supporters. Legal commentators at the time believed it essential that some course of action was taken because of the increased rate of legislative law making which had resulted in large numbers of statutes.

'Statute consolidation addressed the immediate consequence of parliament's legislative activism: the sheer size, jumbled chaos and stylistic irregularities of the statute book'.[34] Lieberman, who considers that statute consolidation was essentially a Baconian solution to the problem of statute law, brings to light the kind of arguments that concerned English lawyers in the eighteenth century and, as Lobban describes, still concerned them in the 1820s.[35] Bentham took his place among his contemporaries to argue for the reform he thought most appropriate. He was not the only advocate of codification, but Bentham wanted not merely codification, but a systematic, utilitarian all-comprehensive reform of all English law which would include within it a property code.

In this thesis I will argue that Bentham seized the opportunities presented by both the publication of Humphreys' book and the appointment of the Real Property Commission to press for the adoption of his carefully

crafted designs for reform. Bentham believed that he had been presented with a unique opportunity to effect subsequent events and bring about statutory change because of his reputation as a reformer and because he was invited to contribute to the work of the Commission. His advice had been sought by influential lawyers and he had many well placed contacts who would promote his ideas. At this stage in his life Bentham was not under any illusion that his plans would be adopted if he merely set them before those with the authority to implement them. However rational and however economic and beneficial his plans were they would be opposed by those who had a vested interest in maintaining the status quo, for whatever reason.

Therefore in his late property writing Bentham had two approaches in his dealings with fellow lawyers and the Real Property Commission. Mostly he was content to argue specific points as they were raised by others, and this could be called his public agenda, which was to bring his ideas to bear on as many of the issues raised as possible. This public agenda is most visible in Bentham's published work, but also in many of his communications with the Real Property Commissioners.

But Bentham also had another, a secret agenda, which was to write about and plan for an all-comprehensive utilitarian reform of property law. This secret agenda is evident in many of Bentham's unpublished manuscripts and in particular in his work on replacing the basic structure

of land law, the antique doctrines of tenures and estates, with a rational system of rights and obligations in land. The secret agenda is also prominent in the work on the principles applicable to real property that Bentham prepared, ostensibly for the Commissioners, and in his brief work on the place to be played by gender differences in the laws of succession and marriage.

5

In chapter one Bentham's relations with James Humphreys are examined. Their acquaintance was short-lived because Humphreys died in 1830. The public reaction to the publication of the book provides a graphic introduction to the range of issues that concerned lawyers about the reform of English land law, including their fears about the consequences of interfering with such an ancient system. The book produced a strong reaction from other property lawyers, mostly unfavourable. In contrast Bentham greeted the book's publication as an important event. Humphreys had shown that it was possible to codify English property law, and had even drafted the outlines of such a code.

Was Humphreys influenced by Bentham when he drafted his proposal for a codified system of property law? Did Humphreys deserve the vilification he received at the hands of his contemporaries, or the praise that he

received at the time and subsequently? I will argue that a detailed examination of the individual articles of Humphreys' code and the proposals in his book makes it plain that Humphreys was not a utilitarian by any stretch of the imagination. It was quite possible for Humphreys to arrive at the opinion that codification represented the best method of reforming the law without having been influenced by Bentham. As we have seen, codification as a method of reform had been the main alternative to consolidation of statute law since the eighteenth century.

Humphreys' main point was that the primary importance of land should be in its commercial value, and so every attempt should be made to make English land law conform to 'the first principle' of land law, which is that land should be freely alienable. Therefore most of Humphreys' plans were to improve the alienability of land and security of title. Although he wanted systematic reform he was not a utilitarian. Bentham wanted to improve mechanisms for the transfer of land and agreed that land should be primarily of commercial and not political value, but he planned a utilitarian reform including some redistribution of property including land on the death of a proprietor.

Humphreys' fellow lawyers were not so certain that he was not in league with Bentham, or at least Bentham's circle, and he was harshly dealt with in an outburst of polemical literature. Bentham joined in the debates in support of Humphreys, by praising his book in a review in

the Westminster Review in 1826. I will argue that Bentham's relations with Humphreys are important in several ways, not least by enabling Bentham to put forward his own views about certain matters raised by Humphreys when he reviewed the book. Here Bentham was wearing his 'public face' as a reformer, and the revisions that he suggested to Humphreys' deeds of sale of land, mortgage and marriage settlement, were largely drafting improvements. This was not insignificant because Bentham thought that drafting reforms could be effected by lawyers themselves without having to involve parliament which was always a difficult, uncertain process. The kind of improvements that Bentham suggested often anticipated modern developments in a sometimes startling way.

Bentham made some criticisms of Humphreys' book that he excluded from his published review, in particular criticising Humphreys retention of gender as the basis of distinction in the laws of succession to property and marriage. In this suppressed work Bentham's hidden agenda for utilitarian reform is apparent, but he does not appear optimistic about the possibility of the adoption of his reforms. He must have considered it politic to suppress this writing.

It is clear from the correspondence that Bentham initially had great expectations from his relations with Humphreys which were subsequently disappointed. He thought he would make important contributions to the second

edition of Humphreys' book which appeared in 1827, but far from adopting Bentham's suggestions, Humphreys retreated from his original position and abandoned his code.

In 1829 Bentham was asked to contribute to the work of the Real Property Commission appointed in 1828 which had been given a very wide brief. This was to investigate the whole of the English law of real property and recommend any necessary reforms. The Commission conducted the largest survey ever undertaken into English land law and produced four large reports in May 1929, June 1830, May 1832 and April 1832. Despite this not much discussion on the issues took place when the reports were presented to parliament, or at least none that was recorded. In chapter two[36] Bentham's relations with the Commission are examined in terms of his contacts with lawyers who contributed to the work of the Commission by preparing written answers to questions sent to them by the Commissioners, or by attending to give oral evidence. Bentham prepared written answers and suggestions for the Commissioners, but he did not give oral evidence as James Humphreys did.

The Commissioners have been represented as a complacent set of individuals with little real interest in change of any sort, but I will argue that this opinion needs some revision in the light of some of the connections between Bentham and the Commissioners and other lawyers who responded to the Commissions. For example, Charles Butler, an eminent conveyancer, had been

an acquaintance of Bentham's for a long time and they had collaborated on work in the past. James Humphreys had dedicated his book to Charles Butler.

Bentham also had close contacts with one of the Commissioners, John Tyrrell, who was a leading conveyancer and was appointed to the Commission in 1829. He wrote to Bentham, telling him he was anxious to prepare a digest of the laws of real property and wanted Bentham's advice.[37] Bentham responded and a warm friendship developed between the two. Tyrrell seemed to act as Bentham's intermediary with the Commission, writing and asking him to hurry up with the work and offering to delay publication of the second report until Bentham's contribution was ready. Bentham wrote to keep him in touch with the progress of his work on the questions and other matters. Bentham's concern was to urge the Commissioners to carry out an all-comprehensive reform because anything less was inadequate, partial reform. So Bentham argued for codification while others rehearsed a range of alternatives which included judicial reform and statute consolidation. In fact the replies of respondents to the Commission's questions set out in the Appendices to their reports exhibit the main arguments in the debate on how best to reform the law and Bentham played his part energetically.

Traces of Bentham's other, hidden, agenda can be seen in the work he prepared castigating lawyers he believed to be insufficiently serious about reform, 'Reformists

Reviewed'. This was probably intended for publication in a journal or newspaper, and Bentham made clear that Peel and Brougham fell far short of his expectations. Despite misgivings Bentham was on the whole optimistic about the outcome to be expected from the Real Property Commission because a government sanctioned reform process had been put in motion, and he thought his own contribution would be beneficial.

6

In chapter three and chapter four, the content of some of the writing that Bentham submitted to the Commission will be examined in more detail. Bentham answered the Commissioners' questions on matters included in the first and second report, and prepared suggestions for them. Much of this material concerns plans for implementing a scheme for registration of title to land, which the Commissioners had rapidly decided was to be the panacea for most of the ills besetting property law. As we have seen, Bentham's own suggestions on registration were included in the Appendix to the Third Report, and later re-published by Bowring in the Bowring edition of the collected works. I will argue that Bentham's 'Outline of a Plan for a Registry' is significant in setting out a detailed plan for a workable institution, with plans for the personnel and for the building, including an idea of the cost of the scheme. What was Bentham's purpose in

undertaking this task? I would argue that Bentham was not confining himself to pettifogging bureaucratic detail, but attempting to provide the Commission with his plan for an important institution of government. L. J. Hume,[38] in connection with Bentham's plans for the Panopticon, and in the Constitutional Code, has described how Bentham's concern for 'good government' led him to draw up plans to ensure that the Executive should be regulated to remove all interests that would work to oppose the general good. This was the 'sinister' interest that 'could vitiate the most formally perfect electoral or judicial machinery'.[39] One way to eradicate sinister interest was to excise all forms of patronage and discretionary power within the machinery of government. These ideas had a direct effect on his plans for the Land Registry because Bentham 'treated all institutions as "political societies" in miniature, and the arrangements to be made for them had therefore to be analogous to those of society at large'.[40]

The same concern with eliminating sinister interest manifested itself in Bentham's announcement to the Commissioners that he would be acting as legal 'counsel for the people'. Other interests, such as the legal profession, the aristocracy and the political interest, all had their representatives on the Commission, but the people had none, so he would remedy this omission and argue for the unrepresented.

I would argue that this represents the democratic

impulse apparent in Bentham's utilitarian thought at this date, institutions should be responsive to the general body of the people. F. Rosen has argued that although there is no necessary connection between utilitarianism and democracy and although many utilitarians have not been democrats, at this late stage in his life Bentham was committed to democratic reform. His problem was to persuade those who held power, the 'ruling few', to relinquish it in favour of the 'subject many'. His strategy was to expose the inadequacies of the present system to discredit it, and at the same time enlist the support of the 'ruling few' by demonstrating reform to be in their interests too.[41] Therefore Bentham intended to appear before the Commission representing the voice of the public calling for reform, and he considered that he was capable of this function because, unlike most lawyers, he was not subject to 'sinister interest' to deflect him from his duty to his clients.

Apart from the plan for the actual Land Registry institution, the main question that must be raised in connection with Bentham's work on registration was whether he regarded registration to be creating a safe deposit, or muniment, for title deeds, or whether it was to be something more. Was it considered at this date that registration could constitute the actual method of transfer of property from one proprietor to another? Bentham did not address this point directly, and although there are indications that he regarded the Commissioners

plans as faulty, the evidence is ultimately inconclusive. The Commissioners drafted a bill for a complex system for the registration of deeds at length, and Bentham commented on the draft bill. He also spent much time answering questions raised by the Commissioners about the registration of births, deaths and marriages, and again I would argue that his interest in these plans lie in his concern to provide good government. In order to provide proper institutions of government the executive needed to have as much information as possible at its disposal about people. It was a function of government to collect such information. Another reason for Bentham's interest lies in his work on evidence. Registers of births, deaths and marriages provided 'pre-appointed' evidence, which would be used in courts of law or wherever required. Again it was a duty of government to provide the mechanisms for obtaining and keeping such evidence.

7

Bentham undertook two other detailed pieces of work for the Real Property Commission in addition to the shorter more superficial answers he made to their questions. These are examined in detail in chapters five and six. In chapter five it will be argued that Bentham constructed a new basis for property law, discarding the historically derived doctrines of tenures and estates in

favour of a system of rights and obligations in land. In undertaking this work Bentham entered into some form of collaboration with John Tyrrell, because first Tyrrell supplied Bentham with the traditional list of incorporeal hereditaments, and then Bentham used the list to show how each incorporeal right referred to some other corporeal property. The incorporeal right holder thus had rights of inhibition or rights of permission over the corporeal property. Bentham mentioned Blackstone's work on property in Book II of the Commentaries[42] in order to demonstrate that because Blackstone used a historical basis for property law, he was quite unable to incorporate 'new' forms of property, such as a company share, within the traditional structure. In contrast Bentham's rationally based system of rights and obligations could incorporate any kind of property. At a time when such 'new' forms of property as company shares were increasing in importance it was obviously necessary to make some form of accommodation with the old structures, and Bentham was showing the Commissioners how this could be achieved. Blackstone's defective plan could never succeed in this.

But it will be argued that this was not Bentham's only purpose in drafting the detailed tables of incorporeal hereditaments, his other, secret purpose was to begin a 'vocabulary of universal jurisprudence'. By this he meant 'in law what is common to all nations',[43] and in law it is the concepts that are common, such as right and obligation. He thought an international school

could be set up which would teach the art of legislation. A model of a complete code of laws could be drawn up and then from this general model individual models for particular states could be fashioned. It will be argued that when Bentham drew up his list of incorporeal hereditaments with Tyrrell's help, he was applying these concepts of universal jurisprudence to property law.

Finally in chapter six, the last detailed piece of work to be examined is Bentham's 'real property tree', a chart of the principles applicable to property that Bentham had mentioned he was devising for the Commissioners when he prepared the 'Outline of a Plan of a General Register'. The chart took the form of a 'philosophers tree', a device with an ancient history, and it displays in diagrammatic form all the principles Bentham considered particularly applicable to property law, beginning with the greatest happiness principle as the trunk of the tree, then main branches and other minor branches leading away from it, labelled with the various principles.

Some of the principles mentioned on the tree are familiar from Bentham's other work, such as the non-disappointment principle which he explained in his review of Humphreys' book as the principle which is especially applicable to property law. Others are met for the first time, and a few will be examined in detail, such as the colonisation principle, because Bentham had undertaken

some considerable work on this.

What was Bentham's purpose in presenting the Commissioners with such a tree? They had not asked for any advice on principles, so this work forms part of Bentham's hidden agenda, in fact the most important part. I will argue that the real property tree was part of Bentham's attempt to provide the common law with an analytical methodology which would aid the legislator in drafting utilitarian codes of law. When he drafted the real property tree, he intended to provide the Commissioners with an analytical device that would enable them to take the first steps necessary to reform the laws of real property.

8

In conclusion, a brief description of the manuscripts on which most of the work of this thesis has been based has been placed in two appendices. The ordering of the manuscripts forms particular problems which are described, one appendix dealing with the chronology for all Bentham's work for the Real Property Commission, and the other with the chronology for the manuscripts on registration of title to land.

Notes

1. Elie Halevy, The Growth of Philosophic Radicalism, trans. Mary Morris, Faber and Faber, London, 1828, pp. 508-509.

2. For example see Avner Offer, Property and Politics, 1870-1914, Landownership, Law, Ideology and Urban Development in England, Cambridge University Press, Cambridge, 1981, pp. 27-28. However Offer states that with respect to one part of Bentham's late writing on property, the plan for a Land Registry, history has proved Bentham right; J. Stuart Anderson, Lawyers and the Making of English Land Law 1832-1940, Clarendon Press, Oxford, 1992, p. 4; Bernard Rudden,'A Code Too Soon, The 1826 Property Code of James Humphreys: English Rejection, American Reception, English Acceptance', in Essays in Memory of Professor F. H. Lawson, ed. Peter Wallington and Robert M. Merkin, Butterworths, London 1986, p. 103.

3. Douglas Long, 'Bentham on Property', in Theories of Property: Aristotle to the Present, ed. A. Parel and T. Flanagan, Wilfred Laurier University Press, Waterloo, Ontario, 1979.

4. P. J. Kelly, Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law, Clarendon Press, Oxford, 1990.

5. Michael Lobban, The Common Law and English Jurisprudence, 1760-1850, Clarendon Press, Oxford, 1991, p. 201.

6. James Humphreys, Observations on the Actual State of the English Laws of Real Property with the Outlines of a Code, John Murray, London, 1826.

7. Jeremy Bentham, 'Bentham on Humphreys' Property Code', Westminster Review, vi (1826), 446-507.

8. 'Commentary on Humphreys' Real Property Code', The Works of Jeremy Bentham, ed. John Bowring, 11 Vols., William Tait, Edinburgh, 1838-43, v. 387-416. This edition is cited hereafter as Bowring.

9. 'Third Report of the Real Property Commission', House of Commons Sessional Papers, xxiii, 1831-32, Appendix 3, p. 36.

10. Bowring, v. 417-435.

11. Lobban, p. 185.

12. There is no doubt that Bentham used the periodicals and papers to argue his cause, see J. W. Flood, The Benthamites and Their Use of the Press 1810-1840,

unpublished Ph. D. thesis, University of London, 1974.

13. A. W. B. Simpson, A History of the Land Law, Clarendon Press, Oxford, 1986, p. 270.

14. William St. Clair, The Godwins and the Shelleys: The Biography of a Family, Faber and Faber, London, 1989, p. 289; Graham Wallas, The Life of Francis Place, George Allen and Unwin, London, 1918, p. 60.

15. F. M. L. Thompson, 'Land and Politics in England in the Nineteenth Century', Transactions of the Royal Historical Society, Fifth Series, xxiii (1964), 23-44; see J. C. D. Clark, English Society 1688-1832: Ideology, Social Structure and Political Practice During the Ancien Regime, Cambridge University Press, Cambridge, 1985, p. 64, for a discussion about the concept of an 'industrial revolution'.

16. F. M. L. Thompson, pp. 23-24.

17. F. M. L. Thompson, p. 23; Eileen Spring, 'Landowners, Lawyers, and Land Law Reform in Nineteenth Century England', American Journal of Legal History, xxi (1977), 40.

18. Sir William Holdsworth, A History of English Law, 14 vols., Methuen, London, 1952-, xiii. 13 (This edition hereafter cited as Holdsworth). See also E. P. Thompson, The Making of the English Working Class, Penguin Books, Harmondsworth, Middlesex, 1968, pp. 97-110.

19. Malcolm Chase, 'The People's Farm': English Radical Agrarianism 1775-1840, Clarendon Press, Oxford, 1988; E. P. Thompson, p. 176.

20. Chase, p. 6.

21. E. P. Thompson, pp. 250-6.

22. Donald Read, Cobden and Bright, Edward Arnold, London, 1976, p. 188.

23. Mostly the Freehold Land Societies became building societies. The modern Abbey National Building Society is said to be able to trace its beginnings to Cobden's National Freehold Land Association.

24. F. M. L. Thompson, pp. 23-44.

25. F. L. M. Thompson, p. 24.

26. F. M. L. Thompson, p. 26.

27. Spring, 1977, 40-59.

28. Eileen Spring, 'The Settlement of Land in Nineteenth Century England, American Journal of Legal History', viii (1964), 209-223.

29. Bruce v Marquis of Ailsesbury (1892) A. C. 356.

30. Constitutional Code, ed. F. Rosen and J. H. Burns, Oxford University Press, Oxford, 1983, (The Collected Works of Jeremy Bentham), p. xxxv.

31. Humphreys, 1826.

32. Halevy, pp. 76, 79.

33. David Lieberman, The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain, Cambridge University Press, 1989; John Dinwiddy, Bentham, Oxford University Press, Oxford, 1989, p. 14.

34. Lieberman, p. 180.

35. Lobban, pp. 186, 189-191.

36. Part of chapter two was published in Mary Sokol, 'Jeremy Bentham and the Real Property Commission of 1828', Utilitas, iv (1992), 225-245.

37. BL Add. MS 33,546, fo. 317.

38. L. J. Hume, Bentham and Bureaucracy, Cambridge University Press, Cambridge, 1981.

39. Hume, p. 246.

40. Ibid.

41. F. Rosen, Jeremy Bentham and Representative Democracy, Clarendon Press, Oxford, p. 21.

42. William Blackstone, Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-69, 2 vols., The University of Chicago Press, Chicago, 1979.

43. UC xxx. 56.

CHAPTER ONE

JEREMY BENTHAM AND JAMES HUMPHREYS: THE NINETEENTH CENTURY DEBATE FOR PROPERTY LAW REFORM.

In 1826 Bentham read James Humphreys' book, Observations on the Actual state of the English Laws of Real Property with the Outlines of a Code, which had just been published. He was inspired to contact the author, and to begin work on a number of property law projects. Some of these remained unfinished when Humphreys died in 1830, after which Bentham's writing on property law for the Real Property Commission[1] took priority over other projects.

Despite the short duration of their acquaintance Bentham's connections with Humphreys are significant for a number of reasons. Firstly, it appears to have been the publication of Humphreys' book which led Bentham to begin his criticism of the substantive rules of property law. Humphreys' book provided Bentham with a 'blueprint' for a codified, reformed system of land law to which Bentham then went on to apply utilitarian principles and rules. In contrast, his earlier writing on property in the Civil Code and elsewhere had been largely theoretical. This practical work of applying utilitarian principles to the rules of property law was then continued in Bentham's writing for the Real Property Commission.

Secondly, Bentham reviewed Humphreys' book in the

Westminster Review.[2] This Review went further than exposition and criticism of Humphreys' work because it was common practice at the time for the reviewer to use the review as a vehicle to put forward their own opinions. Bentham used this formula to argue his own position on specific issues raised by Humphreys. The combined authority of Bentham and Humphreys was bound to attract interest. Bentham was well known as a proponent of reform, and Humphreys' opinions carried great weight because of his reputation as a leading conveyancer. The editors of the Westminster Review, introducing Bentham's review, remarked on the beneficial results that could arise from linking the names of two such men: Humphreys, a leading conveyancer, and Bentham the 'distinguished juris-consult' and 'great founder of a new and better system'.[3] Apologising for the non standard format of Bentham's presentation (which included illustrations of lengthy legal formulae), the editors wrote that they would be pardoned if

> the weight which Mr. Bentham's name must carry, when thus united with that of Mr. Humphreys accelerate in the least the progress of that legal reform which is now beginning to be so loudly demanded.[4]

Thirdly, Bentham's connection with Humphreys led directly to Bentham's own participation in the debate on property law reform currently taking place among lawyers. The interest caused by the publication of Humphreys book resulted in an often hostile public exchange of opinion

among lawyers. Bentham's Review of Humphreys' book should be recognised as his contribution to the debate. There is evidence in the manuscripts that he intended to contribute to the defence of Humphreys' arguments elsewhere, possibly in another review or in a printed open letter.

Finally, Humphreys' suggestions for the reform of the law of succession led Bentham to set out his own views on succession which were not included in Bentham's published review of Humphreys' book. These manuscripts provide an interesting insight into Bentham's opinion on the role that should be played by gender in the laws of succession to property, and on the effect of gender on entitlement to property between parties to a marriage.

In his pre-Real Property Commission writing on property law Bentham was very aware of his 'public face' as a reformer. He sought to convince his Westminster Review readers about the benefits of his proposals by concentrating on improved methods of legal drafting in legal formulae, and on questions of cost. Bentham used the Review itself to expand reforms he had long been advocating, such as the reform of legal language, the reform of the administration of the law, and to explain how these matters had direct application to Humphreys' reform of conveyancing deeds or the registration of title. But elsewhere, in the manuscripts from which the Westminster Review article was prepared and in unfinished connected writings, there is evidence of the other aspect

of Bentham's work, his 'secret' or hidden agenda, to apply utilitarian principles to substantive property law rules.

In this chapter I will first examine Humphreys' complaints about the existing rules of property law and his proposals for reform. A fairly detailed analysis of Humphreys' work serves the dual purpose of providing a general historical context for the early nineteenth century debate on property reform, and exposing the context of Bentham's specific proposals. Then I will go on to consider Bentham's review of Humphreys' book in the Westminster Review which, as far as it is possible to tell, was written before he had met Humphreys. Finally, I will discuss in some detail Bentham's subsequent unpublished writings, inspired by Humphreys' book, some of which post date the article in the Westminster Review.

1

James Humphreys' book is credited with having had great influence on the reform of English land law. Its publication has been referred to as one of the events that led to the appointment of the Real Property Commission in 1828 which undertook the most comprehensive survey to this day of land law.[5] There was contemporary opinion that Humphreys produced his work in response to remarks made in the 1826 Report of the Parliamentary Commissioners into the operation of the Court of Chancery.[6] Bentham, writing in the Westminster Review in October 1826, hailed the

book's publication as marking an epoch in law if not in history. He was generous, even lavish with his praise, writing that one would have expected the author to be a young briefless barrister with nothing to lose, and not an established and successful practitioner. It has recently been suggested that Bentham was jealous of Humphreys' success, but there is no evidence for this assertion.[7] In the published Review of Humphreys' book Bentham remarks that he is Humphreys' 'adventurous pupil', and that 'ambition, not altogether unmixed with a dash of envy and jealousy' has inspired him to follow Humphreys' example and set out model deeds of sale, mortgage and marriage. This should be recognised for what it is, flattery. Bentham went on to write about his 'temerity' in undertaking such a course, and that he was like a dwarf on a giant's shoulders.[8]

Bentham was evidently delighted that a leading conveyancer could advocate such a comprehensive revision of English land law, especially the codification of the entire law of real property. Indeed one might have believed that Humphreys was a close associate of Bentham, but Bentham denied this. He wrote to Robert Peel, the Home Secretary,[9] that despite the fact that 'the spirit of my works howsoever compressed by prudence, breathes in every page of his', he does not know James Humphreys and only saw his book by accident, presumably in a booksellers list because he wrote that he sent for a copy of it.

Bentham wrote most enthusiastically to Peel[10] that of all the legal reforms Peel could have had in view, those proposed by Humphreys for property law must be the most practicable because every man who had an interest in land, whether in possession, in expectancy or in hope, would be benefited by the increased security afforded by the reforms, so resistance to reform measures would be minimal, and the possibility of success great. Mentioning the 'Procedure Code' that he would be sending Peel in less than twelve months, Bentham wrote that Mr. Humphreys' 'Property Code' is to the 'Property- law Chaos' what his proposed 'Procedure Code' is to the existing 'Procedure Chaos'. Bentham proposed to Peel that he, Bentham, should begin a collaboration with Humphreys on a code for property law if Peel would make it worth while to do so. And what would make it worth while to Bentham? 'Sir, it is this', he wrote, 'Say to me that you have taken, or are disposed to take, his plan in hand.' In addition Peel must make it clear that he does not object to Bentham having contact with Humphreys, because for fear of Peel's displeasure, Humphreys may decline Bentham's acquaintance, and Bentham felt that in his seventy ninth year he had no time to spare. Interestingly, Bentham thought that Peel himself might have have been wary of him for similar reasons. Peel may not wish to be known to associate with Bentham because 'many a man, who has long been seconding my designs, would no more dare to mention my name with any mark of approbation, than at Paris to exhibit a bust

of Napoleon.'[11]

In a draft version of this letter, headed 'Not employed', Bentham sounded less optimistic and identified Peel as a probable opponent of any plans he might have. He wrote 'My object is to engage Mr. Peel in common with all the other members of the ruling and influential few to give up in favour of the universal interest as large a portion of their particular and sinister interest as they can be persuaded to give up'.[12] Bentham found fault with Peel's draft Jury and Consolidation Bills, and wrote that 'Mr. Humphreys' proposed Code...[forms] a sort of test...' of Mr. Peels sincerity. To pass the test Peel must show he has a sincere desire for reform by welcoming Humphreys' proposals with open arms.[13] As we shall see, Humphreys' book appeared to constitute a test of commitment to reform for many people.

Subsequent correspondence indicates that Peel failed the test and disappointed Bentham. He did not respond to Bentham's request for an official, government sanctioned, collaboration with Humphreys on property law reform. Peel wrote that 'Mr. Humphreys was good enough to send me a copy of his book, but although perfectly sensible of 'the great importance of the subject' he had not yet had time to read it.[14] He was unable to accept Bentham's offer to work in collaboration with Humphreys because 'Mr. Humphreys is wholly unknown to me'. Peel seemed at great pains to deny that he would disapprove of any connection

between Bentham and Humphreys and concluded his letter by referring to the draft bills to consolidate the laws respecting offences against property which he had sent Bentham.[15] He invited Bentham to note that he had attempted to put Bentham's recommendations for drafting statute law into practice, which at the least indicates a continuing correspondence between the two.

Bentham eventually took matters into his own hands and sent Humphreys a copy of the Review of his book in January 1827. It is not known why he waited until some months after the Review appeared in print. This delay and then Humphreys' letter in reply must mean that Humphreys had not independently read the article, so the Westminster Review did not form part of his regular reading despite allegations that he was a member of a radical circle of reformers. Humphreys wrote thanking Bentham 'for the separate part of Mr. Bentham's review...Mr. Humphreys was yesterday occupied in reading the article, pen-in-hand, as he deemed it too precious a study to let a single reflection resulting from it escape him'.[16] Humphreys announced that he intended to avail himself of the services of Charles Butler to make Bentham's acquaintance, but Bentham wrote back promptly, telling him that he should not avail himself of the services of anyone except his own coachman, 'or what would be better for your own health your own shoemaker' and issued an invitation to 'share a Hermit's dinner at my Hermitage'.[17] In this way Bentham began his association with James Humphreys which

was to last until Humphreys' death in 1830.

2

Who then was James Humphreys whose work has been credited with such significant effect? He is described in the Dictionary of National Biography of 1891 as a legal writer and it is undoubtedly as such that he is remembered, but perhaps more significantly he was a practising lawyer and in particular a conveyancer, a specialist property lawyer. His contemporaries would have known about him first of all because of his reputation as a leading conveyancer. The Dictionary of National Biography of 1891 informs us that Humphreys was Welsh and that he had entered Lincoln's Inn in November 1789 to read law with Charles Butler, an eminent conveyancer who had long been known to Bentham.[18] Humphreys was called to the Bar in June 1800 and then built up a good practice as a conveyancer. In a glimpse of Humphreys outside Lincoln's Inn we are told that he was a liberal in politics and that he was a friend of Charles James Fox, the Whig leader, Clifford, Sir James Mackintosh and Sir Francis Burdett. He often attended Horne Tooke's famous Sunday parties at Wimbledon and lectured at the newly founded University College. Apparently he had 'a high reputation as a liberal reformer', presumably as a result of the publication of the book in 1826. The Dictionary of

National Biography mentions that Fox is said to have suggested the book but that really it was the 'fruit of the author's association with Charles Butler and with the new analytical school of jurists of which Bentham and Austin were the leaders'.

This association of Humphreys with Bentham's circle appears to contradict Bentham's letter to Peel. Was Bentham being over cautious when he wrote to Peel[19] that Humphreys was altogether unknown to him? After all Bentham did remark that 'this ignorance', had been carefully preserved[20] and it is clear that Humphreys did move in circles sympathetic to Bentham's ideas. Both were members of Lincoln's Inn during the same years, and in fact both occupied chambers in the same row in Lincoln's Inn. Bentham had chambers at 6 Old Buildings, also known as Chancery Lane Row. There are records referring to Bentham's occupation from 1769 to 1813,[21] and records of Humphreys occupation of chambers close by at 16 Old Buildings also known as Kitchen Garden Court from 1801, and then 9 Old Buildings from 1802. However the records relating to Bentham's occupation more or less exclusively refer to applications made for leave to compound for absent commons, which indicates that his chambers were tenanted from very early in his tenancy.[22]

The records of Bentham's chambers in Lincoln's Inn end sadly. In 1814 he surrendered his tenancy to his nephew Samuel who shortly afterwards died in Paris in 1816. On Samuel's death the chambers then reverted to

Lincoln's Inn. Despite his well documented poor opinion on lawyers generally and property lawyers in particular Bentham was obviously sorry to end his association with the Inn. Quite possibly the death of Samuel and subsequent loss of chambers also represented a considerable financial loss to Bentham. He presented a petition to Lincoln's Inn asking for the tenancy back because of his long association. He had been there since 1769 either by himself or by tenants until surrendering to Samuel in 1814, and Samuel had then died two years later. The Society refused Bentham's petition, and installed Henry Tinney, who had been Samuel's tenant, instead.[23]

The following year, on 25th June 1817, at a meeting of the Council of the Inn, members by election decided to invite Bentham to become a Bencher of the Inn. This was an honour which from 1795 onwards was accorded to members not on seniority but because of special merit. This was not necessarily for achievements in practice at the Bar, and, for example, Henry Brougham,[24] was honoured in this way. Bentham accepted the invitation and so his association with the Inn continued. It is significant that the members of Lincoln's Inn should have wanted to honour Bentham, the proponent of radical legal reform. Although many were firm supporters of the status quo and opposed change there were others who were sympathetic to reform.[25] Within a few years Humphreys' book would be published leading to a storm of controversy in which Bentham played

a part, and the members of Lincoln's Inn may well have hesitated before issuing the invitation to him. It is not known who actually proposed Bentham for election. The minutes of the meeting merely record the decision to make the invitation, and then later on, at another meeting, record Bentham's acceptance.[26]

It is said that Brougham and Thomas Denman, a member of Lincoln's Inn and a member of parliament who became Lord Chief Justice, proposed that Humphreys and Charles Butler should be made Benchers, but the motion was defeated because of the opposition to Humphreys, mainly led by Edward Sugden. Sugden who as Baron St. Leonards became Lord Chancellor in 1852, had himself been elected a Bencher in 1822. He was to become the strongest opponent of Humphreys' proposals for reform. It is not known exactly when the plan to elect Humphreys was so successfully opposed by Sugden, but it would be interesting to speculate that it was after the publication of the first edition in 1826.[27]

Humphreys' finally left his chambers in Lincoln's Inn in 1823, three years before the publication of his book. In 1822 he had decided not to reside there any longer, informing the Council of his decision at a meeting at which he argued over the sum of money offered to him by the Society for the early surrender of his tenancy. The Society had sent a surveyor to make a valuation of the property, but Humphreys considered the valuation and the Society's subsequent offer to be too low because of all

the improvements he had made to the rooms.[28] Most of the quite numerous records of Humphreys' tenancy refer to his requests for permission to make alterations and improvements to the property, for example putting in a chimney, putting in a window and a cellar, and moving a sun dial. Through the brief records emerges an impression of an energetic, and careful man.

In his book Humphreys argued that 'both good policy and express laws require that land should be commercial or, in another word, alienable. Indeed to be assured of this we need only remark that a purchaser scarcely buys but he improves'.[29] The records of the improvements that Humphreys' made to his tenancies at Lincoln's Inn show that in his own property dealings he managed to provide the world with a good example of his observations about the typical behaviour of purchasers of property.

3

The publication of the book in 1826 resulted in much adverse criticism from Humphreys' fellow conveyancers, which will be examined in more detail later in this chapter. As far as they were concerned the most contentious aspect of Humphreys' book was also very same one that excited Bentham's greatest admiration. This was Humphreys' proposal that land law should be codified. He argued the case for codification persuasively and gave a

general idea of how to put it into effect. But, although the plans for a code caused the most adverse criticism, other specific suggestions that he made were also controversial, most particularly Humphreys' attack on equity and his proposal to abolish uses and bare trusts. In addition the re-organisation of rules of law relating to succession, simplification of the documents needed to alienate real property, and plans for a registry of deeds of title to property were all controversial to a greater or lesser degree.

Humphreys began his book explaining what had led to the current defects in the system of property law. The fundamental problem in his opinion was that there were no basic principles underlying the rules of property law, and no system to these rules. This error was then compounded by an ad hoc, incremental approach to adjusting the working of property law. Such an approach to political institutions did not cause the same problems, because these are comparatively simple and of necessity affect everyone. Political abuses can be quickly detected and corrected by the public, but in contrast comparatively few people are proprietors of land to any great extent. Property laws, especially land laws, are complex and vary according to the geographical boundaries and social habits of the nation. The laws of property appear to have no features of a general interest, so fail to interest the public and because of their complexity they are quite

beyond the grasp of the 'helpless owner'.[30] As a result property law is the sole preserve of the 'dispensers and expounders of the law', who have confined their attention to precedent and practice.

If the practitioners of property law had not made any effective principled changes then neither had parliament. Humphreys accused the legislature of effecting partial reform only where glaring defects forced their intervention, 'but in their remedies they have only lopped, where they should have have extirpated and the noxious weed has grown by pruning.'[31]

Humphreys considered that 'the only legitimate qualities of property,'[32] were its capacities of enjoyment, succession, and alienation, its liabilities to the debts of the owner and his duties to the state. But the existing rules of property law failed to support these essential requirements because of its complexity. He offered an historical explanation for these present complexities, looking back to a lost golden age in Anglo Saxon England whose simple rules of ownership had been overwhelmed by feudal tenures and burdensome privileges of the Normans after the Conquest. These feudal tenures, wrote Humphreys,[33] were an already established system forced on the English by the proverbially litigious Normans. This could have been an advantage because it might have brought the civil law to England, but 'they gave us, not the spirit, but the dregs, of that singular system, which has so largely influenced the laws and

manners of modern Europe'.[34] Although some of the burdens of system of tenures had been reduced at the Restoration much of the original system still remained in 1826 together with the theories built upon it and the fictions invented to evade it, and so the doctrine of tenures, which he wanted abolished, coloured the law of property even though it was quite out of place in modern society. He argued that land should be regarded as commercial property and all undue restrictions on its alienation removed.[35] But the complex general rules of property law, together with the variations found in many local customs, made all too apparent the unsuitability of this law for commerce.

Humphreys emphasised that his purpose was to look at the law relating to real property only and not that relating to movable or personal property. Because personal property was not subject to tenures, and primogeniture was not the mode of succession, it did not require the same urgent improvements. Underlying all the reforms that Humphreys outlined in his book was this insistence that land too should be recognised as a commercial commodity. Personal property was recognised as having commercial value and, for example, shares in companies now formed the larger part of the nation's wealth but personal property was not burdened by doctrines of tenures and estates, or subject to complex rules of succession and rights of dower or curtesy which interfered

with enjoyment or alienation, and neither should land.

Humphreys emphasised that property law needed a system. Even more than other branches of the law the institutions respecting landed property should have a well defined character and be free from mere technical distinctions whether of tenure or jurisprudence. Possession should be kept free from the interfering rights of third parties, rules of succession should be made simple and uniform, whether or not the the rules of primogeniture or equal partibility are followed. Land should be freely alienable and creditors' rights should be adequate and prompt. Periods of prescription, or adverse possession should be clear and of limited extent. But above all, wrote Humphreys, instead of vainly trying to adapt the 'crude and scanty institutions of earlier ages to the complicated relations of the present day'[36] by allowing the rules of equity to interfere, there should be one uniform system of laws to regulate both. The laws of England afford a 'signal example' of such defects in the laws of landed property, and to this one must add the 'supineness of the legislature and the indifference of the public.'[37]

These opinions were very much in accord with Bentham's own views, particularly Humphreys' argument that land law needed systematic reform. Bentham had called for a systematic reform of the law based on articulated principles. These principles should be the leading principle, the greatest happiness principle, and those

principles subservient to it most appropriate to property law, especially the non-disappointment principle.[38] But Humphreys was not a utilitarian. As we shall see his proposals for reform were not grounded on any particular principle, rather the urgent necessity for transforming the laws of real property to make them fit for commerce.

The first part of Humphreys' book was devoted to lengthy and technical descriptions of the problems besetting the different areas of the law of real property. The second section of the book, entitled 'Of the Remedy for the Defective State of the Laws of Real Property',[39] set out Humphreys proposed reforms and this, he wrote, was the 'more agreeable part of my task'.[40] Humphreys considered that there were two ways in which to effect reform and that he would give full and impartial consideration to both. The first was to proceed by 'applying partial remedies' where defects arise, while the second was to frame an entirely new code of the laws of real property. It is in Part Two that Humphreys set out the text of the numbered articles of his code of property law. After the text of each article followed explanation and reason.

Finally in an Appendix[41] Humphreys gave drafts of proposed 'Forms of a Conveyance to a Purchaser', a Legal Charge, and a Marriage Settlement. These instruments depend on the articles of the Code for their legal effect, and it is on these forms that Bentham commented

in his review of Humphreys' book.[42] Humphreys placed his forms alongside existing instruments, so for example his form for a conveyance is placed on the right-hand page whilst the forms of conveyance under existing law are set out on the left hand page. In this way Humphreys achieved effective appreciation for at least one beneficial aspect of his reforms. Humphreys' form of conveyance to a purchaser takes up less than one page in his book, while the Deeds of Lease and Release, which were one of the existing circuitous methods of transferring property, take up fifteen pages. Similarly the marriage settlement takes up twenty six pages in its existing form but only three pages in Humphreys' form. Little wonder that Bentham was so enthusiastic.

4

Was the adverse criticism that Humphreys' book received at the hands of his fellow lawyers justified? In recent years Humphreys has been identified as an important figure in the early nineteenth century movement for property law reform. It has been pointed out that most of the reforms proposed by Humphreys had been adopted in some form by 1891, changes such as shortened forms of conveyance, registration of title, abolition of copyhold tenure, and alteration of the law of descent.[43] Humphreys has been praised as the far-sighted forerunner of modern

land law.[44] In 1826 both Bentham[45] and Brougham in his great six-hour reform speech in parliament greeted the book with publicly expressed approval, and they were not alone among Humphreys' contemporaries. For example the Quarterly Review recorded the importance of Humphreys' book and others agreed.[46] But Humphreys was widely criticised by other conveyancing lawyers. It appears that no-one connected with the law or law reform at the time was merely indifferent to Humphreys' book. Everyone was either strongly in favour or strongly opposed to his proposed code. Does Humphreys' book deserve either the criticism or the praise that it received at the time or indeed since? In order to answer these questions it is necessary to examine some of Humphreys' proposals in detail, particularly his proposals for the reform of the law of succession and married women's property rights. Then the content of some of the criticism he received from other lawyers will be examined, and finally Bentham's comments on Humphreys' plans.

Humphreys subjected the law of succession to detailed analysis and proposed partial correction rather than abolition for the problems this branch of the law presented. He was controversial in suggesting the admission of the half blood to the rights of succession[47] and of lineal transmission of such rights.[48] At that time ancestors, who could of course be such close relatives as parents, could not inherit. Humphreys substituted the state for any collateral kindred beyond the twelfth

degree, which was also regarded as controversial by Humphreys' critics but if we examine his proposals with care Humphreys did not interfere with the status quo as much as one might have imagined from the critics adverse comments. Although the origin of title was no longer to be regarded as significant when deciding succession, the question of gender remained all important. Among kindred of an equal degree the male was always to be preferred to the female. If there is more than one male then the eldest alone inherited, but among females of equal degree all took equally. These proposals did not alter the existing law. In the existing order of succession children succeeded first and then on the failure of this lineal succession the property devolved on the father for life. If not, then to brothers and then sisters of the full and then the half blood. Only on failure of these heirs did Humphreys propose that the land devolve on the mother for life. On the death of the father the land devolves in the paternal line and then failing this to the maternal line.

So it is clear that although his reforms were regarded as controversial Humphreys did not propose abolishing gender as the decisive factor in succession to property. Neither did he propose an end to the custom of primogeniture, and on the contrary argued that it should be retained.[49] He did not find that the custom interfered with conveyancing, disagreeing with the opinion that held that primogeniture impeded alienation. That indeed had

been the effect of entails but it had long been possible to evade entails. Firstly Humphreys argued that primogeniture no longer had an extensive effect on succession. Primogeniture had often been represented as harsh and impolitic, sacrificing the natural affections for younger children to an ill regulated passion for family aggrandisement, or to the vanity of supporting an empty name. The younger branches of a family were beggared to enrich the eldest, and this acted to prevent the free circulation of capital.

But Humphreys disagreed with all this. He maintained that if the total extent of the property to which this law applied is considered then it was evident that, firstly, the rule does not apply to females at all. For them equal partibility had always been the rule of law that applied. Secondly, in all settlements widows' jointures and younger childrens' portions were treated as personal property and not real property and so were charged on the estate, forming large deductions from income and capital. Thirdly, primogeniture had no application to personal property. Therefore scarcely one third of unencumbered property of every description in England was governed by the law of primogeniture.[50]

Because of these considerations Humphreys argued that the proportion of landed property in England was not such as to deprive a father of his power, in conjunction with the right to make a will, of his ability to make ample provision for all his offspring. Therefore the

institution of primogeniture did not injure the civil welfare, but did confirm 'the political security of the public'.[51] If primogeniture was abolished then far greater harm could result from the partitioning of estates. Humphreys considered that the fault of the Code Napoleon was that in establishing equal partibility among all children and other kindred of equal degree it caused land to be broken up into ever more minute proportions with a resulting increase in small and therefore poor properties. Even in France this had now been recognised as a disadvantage and the King of France, in opening the session of the legislative bodies, had announced an intention of submitting to them the project of a law for a modified introduction of primogeniture as applied to land.[52]

Therefore, far from harming the social fabric of the country, primogeniture provided the great benefit of political security because it had an important value in preserving the independence of the aristocratic branch of the constitution. It is quite clear that Humphreys supported primogeniture on political grounds, writing that

> With privileges rather for the public advantage than their own, less violent and more consistent than the multitude, if, in past ages, a tyrant was to be coerced or expelled, or in present times, a sovereign is to be advised, the arms and counsel of our nobility have ever been found equally prompt. Without them,

> whatever may be individual merits, the many are as a rope of sand.[53]

Neither Bentham nor the later land reformers felt much sympathy with these sentiments. In particular Bentham remonstrated with Humphreys, writing

> one passage exhibits a spectacle that I was not prepared for: where our author, taking a sudden spring, mounted on Pegasus, and from civil, making an excursion --an uncalled-for excursion--into constitutional law. It is in page 206...Author "the many are as a rope of sand." Reviewer--Say, are they so in Yankee land?...was it to propitiate those on whom everything depended for success that this tirade was inserted?[54]

For Bentham democracy was the form of government most in accord with the greatest happiness principle, and while not an advocate of enforced appropriation of land, he nevertheless considered that the more equal the inhabitants of a country were in terms of wealth, the greater the degree of aggregate happiness.[55] This will be discussed in greater detail in chapter six. In view of Humphreys express confirmation of tradition it may appear all the more surprising that his critics should have suspected him of seeking to overthrow established order by his reforms. But it could be argued that by insisting that the primary importance of land was its commercial value Humphreys had made a very contentious statement. This denied that ownership of land was, or even should be, the

concomitant of political power.

5

Humphreys subjected the rights of marriage, involving curtesy, dower and wife's separate estate, to careful scrutiny. Here again Humphreys proposals for reform caused an outcry, but was he really so revolutionary? Article twenty of the code[56] stated that during marriage a husband was entitled to his wife's land. It is quite clear that Humphreys was not proposing any change from current legal and religious theory, which upheld the doctrine of the unity of husband and wife, thus allowing a husband legal title to his wife's property on marriage. But if Humphreys left this doctrine intact in form, he did attack its substance. In article twenty three[57] he proposed that a husband and wife should be able to make any settlement or agreement about property that they wished, either before or after marriage. So they could agree between them that the wife was to retain title to her own property. In article twenty four[58] he went further and proposed that if an agreement between husband and wife was made under article twenty three then a wife should enjoy her own land at law so rendering unnecessary the interference of equity and the appointment of trustees. This article could be reconciled with article twenty above because Humphreys in article twenty three[59] said any settlement or agreement

between husband and wife did not operate to derogate from a husband's rights to his wife's lands unless expressly provided. Humphreys said that he made the married woman a femme sole with her own separate rights,[60] but only with her husband's permission.

By article twenty six[61] a wife could, during marriage, alienate her lands intervivos or by will, but to do this she again required the written consent of her husband. If the disposition was by deed then the deed must be acknowledged by her as her free act before a judge in a court of record, or by a justice of the peace. This needed a judge to conduct a private interview with the wife, and certification of her consent must be endorsed on the instrument. Then the document was to be registered. In giving his reasons for these changes Humphreys digressed to discuss the 'harsh law' which gave a wife's personal estate to her husband during marriage which 'cries feelingly for correction'.[62] He dismissed this custom as one that had originated in past ages when people had few personal possessions other than agricultural stock, produce or household equipment, and therefore had little relevance at the present. But he did not expand his remarks, ending the discussion by saying that as he was not addressing personal property he would not dwell on this injustice. However it is possible that he included a discussion of something he regarded as an injustice in respect of personal property at this particular point in

his discussion of real property quite intentionally. Could it be that he was giving an oblique but deliberate hint that he disagreed with contemporary opinion about the doctrine of the unity of husband and wife with respect to both real and personal property?

Humphreys proposed changes to rights of curtesy[63] and dower.[64] In article twenty one if a husband survived his wife and she left children, then the husband was entitled to a moiety of the profits of whatever land she died possessed of during his life, and if she died leaving no issue or if the issue should die then the husband was entitled to the land itself during his life.[65] This abolished the cruel law that deprived children of their mother's lands after her death while the father lived and allowed a husband his wife's lands if no children survived her rather than letting it go to more remote kindred. But if the position was reversed and instead of the wife the husband died first, and the wife survived the husband and he left no issue then the wife received one third of the profits during her life instead of a life interest in the whole of the estate.

By article twenty two[66] a wife was allowed dower of one third of the land her husband died possessed of, whereas by existing law a wife had a right to dower in all land acquired during the marriage. Humphreys therefore reduced a widow's rights. His reason for doing so was because the existing law 'violated the first principle of property', which as we have seen for Humphreys was that

land should be alienable. Attaching an indefeasable right of dower onto land made it difficult for a husband to alienate. A purchaser of land was naturally concerned to ensure that right to dower was not attached to any purchased land. Because of this it was necessary to draft complicated and expensive deeds to prevent the right to dower arising the instant land was acquired.

It is clear that two separate kinds of rights and interests had come into conflict. One was the need for alienation of land to be efficient and reasonably swift. Most importantly a purchaser should acquire a good title and should not be encumbered by unwanted third party interests. But on the other hand a widow had a right to be maintained out of her husband's lands for the rest of her days. This was the corollary of the wife's disability at law. She was not allowed at law to retain her own property but required to be dependent on the husband. After his death she continued to be dependent on his property because, either by primogeniture on intestacy, or by settlements created by deed, the estate passed not to her but to the eldest son. Humphreys' reforms therefore meant that in return for a certain and unbarrable right to dower on some part of the land held by her husband at his death, a wife lost the right to dower on all land he might have held during his life. Humphreys refused to accord a wife the same rights as her husband. He wrote that a husband's rights to his wife's property were not a parallel to her

right to dower because she could never alienate without her husband's consent.[67] Also he considered that his proposals brought real property rules into line with those of personal property where a wife had never been entitled to more than one third of her husband's personalty on an intestacy.

Humphreys fellow conveyancers were very critical of his proposal to allow a wife to alienate her land, albeit with her husband's consent. It was said that this would lead to abuse, and the secret examination of the wife by the court would not provide adequate safeguards against co-ercion by her husband. Equity had long provided the means for allowing a wife to have an interest in land and even to alienate her own land, so surely the most that Humphreys proposed to do was to adopt the equitable solution into the common law. This would then be generally available without the expense of setting up trusts and so available not just to the wealthy. Most of these issues, including a wife's right to alienate her own property during the marriage were not resolved until the Married Woman's Property Act of 1882. It is difficult to be clear about Humphreys' reasons for the changes he proposed in rights to property during marriage. After all he did condemn the 'harsh laws' which disadvantaged wives, but having condemned it he made little alteration to a wife's legal status, but, as I have suggested, this may very well have been in order to avoid conflict rather than from conviction. He does not seem to have deserved the

criticism he received from fellow conveyancers who accused him of attempting to overthrow established order of society. Possibly Humphreys' critics were really complaining about his inroads into the hallowed principle of the unity of husband and wife which would disturb the long established relations between the sexes. In 1790s ideas for a liberation of the relations between the sexes and for female emancipation had been fashionable among philosophical radicals, but by the 1820s these ideas were in retreat and regarded with disfavour and suspicion.[68]

Another reason for the vilification that Humphreys received at the hands of his fellow conveyancers was the adverse effect that they feared his reforms would have on their incomes. Eileen Spring has suggested that by the early nineteenth century primogeniture and entail were of more concern to lawyers than to landowners, who became accustomed to surrendering privileges.[69] Lawyers relied on drafting lengthy deeds, including of course marriage settlements, for their livelihood and so had more to lose by these reforms. This point is mentioned again in chapter two.

The greatest beneficiaries from Humphreys' proposed changes would undoubtedly be the purchasers and vendors of land. For example, by restricting the incidence of dower, Humphreys simplified the alienation of land, which would have resulted in cheaper and quicker conveyancing. It would seem that more efficient conveyancing rather than

any radical political agenda was Humphreys' main purpose and interest throughout his discussion on property rights during marriage, and elsewhere. He indicated that he considered that the important and only necessary characteristics of a system of property law should be to facilitate enjoyment and alienation.[70] Land should be recognised for its commercial value and so, for example, the rights of creditors needed to be strengthened and enlarged. Many of the articles in his code reflect this view of land. In both the first and second edition he pointed out that these rights attach to real and personal property in a manner so intermixed that it is not possible to distinguish one from another. But whereas Bentham was later to call for an end to the anomalous distinction between real and personal property,[71] Humphreys was content to remark that as the limit of his essay is real property he was precluded from attempting to set out a general system encompassing both.[72] But he did suggest that creditor's rights should be extended to copyhold lands and to freehold lands encumbered with old terms of years or other satisfied interests. In the code article eighty[73] set out a new regime that allowed creditors to turn first to personal property and then to real property.

A brief examination of Humphreys' other suggestions include several which were to be enacted as statutory reform within a short time. For example his proposal that wills should speak from the date of death and not from the date of the will is is known as an ambulatory will and was

innovatory.[74] The Wills Act 1837 finally introduced this change into the law. Similarly when Humphreys looked at the administration of the assets of a deceased, he advocated that real estate should be liable for payment of debts after personal estate so avoiding the costly intervention of equity.[75] In addition the abolition of formal trusts and reducing mortgages to their natural character of legal charges instead of conveyance and re-conveyance, would extinguish the technical distinction between legal and equitable estates.

Humphreys proposed changes in the laws relating to prescription and to limitation of time, finding that these were incorrigible in their present form. His proposal was for an end to the distinction between negative prescription and positive prescription, positive being that period of time which is necessary to establish a title to incorporeal hereditaments which he says are in reality merely servitudes on land, whilst negative prescription is the period beyond which the right to land cannot be enforced against adverse possession. Incorporeal hereditaments will be confined to rights to light, way and water. For both positive and negative prescription the same period of time will be sufficient, and Humphreys suggests twenty five years[76] instead of the present extravagant demand for duration of the right to be beyond living memory, this being fixed at the year 1189. The Prescription Act was passed in 1832 and one wonders

whether Humphreys' work had some influence, the Act has been criticised for confusing a right acquired by adverse possession with a right acquired through long usage and has been called the worst drafted Act on the statute book by the Law Reform Committee in 1966 which recommended the abolition of prescriptive acquisition of rights. Despite this the Act remains in force. Bentham's arguments on incorporeal hereditaments are discussed in detail in chapter five.

In conclusion, Humphreys is justly deserving of praise for his detailed plans to simplify and rationalise conveyancing. But the limits of these express aims should be recognised. It seems Humphreys did not deserve the criticism that he received from fellow conveyancers, and other motives for his vilification at their hands should be looked for. He was possibly most influential in his call for a national Registry for deeds concerning land, but this will be discussed in more detail in chapter four.

6

A second edition of Humphreys' book appeared in 1827 containing several changes made since the first edition in 1826. The very title had changed. Instead of offering a code Humphreys now offered a 'systematic reform'.[77] The code had disappeared and in its place was a more cautious proposal for reform. Humphreys wrote that he was proposing a reform of land law instead of codification

because public prejudice was averse to the title code. It seemed to mean something revolutionary, or at any event foreign and unconstitutional, and inappropriate for the English temperament.[78]

It is difficult not to conclude that the published criticism made of Humphreys' first edition sufficiently affected him to make him withdraw from his original bold position, despite Bentham's praise for his code. In general other lawyers reacted adversely to the publication of the book.[79] Legal reaction to the book has been characterised as 'spontaneous, venomous and almost unanimous.'[80] Shortly after the publication of the first edition in 1826 a flurry of critical tracts and open letters appeared criticising Humphreys. The attack was led by Edward Sugden, a leading conveyancer who became Lord Chancellor and was made Baron St. Leonards in 1852.[81] He published an open letter to Humphreys,[82] which Humphreys then answered. In total Sugden wrote three open letters to Humphreys and then others joined in the debate. Sugden wrote that he was decidedly opposed to all codes,

> my firm impression is that a greater calamity could not befall the country than the adoption of the proposed code, and I conscientiously believe that the general rules of law are as perfect as human intelligence can make them, although there are anomalies that should be corrected, and many forms that should be abolished.[83]

In language that contains echoes of Blackstone, Sugden wrote that laws owe much to the reverence that that their antiquity inspires, time mellows and forms laws.

> Contemplate a great and ancient city; it's public edifices rendered venerable and sacred not merely by age but by the solemn purposes to which they are dedicated...a sudden convulsion of nature overthrows the ancient towns, the magnificent palaces, and the humble dwelling- all are swallowed up in a common abyss...Now like an earthquake, the code would remove all the settled law of property in the country.[84]

Eventually Sugden concluded that the code was well calculated to alarm every owner of real property in the kingdom, because it would destroy the distinction between real and personal property and this would have the inevitable tendency to weaken the aristocracy, and leave many peerages without any estates to support their honours.[85] So the problem caused by codification was the political threat to the landed proprietors.

Robert Dixon, in an open letter addressed to Peel[86] summed up the argument between Humphreys and Sugden and concluded that a code would not be advisable in a country such as England because codes of law were more or less synonymous with absolutism. Jonathan Henry Christie probably expressed the opinions of many when he wrote that a 'new code would be a great evil...the present system is substantially excellent, and well adapted for for all its purposes; and above all, has the advantage of being well

known and understood.'[87]

J. J. Park wrote of the common law as 'a connected stream of decisions'[88] and surprisingly used Bentham's principle of security to argue against changing the established law. Calling Bentham a law reformer and referring to Bentham's Rationale of Judicial evidence, he called on Bentham's work in support of his own arguments against reform, in particular not disturbing established expectations by changes in the law.[89] But Park was being disingenuous in using Bentham's arguments in this manner because finally he revealed his real opinion and condemned Humphreys for acting as a mouthpiece for Bentham. 'I find the closet philosophy of Mr. Bentham...affixed (to) a name which is a synonym for long experience and profound knowledge...'[90] Park found this situation to be a cause for concern and wrote that every man owed it to his profession and to the public to put a stop to 'so singular an infatuation'.[91] Finally Park turned to a direct attack on Bentham, writing that he could not

> look into the writing of such men as Mr. Bentham and Mr. Mill, without seeing that, great as they are as theorists, important as their speculation may be to newly formed states or to future worlds, they are in reference to a country like the present, talking upon a subject <u>which they do not understand</u>.[92]

Reading this onslaught must have made Humphreys even more cautious and confirmed Bentham in his view that it was

indeed bad publicity, if not worse, for any one to be associated with his ideas.[93] Park's outburst also makes John Tyrrell's determination to work with Bentham the more remarkable.

Bentham, stung by Park's comments, wrote to the Real Property Commissioners that Mr. James Park had done him the honour 'to say I know nothing about the matter and at the same time has done me the further honour to quote a passage from my Rationale of Evidence in support of his own opinion'.[94] Bentham suggested the Commissioners ask Park to give particulars of Bentham's errors and not rely on vague generalities, and pointed out that

> Mr. Park supposes that codification must produce a great change in the law that this change must give insecurity to property which is a bad thing therefore codification is a bad thing.[95]

Many other lawyers joined in the debate[96] including Humphreys who replied to Sugden. He wrote that Sugden argued that neither the legislature nor the public were at all disposed to consider any material reform in the law of property, 'but this ground is daily sliding from under you.'[97] Other lawyers criticised what they perceived as Humphreys' attack on the common law, complaining that the code was French inspired and foreign, therefore certainly unsuitable for England.[98]

Apart from extreme suspicion of codes of law, Humphreys' critics found most fault with his interference with primogeniture, rights of property in marriage, and

abolition of uses. It does indeed seem interesting and 'curious'[99] that Humphreys proposals resulted in such vehement and extreme reactions, more especially since, as we have seen, his reforms did not in fact interfere with the political status quo very much at all. His opponents came near to accusing him of attempting the revolutionary overthrow of an ancient system.

There is evidence that Bentham must have followed this debate carefully, because a bound volume of these and similar tracts in the British Library has Edwin Chadwick's name plate inscribed in the front cover and is heavily annotated in Bentham's hand, with particularly scathing remarks beside some of Sugden's sentiments in support of the existing system. For example Sugden had brought out the standard Blackstonian argument against codification, which was that the laws of England were like a house built over many years to suit the inhabitants. Bentham noted at the foot of the page 'a vague...analogy. A body of laws is it a house?'[100] Many of the tracts were personally addressed to Bentham by their authors. Of course the tenor and level of the criticism of Humphreys' proposals confirmed Bentham in his opinion of lawyers as representatives of 'judge and co.', with their own sinister interests which led them to oppose all plans for reform.[101] However Bentham did not appear surprised by the reaction and in fact publicly warned Humphreys about the reception that his work was likely to receive from his

peers when he reviewed Humphreys' book for the Westminster Review. 'Proportioned to the service he has rendered to all who are not lawyers, is the ill-will which, with few exceptions indeed, if man be man, he cannot but have called forth, in the breasts of all, who, proportioned to the advancement given to the art-and-science, see, as they cannot but see, the defalcation made from the profit of the trade.'[102]

Recent historians have returned to this fear of an attack on incomes as the motivation and explanation for opposition to property law reform in general. A. W. B. Simpson considered that professional interests were opposed to reform because lawyers had a vested interest in delay and expense.[103] Eileen Spring suggests that the relative failure of the land law reformers lay in the fact that they, unlike other reformers, took on not merely the aristocracy but the most powerful of modern professions as well.[104] Avner Offer[105] and more recently Stuart Anderson[106] have examined the role played by the legal professions in proposing and opposing land law reform, particularly the registration of title. This point will be examined again in chapter two.

Humphreys' book was reviewed not just in the Westminster Review by Bentham, but in the other leading periodical papers. The Quarterly Review of 1826 noted Humphreys was 'a gentleman well known for his professional skill and experience'[107] and praised his work, although reservations were expressed about the wisdom of proposing

a code. The reviewer reminded Humphreys that he was supposed to be legislating not as a cosmopolitan philosopher, but as an Englishman, and for Englishmen.[108] Turning to reform in general, the reviewer said that Humphreys is not the only lawyer anxious to wipe off the reproach to his profession of having an interested and sordid opposition to all plans of improvement, 'philosophical legislation', that will narrow the field of practice and reduce income, and indeed under the auspices of a liberal and wise administration men like Humphreys will increase and the opposition of petty and private interest will be powerless.[109] The Edinburgh Review in supporting Humphreys and deploring opposition to reform wrote that old men could stay the plague of improvement for a season but that their night was far spent. The day was coming when there must be a rigorous, unsparing, philosophical and prudent revision of the laws and of the whole administration of justice.[110] In these remarks we can find contemporaneous support for Bentham's criticism of lawyer's sinister interest in opposing reform.

7

Bentham was full of praise for Humphreys' achievement in presenting the world with a plan for the reform of property law. 'Ex-learned as I am, and therefore, if ever, no longer learned- in the law in general, and in

conveyancing law in particular, never learned at all, till I got this smattering at the feet of my Gamaliel...'[111]

Bentham's greatest praise was for Humphreys achievement in presenting the world with the code. 'Before this work came out, code and codification were rank theory; and as such, objects of sincere horror...'[112] In his Review Bentham subjected of Humphreys' book to detailed examination. First he outlined the topics Humphreys discussed, and then went on to make detailed textual criticisms of Humphreys' proposals for revised deeds of sale, mortgage and marriage settlement. Bentham found eight distinguishable topics or heads within Humphreys work, some more and some less explicitly declared by Humphreys than others. Firstly, the improvement of legal instruments, particularly for conveyancing. Secondly, improvement and extension to the registration of conveyances. Thirdly, ending the anomalous modes of descent by abolishing gavelkind, where land devolved on all male heirs equally, and borough English, where the youngest male, often called the hearth child, inherited. Fourthly, reducing copyholds to freeholds. Fifthly, the enclosure of common lands. This must have been one of Humphreys' less explicit points because it was not evident to me, although Bentham explained that to a certain extent this improvement was contained in the conversion of copyholds[113] to freeholds which Humphreys did mention. Bentham here commented on the evident change in English landscape brought about by

numerous parliamentary enclosure acts during these years. But also he considered the enclosure of common land a great and necessary improvement. He wrote in the Civil Code that there was no arrangement more contrary to the principle of utility than community of property, and contrasted the 'harvests, flocks and smiling habitations' of enclosed land with the 'sadness and sterility' of common land.[114] In the Westminster Review Bentham remarked that a general enclosure act was needed to back up all the private enclosure acts of the recent years.

The sixth improvement was the substitution of a code to the present compound of laws, codification in 'counterdistinction' (sic) to consolidation of the law. The seventh and eighth improvements were the necessary additions to the judiciary and to judicial procedure or adjective law to give effect to the code.

Bentham concluded that it was of the paramount importance that Humphreys had separated out the different parts of his proposals for reform. This was because there was a far greater probability of adoption if this was done. If they were divided only into two parts then two sinister interests that combined could defeat the whole plan. Also Bentham's theory of 'appropriate aptitude' meant that the greater the separation of functions, then the greater the number of appropriately apt people to carry out the tasks.[115]

In the same way Bentham considered the greatest

improvement Humphreys suggested to be the substitution of new deeds, or formulae, for a sale, or mortgage or marriage settlement because this reform was the most likely to be adopted. Such reforms were not likely to result in the same degree of opposition. There would be no need to rely on either legislation or indeed judicial ruling to put the reforms into operation. All that was necessary was that the improved forms were used by practitioners. Bentham also pointed out that the main cause for interminably lengthy and complex deeds were the existence of 'needless and useless trustees',[116] in other words bare trusts, and the drafting of legal fictions in the form of deeds of fines and recoveries. Improved drafting would make deeds less unintelligible would lessen the suffering caused by confusion, dispute and disappointment, and at the same time 'lessen the abundance of the lawyers harvest'.[117] In other words it would reduce in some degree the profit of the conveyancers and the 'firm of Eldon and Co. in Chancery and in the House of Lords'.[118] But on its own this reform had it limits. This reform alone without any assistance from statute law would not be very far reaching. It would not succeed in 'Blowing up the manufactory of factitious litigation at one explosion' and may at the first proposal of it call up in defence of the 'Matchless Constitution' the judiciary system that denies ninety nine per cent of the people access to it.[119]

After a general discussion and having listed the

eight parts into which Humphreys' proposals fall, and commented on them, Bentham turned to a detailed look at the three deeds presented by Humphreys as improvements. He wrote,

> Now for a trespass on his patience. The time is come, when the scalpel must be set to work... More than fifty years ago I took it up for the first time with Blackstone lying on the table... in Blackstone every abuse had it's varnish or it's apology: in Humphreys, none. Should the liberties now taken have any such effect as that of calling forth like for like, my gratitude will not be less sincere than my admiration is now.[120]

Bentham's general comments are interesting in their anticipation of the modern forms of these instruments. For example he observed that each of three forms, for a sale of land, for a mortgage and for a settlement of land on marriage, would benefit from a systematic approach to setting out the information required in each case. To a certain extent all deeds needed the same information, such as names of the parties, subject matter, date and so on. The way this information is organised and presented could be standardised. Bentham advised Humphreys to begin by indicating clearly the topic in the deed. A client, such as Miss Campbell the beneficiary of the marriage settlement, should be able to turn to the deed in later years to find out her children's entitlements with ease

instead of perplexity. Important information should be conveyed in short sentences in a systematic manner, instead of the pages of lengthy descriptive sentences with strained grammar, prepositions separated by pages from their verbs and the like.

In the deed for the sale of land Bentham pointed out that the description of the land was insufficient, and yet confusing. What should be done in each instance was to give as short as possible generic description of the land in the body of the instrument. Then a detailed, individual description of the land in question should be given in an attached schedule. All habitations should be numbered. By excluding a detailed description from the deed Bentham shortened the form and saved five lines. But more importantly he anticipated the systematic production of pro-forma deeds for a variety of purposes. Lengthy individual drafting was no longer to be necessary. His proposals accord with modern practice.

Bentham went into fine detail to discuss improvements, deploring the practice of having excessively lengthy sentences, in other words aiming at simplicity and clarity, which may cause his own readers to wish he had practised what he preached. Bentham has often been criticised for convoluted sentence structures. He said that the deed should be broken up into several distinguishable topics - so many topics, so many sentences. This will make it easier for the reader and will prevent the draftsman making mistakes when his mind

becomes lost in the 'mizmaze'. Long sentences, said Bentham giving an example, have a narcotic quality.

Just as Humphreys had rendered perceptible the degree of improvement he made in respect of lengthiness by exhibiting in parallel pages his proposed forms by the side of those in use, so did Bentham. There then follow several pages in which Bentham commented first on Humphreys' draft, and then his own. Bentham has been particularly ill served by his editors' choice of double column presentation for the Bowring edition of his collected Works. His work has been rendered difficult to follow and fairly incomprehensible in many instances, but specially in the Review of Humphreys. Bentham set out Humphreys' draft deed, followed by his own, with comments on both deeds, and general comment. In small columns this becomes baffling and the overall effect is of obscure eccentricity. The straightforward presentation in the Westminster Review gives a different impression, imparting a degree of urgency in Bentham's praise for Humphreys and then his clearly set out and visible suggestions for improvements in drafting.

Bentham's proposed forms are interesting, particularly the contract for sale of land which closely resembles a modern contract for sale of registered land. But Bentham's marriage settlement looks less like a modern example of such an instrument than does that of Humphreys, possibly because no pro forma deed of this nature yet

exists and each would be drafted anew, and possibly because Bentham includes in his deed a long list of persons who would in turn inherit in the event of the death of the main parties. Bentham suggested that Humphreys' code should contain an article listing those who will inherit on an intestacy which could then be referred to with ease. This is reminiscent of the statutory succession lists given in the Administration of Estates Act 1925.

Bentham concluded his review of Humphreys' book by commenting on the drafting of the code itself. It should be in five distinguishable shapes, the enactive, the expositive, the ratiocinative, the instructional and the exemplific ative, all familiar from the Constitutional Code. Humphreys has given only the enactive in his code. Bentham also mentioned the standard of aptitude required from functionaries in the registry and the underlying utilitarian principle of law, the disappointment preventative principle, or more specifically the unexpected loss preventing principle, which is a branch of the greatest happiness principle with a special denomination adapted to land law. All proposals for reform should accord with this principle. After all the need to prevent disappointment is the reason why the subject matter of ownership should be given to the owner and not to an usurper, or why any regard should be paid to vested interests, or why indemnity should be paid for loss.

8

Bentham's published Review of Humphreys' book reveals his public face as a reformer in his concern to point out the beneficial effect of improvements in drafting techniques for legal deeds. The unpublished manuscripts reveal Bentham's hidden agenda as a reformer, and his private concerns. As the article on Humphreys' book was published in his lifetime he was responsible for the preparation of the material for printing. He therefore chose what to include and what not to include, which is in itself revealing. The manuscripts fall into three groups. The material from which the Review was formed, some of which was suppressed in the published Review, and then two short but continuous series of pages. One of these appears to be Bentham's work on either another review of Humphreys' book, or else possibly the draft of an open letter which he considered publishing in the immediate aftermath of the books publication in defence of Humphreys. The other is entitled 'All-comprehensive overview', and deals with general matters. All these will be examined in turn.

Turning first to those manuscripts which clearly form part of the materials from which the article in the Westminster Review was drawn, the first puzzle concerns the dating of the manuscripts. Of course all post-date the date of the publication of Humphreys' book, but oddly some

also post-date October 1826, the date on which Bentham's Bentham's review of Humphreys appeared. Why should Bentham have continued working on this material too late to be included in his article? Also why was some of this work done before he had made Humphreys' acquaintance? There is not a great deal of evidence about the nature of the subsequent collaboration between Bentham and Humphreys. For example, a brief note from Bentham to Humphreys, dated March 1827, enclosed a report on facilities for the transfer of property in the West Indies taken from a parliamentary report which points to discussions between the two taking place before the date of Humphreys new edition.[121] Other letters from Humphreys to Bentham enclosed the Civil Code of the Pays Bas for Bentham to read,[122] or showed that Humphreys discussed the progress of his second edition with Bentham.[123] A brief comment made by Bentham on one of the manuscripts indicates a reason for his continuation of work on Humphreys' book after the publication date for his Review. He wrote

> improvements employed by JB and recommended to H in the form of precepts. Some are here first given: 2. others are references to already proposed ones. The second edition will afford H an opportunity of employing such as he approves'.[124]

Bentham appears to have decided to begin a collaboration of sorts with Humphreys, even though he had failed to obtain official government adoption for the project

through Peel. He obviously thought he would play a part in the production of a subsequent edition, but there is little evidence internally from the book itself, or elsewhere that he did have any influence on the second edition.

Bentham clearly intended not only to influence the general direction of Humphreys' revisions but also to use the book as a vehicle for his own ideas in a direct manner. He had planned to include some of his own work in the second edition. A letter from Humphreys to Bentham reported Humphreys to be 'much flattered' by Bentham's selection of his 'semi-gothic work' for the insertion of Bentham's 'pure article on codification'. He accepted Bentham's offer but then went on to ask him to reduce the forty five pages because he was anxious to keep in mind reduced prices and increased sales for his book.[125] So Bentham had intended Humphreys' second edition to contain a separate article on codification by Bentham which would presumably serve the double function of publicly endorsing Humphreys work and publishing his own. But in the event the second edition contained no such article and Humphreys abandoned his codification plan in favour of general reform. His retreat in the face of criticism was more profound than has been appreciated. Humphreys supported systematic reform and codification, but he was not a utilitarian and the correspondence, though polite and friendly, indicates that his friendship with Bentham was never as warm as Bentham's subsequent friendship with

John Tyrrell.

Many of Bentham's manuscript comments on Humphreys' book, like those in the published Review, concern suggestions for the improvement in the drafting of the three legal formulae. Bentham repeated his criticism that there was needless repetition in all three of Humphreys' forms. Humphreys needs to remove obscurity and ambiguity caused by different use of same expressions.[126] Bentham's suggestions for standardising the information given on Humphreys' forms is more like the pro-forma deeds employed by present practitioners, and he repeated the insistence that a great benefit would be to make continual references to the relevant articles in the code in the deed itself.[127] Although English property law has not been codified, nevertheless a modern pro-forma deed would rehearse the statutory authority under which it is to be executed where this is appropriate.

Bentham remarked that brevity and perspicacity were the good qualities that Humphreys endeavoured to exhibit in his forms and 'in both he has been successful compared to those in use: in brevity most, in perspicacity least'.[128] Problems with regard to brevity could be remedied by ending the convention by which English deeds resembled one long sentence. They should instead be broken down into topics. Lack of perspicacity was more of a problem. For example on his mortgage deed this led to grammatical error, 'a natural and perhaps universal

consequence of the length of all English language instruments'.[129] Lengthy deeds were incomprehensible which could cause loss to the unwary. 'Thieves jargon cannot extract money from the victims pocket - lawyers jargon can and does'.[130]

It may be considered that Bentham was descending to 'pettifogging trivia' in suggesting yet further drafting reforms to Humphreys. But Bentham, wearing his public face, was trying to facilitate a reform that might be introduced without expense or delay, or possibly opposition, because improved drafting did not depend on legislative intervention. By this date he was all too aware of the difficulties attendant on introducing reforming bills into parliament. In addition these drafting reforms should be seen as an integral aspect of Bentham's programme for the administrative reform of government. 'All comprehensive properties desirable in a Code', he wrote, '1. Appropriate aptitude as to matter. 2. Cognoscibility as to form. Appropriate aptitude is conducible to the maximising of happiness principle.' Whereas 'H. had looked to these properties, but neither methodises nor denominates them'.[131]

9

In November and December 1826 Bentham wrote roughly twenty six pages of continuous material all of which is headed Sugden v Humphreys, which indicates that he was

preparing either another review of Humphreys' book, or that he was intending to join in the battle of open letters in defence of Humphreys against Sugden's attacks. But whichever was his intention, it does not seem that this fairly finished work was ever published. Bentham began by remarking on Sugden's violently proclaimed preference for the unwritten, judge made, common law rather than statute law, particularly an enacted code of law.

> According to Mr. Sugden's plan, throughout the groundwork should be/that is to say should remain/composed altogether of judge made law, with here and there the occasional patch or two of legislation made laws'.[132]

From this state of things Sugden promises conduciveness 'to the only proper end of law whatever it be' and certainty and notoriety.[133] Bentham proposed that the greatest happiness of the greatest number should be taken to be the only proper end of government, at least until such time as Sugden informed him of some other proper objective, with supporting acceptable reasons for it being the proper objective. Having established this principle Bentham then went on to contrast 'judge made' or case law with statutory law, finding of course in favour of statute. Interestingly the reason he gave was because this was more likely to be conducive to general happiness because of the method by which it became law. In these late writings on

property law Bentham revealed the strength of his conviction that democracy was the form of government most acceptable to the general happiness principle.

> Statute law...has for its authors who? Being statute law, it is the result of the will of a single person, agreeing with that of two bodies in the composition of one of which men, drawn from the great body of the people, have some share.[134]

In contrast judge made law is made by a body of men who do not depend on the 'great body of the people' for their position. Therefore legislative law is 'more democratic'. In judge made law, because no man need take any notice of other than his own interest, it is likely that the interest of the greatest number will be sacrificed in the event of any competition or conflict between the general and individual interest.

Bentham took issue with Sugden about the ill-effect caused by the dependency of judge-made law on established precedent. Humphreys had complained about the increasing problems caused by the demands of precedent, in particular the ever increasing number of authorities that needed to be consulted. Humphreys maintained that a code would solve these problems and the large number of existing authorities should be thrown out.[135] Bentham agreed wholeheartedly, writing that the worst effect of precedent showed itself when a decision which 'had lain buried for perhaps half a century/a sleep of seventy years...unexpectedly bursts its coffin and rises into

empire'.[136] Bentham recounted the story of such an accident which had befallen an acquaintance. Bentham's informant, a barrister, had carefully researched and prepared his case in readiness for the hearing in court. The day arrived and all was well until 'up stood the leading counsel with a notebook in his hand containing a report of an unpublished case' in which a contrary decision was reached.

> Judge of my feelings, said my informant, under my feet to an extent altogether unmeasurable I felt a mine of authorities altogether inscrutable which on any occasion whatever any opinion of mine howsoever elaborately formed and correctly deduced/with my clients fortune hanging to it might be blown into the air, my client ruined, myself disgraced.[137]

Although the rise of Law Reports meant that this was less likely to happen than in the past, it was still an ever present eventuality. Could it be that Bentham's informant was Bentham himself, and that he was recalling a painful event in his own past? He wrote that the incident had resulted in his informant's decision to leave practice at an early age.

Throughout this material there is not much reference to Humphreys, but instead Bentham concentrated on attacking Sugden's criticisms of Humphreys contained in the published open letters. He had no hesitation in declaring the partisan nature of the exercise. For

example, referring to Sugden's comments that one of Humphreys' suggested reforms would be opposed to the habits of and the genius of the nation, Bentham responded indignantly

> Suited to the habits of the nation indeed! Say rather to the habits of the conveyancers. What does the nation know about conveyancers? What part of the nation draws its own conveyance? And whence come the habits of conveyancers? But from interests the sinister interests of these conveyancers. And these same conveyancers Who are they? Either practising barristers or attorneys, or men linked to both tribes by a community of sinister interest.[138]

If this tract had been published it would have made a strong contrast with the moderate tone of Bentham's published review of Humphreys and would no doubt have raised the temperature of an already heated debate.

10

The last matter to be examined in the consideration of Bentham's connections with Humphreys and property law reform is the detailed examination that Bentham made of Humphreys' marriage settlement. Bentham wrote extensively, but used only a relatively small part of his manuscripts in the published review. In the review he included mostly those matters that were connected with drafting improvements, a policy in line with his treatment of the

deeds of sale and mortgage. The suppressed materials on marriage settlements include comments on succession, and the benefits or detriment arising from partibility of estates, and also the rights of women to title to property in marriage.

Turning first to rights of succession, Bentham listed the properties or qualities that were subservient to the greatest happiness principle in a code. These were, in order, enjoyment, succession, alienation, the liability of property to a holders private debts and the liability of the holder to public duties. Rights of succession were therefore to take a leading place.[139]

Bentham began his discussions on property law from the starting point of a conviction of the need for a right to private property. The law should protect this right,[140] and rights of succession should be seen in the context of a right to private property protected by the law. Bentham's utilitarian philosophy was compatible with a right to private property and did not extend to enforced appropriation or redistribution of property.[141] Bentham went on to show himself far more radical in his understanding of the issues involved in succession than Humphreys' critics among the conveyancers. He criticised Humphreys for giving the estate undivided to the eldest son, as was customary. Only if there were no other sons or daughters at all would the estate devolve on a single daughter. In other words Bentham criticised Humphreys for

using gender as the basis of rights of inheritance. But Bentham was not harsh in his condemnation, and clearly believed that political expediency had led Humphreys to uphold the status quo. Bentham remarked 'Not otherwise could he have done without wounding selfish pride of those on whom adoption depends'[142] because this convention was 'so prevalent among those on whom all reform depends.'[143]. But whether this convention was in fact in accordance with the greatest happiness principle Bentham was 'not absolutely prepared to say'.[144]

At first Bentham was cautious about his comments, but went on to expand his remarks. If the greatest happiness principle was used as the measure of the worth of a rule of law, then in the law of succession the youngest rather than the eldest should succeed because the eldest had had a longer time to provide for themselves. In a similar way this also applied to the rules of succession between the sexes, between the weaker sex and the stronger. 'As between male and female, in regard to strength, the less the care taken by nature the greater should be that taken by law.'[145]

Bentham said that traditionally the reasons advanced for male rather than female succession were, firstly, deterioration of estates if partition were allowed, and secondly the history of the country. With respect to the first, if estates deteriorated partitioned in male hands this would also be true in female hands. Reason therefore dictated that females should not be excluded on this

ground. If equal partibility was shown to be unfavourable to land values, then 'as in the case of brothers so in the case of sisters, the eldest alone should take the estate'.[146]

Bentham questioned the widespread belief that equal partibility would really cause deterioration to property values and subjected different kinds of property to the test. He concluded that money was the form of property most suitable for partition, but only in a country with a plentiful supply of property in the form of money in the first place. Bentham therefore suggests that the greatest happiness principle would be served by equal partition of property in a country with a commercial, industrial, rather than agrarian economy.

Having exposed opposition to equal partibility as illogical, Bentham went on to explain the historical reasons for primogeniture, beginning with the conquest of England and the military system set up by the Normans. It was politically expedient for male succession to be preferred to female succession to land because at that time 'the universal national interest of military self defence' dictated that males took the estate because of their superior capacity of contributing to defence in their own persons.[147] So there is historical excuse for the general rule of primogeniture, and also probably for the exceptions to the general rule, borough english and gavelkind. These could probably be accounted for by

historical 'accident' or 'goose like follow the leader principle', for example the superior aptitude once possessed by a younger son over an elder.[148]

If history had dictated that estates should devolve on the eldest son undivided then history had also dictated that, in the absence of sons, the more female proprietors the better. This resulted in the equal partibility rule for females. If land was divided equally among daughters this would result in a greater number of female proprietors, who could then be 'sold' in marriage to males. On marriage the males would obtain title to the land and owe service to the superior lord. So if the land was fragmented among several daughters then the superior services of many men instead of one man could be claimed. 'The more female proprietors the more saleable to males for their... services'.[149] If land descended to the eldest female undivided then the service of only one male would be procured. But now these reasons, which were really 'political economy and barbarous feudal law',[150] had evaporated. The only efficient cause that remained was the fact that males were possessed of political power. The rule that accordingly prevailed was the greatest happiness of men, the stronger of the two sexes, in comparison to women, the weaker of the two sexes.[151]

Bentham rejected these reasons as the basis for any rule of law. What was required was that one of two courses was decided on as the better for a general rule of succession law. Either the general rule of law should be

equal partibility of estates for both males and females, or the eldest, whether male or female, should inherit. Gender should not be the basis for laws of succession. If a general rule was established on one or other of these bases, then in an individual case the parties themselves could be left to determine what was more suitable to their circumstances.

Bentham did not seem at all convinced that the clear logic of this re-arrangement of succession law would find general acceptance. He wrote

> For England, I give and bequeath these measures as a legacy to the next Elizabeth; for Russia for the next Catherine. In a democracy, though in all other accounts the only form of government admissible by the greatest happiness principle, I see little chance for it.[152]

This passage must mean that either Bentham did not envisage universal female as well as universal male suffrage in a democracy, or that he considered that females would still be powerless politically even in a democracy. Therefore in his despondent opinion only a female absolute monarch would have the necessary political power to implement these drastic changes in the laws of succession.

Bentham's insistence that gender should play no part in the right to inherit property on intestacy is support for the arguments of those writers who have claimed that

Bentham was a supporter of women's equality, and more than that, a feminist.[153] But until the Married Women's Property Act in 1882 the problem for women was not that they could not inherit property, because they could, but that on marriage all their property became their husbands'. Concerned fathers, anxious to keep family property out of the hands of fortune hunters or to avoid loss of family property in the event of a daughter's death and subsequent remarriage of a son in law, were able to use the law of trusts to provide for their daughters, but this was only available to those able to pay the legal costs. So rather than primogeniture the more significant issue in property law for women, and those men who supported their interests, was whether married women should be accorded the legal capacity to own property in their own name. This was not something that Bentham addressed in the context of succession, probably possibly because it was not an appropriate context in which to do so.

11

However at about the same time Bentham wrote what he called an 'all-comprehensive view' of Humphreys' marriage settlement. Again this was composed in November and December 1826 and is a continuous series of pages containing a description of Bentham's views on what were the most important considerations to take into account in a marriage settlement. 'On the occasion of marriage two

sorts of interests require to be provided for: the actual interests/those of the existing parties to the contract, and the eventual interests of probably future children'.[154] With regard to the parties the greatest happiness principle dictates that the rule should be equality, but having stated this Bentham did not expand on what equality would amount to, or how it should be effected. But he did go on to argue not for equality but for positive action in favour of a disadvantaged group, writing that the weakest should be compensated by the law, they should have the advantage as they are least capable of taking care of themselves.[155]

With respect to the children of the marriage the question at issue was whether there should be non partition indivisible in favour of one, or alternatively equal partition in favour of all, or an infinite number of intermediate positions. Other matters were at issue between the sexes. Here it was not just a question of the right to inherit property. 'The question as between the sexes - whether sex should make any or what difference' to entitlement to property during marriage.[156] Bentham recommended that these issues be resolved in a marriage code, presumably referring to the code he had drawn up for the Civil Code, and to his work on Humphreys' marriage settlement. A marriage code would regulate the respective rights to parties to a marriage and should be readily available. 'For the prevention of disputes marriage code

to be given to the parties on their marriage.'[157]

Regrettably in any state a legislative draftsman will find that he has to pay 'more or less deference to the habits, affections and opinions more or less prevalent on the part of all, but more especially on the part of the ruling and otherwise influential few'.[158] But this problem of having to abide by the wishes of those on whom the implementation of reform depended should not preclude a legislative draftsman from putting before the legislature a course of action that he believed to be more conducive to the greatest happiness. Also Bentham was more optimistic about some of the reforms he proposed because he considered that if lawyers could be persuaded to reform the drafting of legal deeds then implementation would not depend on the hazards of legislative adoption. However we have seen that his optimism did not extend to believing that improved drafting techniques would affect radical changes in relative position between the sexes with respect to property.

12

Finally, in this all-comprehensive overview, Bentham justified an 'interventionist' legislative policy with respect to succession. It was clear that the disposition of property after the death of a proprietor affected the happiness of individuals in their capacity as members of a family. But they were also affected in their aggregate

capacity as members of a political community. This fact justified the intervention of a utilitarian legislator concerned to implement the greatest happiness principle. 'To the field of non penal and penal law belongs the question as to the happiness of members of a family: to the field of constitutional law and that of political economy the question as to the members of the community in the aggregate state'.[159] No legislator could have as clear or correct or comprehensive a knowledge of members of an individual family as they have themselves. But despite this individual 'deficiency of judgement' or 'education' or 'badness' means that even at a distance the legislator might be capable of forming a better judgement.[160] So the legislator should propose a scheme that to him appears 'most conducive to the maximum of happiness of the aggregate of families happiness', at the same time leaving it to an individual proprietor to make individual arrangements, either by intervivos deed or by will, if necessary. At this point Bentham finally gave his view on whether the general rule applied by the legislator should be equal partibility or indivisibility. Equality should be taken for the standard set by the legislator.[161]

These remarks Bentham made on succession in the manuscripts are in accordance with the views he had outlined in his writings on the Civil Code about the role of the legislator. This was to provide a suitable framework of utilitarian laws to protect people from the

pain of suffering in whatever degree possible. For example he proposed a rule of law that would preserve a certain part of the testator's estate for dependent family, following the French example. This will be discussed more fully in chapter six, but is mentioned in this context as evidence of Bentham's intention for legislative intervention to provide rules of law most conducive to the greatest happiness. Within this utilitarian framework an individual should then be left free to pursue their own happiness. 'The care of providing for his enjoyments ought to be left almost entirely to each individual; the principal function of government is to protect him from suffering.[162] So in the case of laws of succession, the legislator should provide a framework of laws based on the greatest happiness principle. This principle dictated equality in distribution within an individual family. But each proprietor within a family should be free to make other positive arrangements when this is considered appropriate, although even here a legislator may intervene. This anticipates the modern idea of a general rule of equality within a family, so that gender plays no part, and a statutory scheme of inheritance to apply on intestacy.[163] An individual is free to make whatever disposition they wish of their property intervivos, or by will, but statutory intervention is possible to protect those who could otherwise suffer.[164] Bentham's plans for reform waited far longer in some instances than he could have imagined. However England did not have to wait quite

as long as the reign of the next Elizabeth for gender to cease to play a role in inheritance.

Notes

1. This was set up in 1828, see chapter two.

2. 'Bentham on Humphreys' Property Code', 446-507 and Bowring, v. 389-416.

3. 'Bentham on Humphreys' Property Code', p. 445.

4. Ibid.

5. Simpson, 1986, p. 274; see also Anderson, p. 3; Lobban, pp. 195-197; Bernard Rudden, p. 101.

6. Edinburgh Review, xlv (1826-7), 458-482.

7. Offer, p. 28.

8. Bowring, v. 394.

9. UC xi. 201-3.

10. UC xi. 201-3.

11. UC xi. 201-3.

12. UC xi. 209.

13. UC xi. 210.

14. UC xi. 215.

15. UC xi. 216.

16. UC xi. 237.

17. UC xi. 239.

18. See chapter three.

19. UC xi. 201-3.

20. UC xi. 203.

21. Records of the Honourable Society of Lincoln's Inn: Red Book iii. (1753-1793) 143. I am indebted to Guy Holborn, Librarian, Lincolns' Inn, for assistance in investigating these records.

22. A member of Lincoln's Inn was required to 'keep commons'. This meant eating the prescribed number (six per term) of dinners in Hall. Absent commons were charges for meals in term time when a member was absent. From about the early eighteenth century it became possible for an absent owner of chambers to pay half the duties owed on

their chambers out of receipts collected from the actual occupiers. This was known as compounding for absent commons. David Lemmings, Gentlemen and Barristers: The Inns of Court and the English Bar 1680-1730, Clarendon Press, Oxford, 1990, p. 50-51.

23. Records of the Honourable Society of Lincoln's Inn: Red Book, v. (1813), 39-40.

24. Brougham, who was a member of Lincoln's Inn and a member of parliament, was well known to Bentham. In 1830 he was to become Lord Chancellor, as Baron Brougham and Vaux.

25. See chapter two for a discussion of the 'the Institute'.

26. Records of the Honourable Society of Lincoln's Inn: The Black Book, xx. (1816-1823) 85 and 106. The members present when the meeting heard that Bentham had accepted included Henry Martin, treasurer, the Right Honourable Sir William Grant, M. R., the Right Honourable Sir Thomas Plummer, V. C., Nathanial Gooding Clark Esq., Jonathan Raine Esq., James Tower Esq., William Cooke Esq., Samuel Yate Benyon Esq., William Agar Esq., Sir Thomas Hanmer, Bart. The Master of the Rolls, the Vice Chancellor and Sir Thomas Hanmer had not been present at the first meeting, but the others and also Charles Thompson and William Town had been present.

27. Offer, p. 28.

28. Records of the Honourable Society of Lincoln's Inn: Red Book, v. (1813), 124.

29. Humphreys, 1826, p. 203; see Rudden, p. 102.

30. Humphreys, 1826, p. 2.

31. Humphreys, 1826, p. 3.

32. Humphreys, 1826, p. 6.

33. Humphreys, 1826, p. 4.

34. Humphreys, 1826, p. 4.

35. Humphreys, 1826, p. 6.

36. Humphreys, 1826, p. 3.

37. Humphreys, 1826, p. 4.

38. Bowring, v. 413; see also chapter two generally on the difference between Bentham's plans for reform and

those of other reformers.

39. Humphreys, 1826, p. 167.

40. Humphreys, 1826, p. 167.

41. Humphreys, 1826, p. 328.

42. Bowring, v. 389.

43. See Rudden, pp. 27-29.

44. Rudden, p. 101, writes that Humphreys had the 'profound simplicity of pure genius'.

45. Westminster Review, vi. 446.

46. Quarterly Review, xxxiv (1826), 540.

47. Humphreys, 1826, p. 192.

48. Humphreys, 1826, pp. 192-3.

49. Humphreys, 1826, p. 201.

50. Humphreys, 1826, p. 203.

51. Humphreys, 1826, p. 203.

52. Humphreys, 1826, p. 214.

53. Humphreys, 1826, p. 206.

54. Bowring, v. 416.

55. 'The Principles of the Civil Code', Bowring, i. 305.

56. Humphreys, 1826, p. 217.

57. Humphreys, 1826, p. 218.

58. Humphreys, 1826, p. 218.

59. Humphreys, 1826, p. 218.

60. Humphreys, 1826, p. 222.

61. Humphreys, 1826, p. 219.

62. Humphreys, 1826, p. 219.

63. A widower's rights to a deceased wife's property

64. A widow's rights to a deceased husband's property.

65. Humphreys, 1826, p. 217.

66. Humphreys, 1826, p. 217.

67. Humphreys, 1826, p. 222.

68. Mark Philp, Godwin's Political Justice, Duckworth, London, 1986, pp. 176-192.

69. Spring, 1977, p. 40.

70. Humphreys, 1826, p. 203.

71. UC lxxvi. 283.

72. Humphreys, 1826, p. 285.

73. Humphreys, 1826, p. 286.

74. Humphreys, 1826, p. 233.

75. Humphreys, 1826, p. 295.

76. Humphreys, 1826, p. 297-8.

77. James Humphreys, Observations on the Actual State of the English Laws of Real Property with the Outlines for a Systematic Reform, John Murray, London, 1827.

78. Humphreys, 1827, p. ix.

79. Holdsworth, xiii. 295.

80. Rudden, p. 103.

81. See also chapter two.

82. E. Sugden, A Letter to James Humphreys Esq., on his Proposal to Repeal the Law of Real Property and Substitute a New Code, J. and W. T. Clarke, London, 1826.

83. Sugden, p. 8.

84. Sugden, p. 5.

85. Sugden, p. 26-27.

86. Robert Dixon, Observations on the proposed New Code Relating to Real Property, J. and W. T. Clarke, London, 1827, p. 7.

87. Jonathan Henry Christie, A Letter to Right Hon. Robert Peel on the Proposed Changes in the Laws of Real Property and on Modern Conveyancing, John Murray, London, 1827, p. 48.

88. J. J. Park, Contre-Projet to the Humphreysian Code; and to the Projects of Redaction of Messers. Hammond, Uniacke, and Twiss, John Murray, London, 1828.

89. Park, p. 31.

90. Ibid., p. 183.

91. Ibid.

92. Ibid., p. 229.

93. UC xi. 201-3.

94. UC lxxv. 14.

95. UC lxxv. 15.

96. See also the discussion in Rudden, pp. 103-4.

97. James Humphreys, A letter to Edward Sugden Esq., in Reply to His Remarks on the Alterations Proposed by James Humphreys Esq., in the English Laws of Real Property, John Murray, London, 1827, p. 2.

98. See Dixon generally and also the unfavourable comparison with French law in Sugden; see the interesting discussion in Rudden, p. 104, who quotes William Best as complaining that the code would sap 'the essential manliness of the common law'.

99. Rudden, p. 103.

100. Sugden, p. 5.

101. UC lxxvi. 28.

102. Bowring, v. 389.

103. See Simpson, 1986, p. 273.

104. Spring, 'Landowners', 57.

105. Offer, 1981.

106. Anderson, 1992.

107. Quarterly Review, xxxiv (1826), 543.

108. Ibid, 575.

109. Ibid, 578.

110. Edinburgh Review, xiv (1826-7), 482.

111. Bowring, v. 394.

112. Bowring, v. 389.

113. Copyhold tenure was the successor to villein tenure and was less then freehold tenure. It was finally abolished in 1925.

114. Bowring, i. 342.

115. Bowring, v. 390; see also Official Aptitude Maximised: Expense Minimised, ed. Philip Schofield, Clarendon Press, Oxford, 1993, (CW), where Bentham most fully explained these ideas.

116. Bowring, v. 390.

117. Bowring, v. 391.

118. Bowring, v. 391.

119. Bowring, v. 391.

120. Bowring, v. 391-392.

121. UC lxxvi. 1.

122. BL Add. MS 33,546, fo. 122.

123. BL Add. MS 33,546, fo. 137.

124. UC lxxviii. 7.

125. BL Add. MS 33,546, fo. 128.

126. UC lxxviii. 9.

127. UC lxxviii. 9.

128. UC lxxviii. 9.

129. UC lxxviii. 9.

130. UC lxxviii. 23.

131. UC lxxviii. 18.

132. UC lxxviii. 186.

133. UC lxxviii. 186.

134. UC lxxviii. 187.

135. Humphreys, 1826, p. 226.

136. UC lxxviii 196.

137. UC lxxviii. 196.

138. UC lxxviii. 214.

139. UC lxxviii. 18.

140. Bowring, i. 308-309; see Kelly, 1990, pp. 8-9, 79-81.

141. See Alan Ryan, Property and Political Theory, Basil Blackwell, Oxford, 1984, pp. 91-96, for Bentham's utilitarian reconciliation of the right to private property contrasted with William Godwin's denial of rights to private property.

142. UC lxxviii. 22.

143. UC lxxviii. 155.

144. UC lxxviii. 22.

145. UC lxxvii. 22.

146. UC lxxvii. 155.

147. UC lxxvii. 156.

148. UC lxxviii. 22.

149. UC lxxviii. 22.

150. UC lxxvii. 158.

151. UC lxxvii. 155; see also Bowring, i. 335.

152. UC lxxvii 157.

153. See Miriam Williford, 'Bentham on the Rights of Women,' Journal of the History of Ideas, xxxvi (1975), 167-76; Lea Campos Boralevi, 'In Defence of a Myth', Bentham Newsletter, iv (1980), 33-46; Kelly, 1990, p. 193-4; but contra Terence Ball, 'Was Bentham a Feminist', Bentham Newsletter, iv (1980), 25-32, and 'Bentham No Feminist: A Reply to Boralevi', Bentham Newsletter, iv (1980), 47-48.

154. UC lxxvii. 181.

155. UC lxxvii. 181.

156. UC lxxvii. 181.

157. UC lxxvi. 152.

158. UC lxxvii. 181.

159. UC lxxvii. 183.

160. UC lxxvii. 184.

161. UC lxxvii. 184.

162. Bowring, i. 310; see also Kelly, 1990, p. 138 on the security providing principle.

163. Administration of Estates Act 1925.

164. Inheritance (Provision for Family and Dependents) Act 1975, but this is not the same as the French law inspired scheme that Bentham proposed.

CHAPTER TWO

JEREMY BENTHAM AND THE REAL PROPERTY COMMISSION OF 1828

In February 1828 a Royal Commission was appointed to examine the law of Real Property of England and Wales. The Commission sat for four years and examined a vast amount of material, recommended certain changes in the law, and drafted several bills for consideration by parliament. Four massive Reports were eventually presented to parliament in May 1829, June 1830, May 1832, and lastly in April 1833. As a result parliament enacted a limited number of piecemeal (although important) reforms, but did not attempt a major revision of the law.

Jeremy Bentham was invited to contribute to the work of the Commission. He wrote some 'Suggestions' for the introduction of a system of registration of title to land. These were included by the Commissioners in the Third Report of 1832, and were eventually published by Bowring in the collected Works as an 'Outline of a Plan of a General Register of Real Property'.[1] Bentham also contributed to the lively debate raging among lawyers in the years before the Commission was appointed. This debate sought answers to the question how best to reform land law. James Humphreys' controversial book[2] on land law reform proposing a code of property law was published in 1826. As we have seen, Bentham reviewed the book for the Westminster Review and he was enthusiastic in his support

for Humphreys' proposals to sweep away or modify much of the existing law and above all for the code.

The Real Property Commission was set up to consider the reform of a body of law that had evolved without any major review since the imposition of feudalism by the Norman Conquest. The task faced by the Commissioners was immense. A. W. B. Simpson wrote that there had been no comparable undertaking either before or, for that matter, since.[3] In the eighteenth century land law was a complex structure composed of common law and statute, with interventions by equity, and much employment of legal fictions. Opinion varied on what reforms were necessary, and how best to put them into effect. By the early nineteenth century three kinds of attitude can be found in the work of legal writers. One inclined to the belief that the law was quite healthy, and that English land law was perfectly adapted to the needs of the English nation, needing no more than minor legislative or judicial adjustments. Another believed that while the substantive law needed no alteration, the mechanisms for creating or transferring interests in property were in dire need of vigorous reform. The third kind of attitude showed enthusiasm for a far more fundamental revision of the substantive law itself, a radical reform that redefined the nature of a right in property, or even replaced the substantive law with a French inspired code of law.

Bentham supported codification, but he differed from other lawyers who advocated codes, like Humphreys, because

Bentham's plans for a code of property law were firmly based on utilitarian principles. Yet the Real Property Commissioners, whose inclination was mainly to address modal and not substantive issues of law, actively sought Bentham's help.

Just how significant was Bentham's contribution to the early nineteenth century debate on land law reform? Was the philosopher and self-styled 'hermit' of Queen's Square seriously interested in a close consideration of the dense, complex structures of land law? Avner Offer suggests that Bentham 'shrank from the magnitude of the task' of land law reform, and that, abandoning the effort, he turned instead to constitutional matters, leaving it to James Humphreys to produce the Benthamic project of codification of property law.[4] Despite old age and other commitments that demanded his attention, Bentham in fact prepared a great deal of material on land law reform for the Real Property Commission. He had discussed property issues elsewhere, most importantly in his writings on civil law,[5] but the work on property that Bentham undertook in 1828 and which is examined here, was prepared expressly for the Real Property Commission. It is here that Bentham sought to apply the principle of utility to part of substantive law.

The most familiar view of the development of English land law is that this is a history of legislative neglect added to the gradual accretion of common law. It is frequently said that reform of land law, as well as many other branches of English law, was long overdue after what has been called the 'legislative holiday' of the eighteenth century,[6] but that such reform presented special difficulties. Property law was fully understood only by the few specialist conveyancing lawyers and the very complexity of the structure acted against reform because many people, lawyers and politicians, feared quite sincerely that interference with any one area of land law would lead to unforeseen dire consequences in another.

Even today it is considered difficult to understand English land law without looking at English history. The great legislative reforms of 1925 have been described in terms of evolution rather than revolution.[7] Many of the measures of 1925[8] were anticipated in recommendations made by the Real Property Commission between 1829 and 1833, and some were enacted piecemeal in the years that followed the Commissioners' last Report. But still it was not until 1925 that major reform was effected by parliament, and so the reform of land law was delayed almost one hundred years.

Against this picture must be placed the recent work

of David Lieberman[9] who points out that on the contrary, instead of failing to legislate, during the eighteenth century parliament had legislated at a greatly increased rate. For example between 1760 and 1820 parliament had enacted 254 statutes per session. Lieberman attributes the increase in legislative activity to the consolidation of parliamentary government in the years that followed 1688: 'Accompanying the establishment of a regular, annual parliamentary session was the dramatic increase of the King-in-parliament exercise of its constitutional powers to make law'.[10] Not only was there such a dramatic increase in the number of acts of parliament, but Lieberman writes that these acts were badly drafted, and verbose. If the law of Real Property escaped the worst abuse at the hands of the legislators it was because it received less attention from parliament than other areas of law, for example criminal law. Thus, as Lieberman argues,[11] it was the common law that transformed property law during the period. Judicial rather than parliamentary law-making solved the practical problems of land holding, such as the creation of the trust from the medieval use, and the collusive common recovery used to bar entails and so to alienate land.

Despite having fewer badly drafted Acts to contend with a common source of concern and complaint among the lawyers involved in the reform of property law in the 1820s was the sheer number of 'ponderous tomes' of both

common law and statute in which it was necessary to search for the law. To quote James Humphreys: 'The result is, that our laws of Real Property are to be sought in the copious library of 674 volumes, exclusive of indexes to statutes'.[12] Humphreys wrote that an advantage to both practitioners and the public, nearly equal to all the reforms that he proposes in his book, would be to sweep away the 'ponderous pile of volumes in different ages, various languages, semi-barbarous and polished, --Norman -- French, low Latin, and modern English, -- in which the laws of Real Property are at present to be sought'.[13] He adds that, 'till the present indigestible heap of laws and legal authorities is consigned to oblivion, in vain will the public seek an uniform system of landed property'.[14]

In the work for a General Register of land that Bentham submitted to the Commissioners,[15] he complained of the 'train of surplussage, of which, under Matchless Constitution, the greatest part of an Act of Parliament is so regularly composed'. For example the use of the phrase 'whereas it is expedient' in an Act is not in accordance with anything that could be called reason, but is perfectly in accord with precedent. In a draft of 'Suggestions' on Real Property written in December 1829, Bentham wrote: 'From simplicity cognoscibility -- from cognoscibility happiness. So from complexity uncognoscibility, from uncognoscibility unhappiness'.[16] Bentham had a life long concern with making the language of law accessible to everyone.[17] We have seen that when he

reviewed Humphreys' book[18] in 1826 he used the model legal instruments provided by Humphreys to show how legal drafting could be clarified. An advantage of such reform was that it could be put into immediate effect by conveyancers without waiting for the 'difficultly-moved machinery' of parliament.[19]

Nevertheless a code of law was was much to be preferred. Anything less was at best 'partial legislation' and much to be 'reprobated'.[20] 'No partial legislation' was the 'principle laid down by JB in his Codification Proposal'.[21] Referring to property law Bentham wrote 'for want of a code the whole a mass of fictitious law'.[22]

In 1829 Bentham prepared material for an article that remained unfinished at his death, entitled 'Reformists Reviewed.' He wrote that there were three different kinds of reformers. 'As in Parliamentary so in Law Reform 1 Radical Reformists 2 Moderate do 3 Anti reformists'.[23] Bentham called himself a radical reformist, in fact 'the first beyond all controversy'.[24] Later he expanded on the categories, listing five. These were '1 Reformists 2 Semi Reformists 3 Anti Reformists'. Then Anti Reformists were divided into two, the 'pseudo Reformist' and the 'dubious Reformist (Brougham)'.[25] Lord Eldon was the non reformist and 'Peel the pseudo reformist.'[26] Bentham accused Brougham of inconsistency in his approach to law reform because in his great speech in parliament he had argued against 'partial legislation', and yet 'after his speech a

Commission with limited powers appointed with his assent'.[27] This Commission was not the Real Property but the Common Law Commission.

When Humphreys' controversial book was published in 1826 it had produced a furore among lawyers most of whom deplored the idea of substituting a French inspired Code of Law for the Common Law, even though they might very well have approved of specific reforms suggested by Humphreys.[28] The book is often credited with being the immediate cause for the setting up of the Royal Commission on Real Property, together with Brougham's six hour speech in Parliament in 1828 urging law reform.[29] But as we have seen the need for reform of land law had already been recognised and debated in legal and parliamentary circles, particularly the need to reform the confusing, cumbersome and slow conveyancing procedures that did not meet the increased demands for quick and efficient alienation of property.

It was the intervention of equity in the common law that caused grave problems in conveyancing. For some time there had been open dissatisfaction amongst lawyers with the operation of the Court of Chancery which administered equity. This Court was renowned for delay and expense, which was partly the result of its very success in earlier times. The Lord Chancellor was the only judge and although he delegated to others he was able to review their decisions. The Master of the Rolls could deal with some matters, but only when the Chancellor himself was not

sitting. The Chancellor was not a full time judge and did not have a department of salaried clerks to assist him until 1885. As a result before this date the Chancery clerks were dependent on the often exorbitant fees they charged to litigants. The system was thought by some to have ground to a halt with the Chancellorship of Lord Eldon from 1801 to 1827. In his attempt to create a system of equity, to make sure that equity operated in as certain a manner as common law, Eldon's slow progress caused even longer delays.[30]

Such excesses had not escaped Bentham's critical attention. Bentham was acquainted with Michaelangelo Taylor, a Member of Parliament, who in 1811 procured a select committee to look into the delays in the court of Chancery. In May 1811 Bentham wrote to Sir Francis Burdett asking for Burdett's support for Romilly in a future debate in the Commons on Chancery. 'The pace of the present Chancellor in the making of decrees is more than ten times as slow as the average pace . . .. In one term, (I think it was the last) during which the master of the Rolls made <u>one hundred and fifty</u> decrees, the Chancellor made --<u>not one</u>'.[31] The House of Commons Committee recommended the appointment of a third judge and in 1813 a vice-chancellor was appointed, and the powers of the Master of the Rolls increased until in 1833 he was given concurrent jurisdiction with the Lord Chancellor.[32]

In 1824 a Royal Commission was set up to examine the

Practices of the Court of Chancery and to recommend the appropriate reform. The Commission was headed by Lord Eldon and when it reported in 1826 the Commissioners commented that they had not conceived it to be within the limits of the Commission to discuss complete revision of the English system of common law and equity. But because many suits in equity either owed their origin or were greatly protracted by questions arising from the complexities of conveyancing, the Commissioners suggested that it might be 'proper to commit to competent persons the task of examining this part of our law'.[33] This report was influential among lawyers because it sanctioned the need to survey and reform property law and it was probably in response to this report that James Humphreys wrote his book. Certainly the reviewers of Humphreys' book in the Edinburgh Review and the Quarterly Review made great mention of the Commission's Report as calling for reform.

Although he was pleased that the need for reform was publicly acknowledged, Bentham was disappointed by the bodies set up to discuss the proposed reforms. He thought that by limiting the scope of each commission the anti reformists tried to ensure in advance that little would be accomplished by any commission. Bentham wanted an 'all comprehensive' reform that was grounded on fundamental principles. 'For the law of property system of reform but one: giving to each party the greatest facilities for ascertaining and understanding their respective rights'.[34]

In particular he pointed out that 'nothing can be done to any good purpose in Common Law without the like operation in Equity. This inseparability well understood by Eldon when in Peel's mouth he forced the separation of the Common Law and Real Property Commissions from the Equity Commission . . . inseparability between the several parts of the law the same as the inseparability of flesh and blood as per Portia in the Merchant of Venice'.[35] So Bentham believed that separating common law and equity in this way could only prevent real reform in any area, and that this was done quite deliberately. 'To stave off reform a fork with two prongs 1 Commissions 2 Bills.'[36] Despite the disappointment he expressed about the manner in which the commissions set about their tasks, Bentham was more optimistic about the Real Property Commission because of his own involvement.

By the time that the Real Property Commissioners came to examine property law there was a range of conflicting opinions on reform, including either judicial reform of the Common Law, or legislative reform of the Common Law. If the latter option was followed, then how could acts of parliament be improved in quality, and reduced in quantity?

The Real Property Commission was at last appointed in 1828. Since 1815 there had been several Royal Commissions appointed to investigate reform of legal process and courts, including the Chancery Commission of 1824 and the Common Law Commission appointed in 1828. Lawyers were heavily represented on these commissions as secretaries, commissioners and as evidence providers, although sometimes the secretaries were civil servants. Nothing very much is known about Swann, the secretary to the Real Property Commission save that he was a civil servant. Until 1854 the Home Secretary was the sole secretary of state responsible for the appointment of Royal Commissions, all of which were appointed under either by letters patent under the great seal until 1842.[37]

The Real Property Commission's first report was presented to the House of Commons on the 20th of May 1829. This began by naming the Commissioners and setting out their commission, which was: 'To make a diligent and full Inquiry into the Law of England, respecting Real Property, and the various interests therein, and the methods and forms of alienating, conveying and transferring the same, and of assuring the titles thereto' with a view to reporting to parliament within two years recommending improvements and how these could be effected.[38] In fact the Commissioner's took only one year to report that they

felt they had as yet made little progress in the wide field of investigation presented to them, and that they needed a longer time because 'the whole field of Real Property is so connected, that alterations to be recommended in one Branch cannot be definitively arranged without an understanding as to the manner in which others are to be regulated'. Thus they hoped that any legislation introduced as a result of their recommendations could all be brought in at the same time as parts of a systematic reform of the whole field of property law.[39] So they confined their first Report to examining the law relating to Inheritance, Dower, Curtesy, Fines and Recoveries, Prescription and Statutes of Limitation of Actions. The second Report of 1830 was entirely concerned with registration of title to land, and their third Report of 1832 considered the law relating to contingent remainders and future estates, covenants and a period of limitation for the rights of the church. The fourth Report, which did not appear until after Bentham's death, was completed in 1833 and examined the law relating to Wills.

The Commissioners have often been criticised for their unwillingness to accept the need for reform. They are presented as self congratulatory lawyers, for example, by Avner Offer who wrote of the Royal Commission's 'complacency'.[40] Certainly the opening remarks of the First Report seem to support this view: 'the Law of England , except in a few comparatively unimportant

particulars, appears to come almost as near to perfection as can be expected in any human institution',[41] But, as A. W. B. Simpson points out,[42] the Report did distinguish between the substantive law establishing the nature of a right in property, and mechanisms for effecting the creation and transfer of such rights, and the Commissioners were in fact very critical of modes of creation and transfer of interests and estates in Real Property, finding them 'exceedingly defective' requiring 'many important alterations'.[43] This state of affairs was caused by preserving 'antiquated maxims when the state of society and modifications of property are changed'. They wrote that they were conscious of 'how much easier it is plausibly to expose the imperfections of the Law as it now stands than to show how it may be safely amended'.[44]

The Commissioners went on to explain the manner in which they intended to proceed, which was with caution and due regard for existing institutions. Then they went on to quote from Humphreys' book, calling him an eminent legal writer. The language they used was Humphreys' when they wrote that the public would be too sanguine in hoping for a system comprehensible to all because the law was of necessity too complex for this and such an expectation could not be met.[45] Nevertheless they aimed to improve the operation of the existing law.

The Commissioners deliberately set out to encourage the general debate on reform, and to collect as much informed opinion as possible. They did this by first

circulating a general letter stating the nature of their Commission, inviting suggestions on any of the subjects to be discussed. They also prepared a series of written questions on some issue intended to be covered in each Report, which they then sent to people they believed would respond with useful information, requesting either written answers or attendance before the Commissioners for oral examination. The 'Suggestions' received by the Commissioners, and the answers to the questions sent out were placed in an Appendix at the end of the successive Reports. Bentham's 'Suggestions on Registration' (registration being the subject of the entire second Report of June 1830) were appended to the third Report of 1832. This was the work eventually published by Bowring as 'An Outline of a General Register of Real Property'. Bentham prepared pages of answers to the questions sent to him, but they were not included in any of the Reports. It is not at all clear why not, but of course it may be that Bentham never sent in his answers to the Commissioners. The original working papers of the Commission have not been found and perhaps were destroyed long ago, because they were not required to be kept by any official. After 1850 some Commissions presented their minutes as an Appendix to their reports, but the Real Property Commission did not do so. Therefore it is not possible to do more than conjecture from drafts and correspondence that either Bentham's answers remained incomplete at his

death in 1832, or that he intended the work that he had done to be published separately, even forming a whole report on its own. The correspondence with one of the Commissioners, John Tyrrell, seems to support this last idea, but is ultimately inconclusive.[46]

With the exception of the first question in the First Report, the questions sent to chosen respondents were all very specific and limited in extent.[47] The first question concerned tenures and asked if the respondent considered it desirable to abolish the rule or fiction of law known as the doctrine of tenures, which vested the absolute property of all lands in the Crown. The answers given by the respondents give an illustration of the attitudes to reform prevailing. Predictably these varied from expressing an opinion that no reform was necessary to suggesting a code.[48] One respondent, the barrister John Pemberton, complained, 'I must remark upon these Questions generally that they seem only to lead to such alterations as will not tend much to relieve the country from the great expense and loss attendant on the present system'.[49] This could be a justifiable complaint that the questions did not allow much general discussion. Bentham certainly complained of the lack of general discussion on the aims of the reforms to be introduced by the Commissioners,[50] but was content to answer the question on tenure briefly. He thought that tenures should be abolished and gave as his reason two principles, the 'falsehood excluding' and the 'complication minimising' principles. The 'falsehood

excluding' principle attacked the continued use of legal fictions. To retain the doctrine of tenures is to retain the feudal fiction for holding land that says all land is granted by and held from the Monarch in return for services. For Bentham of course ownership of property depended on the law: 'Property and law are born together and must die together. Before the laws, there was no property: take away the laws, all property ceases'.[51] In addition the continued use of the doctrine of tenures led to 'confusion and thence misconception and disappointment', and so the 'complication-minimising principle' urged its abolition.[52] For Bentham the lack of general discussion meant a failure to discuss the principles to be applied in undertaking any reform. In response to the First Report he wrote in 1829 that before all things it is necessary to have in our eyes the end in view,[53] and again the same month 'Excuse me Gentlemen but as yet it seems to me that for want of [a] leading principle you have been building without a plan- wandering in a labyrinth without a clew- shooting in the air without a mark to aim at'.[54] He proposed the greatest happiness principle to remedy the defect. The fact that the Commissioners restricted their respondents to such a degree in the answers required from them explains why in his published work on registration prepared for the Commissioners Bentham was compelled to restrict himself to such a narrowly bureaucratic discussion of the working of

the Registry. He was quite correctly basing his work on the questions set by the Commissioners, and other respondents who sent in Suggestions on the subject of Registration followed a similar pattern in their responses.

3

Turning from the content of the Reports to an examination of the lawyers who acted as Commissioners, it is clear that all were successful practitioners. The Commission appointed by Peel in 1828 to undertake such a major review of the English law of Real Property was headed by John Campbell, later made Baron Campbell, author of the Lives of the Lord Chancellors and the Lives of the Chief Justices, who became Lord Chancellor in 1859. The Dictionary of National Biography reports that Campbell was appointed to head the Commission after Edward Sugden had refused to serve. Edward Sugden, Baron St. Leonards, who became Lord Chancellor in 1852, was the noted and successful conveyancer who had publicly taken issue with James Humphreys on the subject of the reform of land law after the publication of the latter's book in 1826:

> I must declare myself decidedly opposed to all Codes . . . like an earthquake the Code would remove all the settled law of property in the country . . . my firm belief is that a greater calamity could not befall the country . . .. I conscientiously believe

that the general rules of law are as near perfect as human intelligence can make them.[55]

Sugden was particularly opposed to a Registry of Deeds of title, and mentioned in the same open letter to Humphreys[56] that he had once said that he would use his best exertions to prevent such a measure becoming law. There is some irony in the vehemence with which Sugden opposed reform, because he was acquainted with Bentham and he had written to him in November 1812 in most flattering terms: 'I do myself the pleasure of sending you a copy of a Pamphlet on a subject which you have long since so entirely and happily exhausted as to leave nothing for any future writer to attempt'.[57]

Campbell, however, was not a conveyancer but an eminent common lawyer. It was Campbell who drafted the introduction to the First Report of the Commission in 1829, so the often quoted remarks on the state of perfection of English law are his. But then so are the remarks in praise of Humphreys. Since Campbell was Peel's choice as head of the Commission[58], can we conclude that Peel had carefully chosen[59] a lawyer who he thought would be unlikely to want to introduce any drastic changes in the law, such as a Code? Peel's letter to Campbell making the appointment almost seems to confirm this, because instead of setting out the wide brief given to the Commission to survey the whole field of Real Property, he wrote 'His Majesty has been graciously pleased to direct

the necessary steps to be taken for the appointment of a Commission, to enquire into the state of the laws regarding the Transfer of Real Property'.[60] This was a very partial view of the Commission's brief.

Certainly Campbell was no radical, and as a whig member of parliament in 1832, did not at first support the Reform Bill. In fact, in a letter to his brother George he wrote:

> I must say you are much too radical for me. Anything that amounts to the formation of a new Constitution I shall oppose, as I hold the formation of a new Constitution to be an impossibility, and there has as yet been no instance of it in the world. A Constitution may be modified and improved, but it must spring from time and accident, and not from design.[61]

But once Campbell was appointed to the Commission he took up the task with energy and enthusiasm. He regarded the appointment as a considerable distinction, and certainly did not see himself as constrained to look only at ways of improving the transfer of Real Property, as Peel had seemed to have intended.

Campbell acted on his determination to bring before the House Bills based on the work of the Commission, and drafted by them. It seems to have been through his efforts that in the years following the Commission's Reports several important measures were passed. These include in 1832 the Prescription Act, and in 1833 the Fines and Recoveries Act, the Dower Act, the Inheritance Act, the

Real Property Limitation Act and the Wills Act of 1837. Campbell took up the cause of registration of title to land with particular interest, and presented bills to Parliament on the subject in 1830 and 1851. The consideration of registration of title was a major part of the work of the Commission, but Campbell was less successful here, despite his clear commitment to the reform. A working system of registration of title to land was not to be finally accomplished until 1925, although a limited area of compulsory registration was achieved earlier. The very successful hostile opposition to this particular reform came from the landowners and from provincial solicitors[62] but does not come within this discussion. However it is interesting to note that Bentham had expressed his own decided opinions at the time. 'Opposed to the greatest happiness in this part of the law . . . two classes of sinister interests, 1) the aristocratic, 2) the professional'.[63] The professional interest was that of the conveyancer.

Campbell's letters to his brother and his Memoirs provide another brief glimpse of the fate of bills for registration of land. In 1832 Campbell was appointed Solicitor General. On the day before his appointment he wrote to his brother that he had had an interview with 'Gaffer' Grey, and that Lord Grey had made only one condition for the appointment. This was that Campbell would not bring in his 'Register Bill'. Grey declared

himself personally hostile to Registration, and feared it would make the Government unpopular.[64] In his Memoirs Campbell repeats the story, adding that Grey thought Registration of land was 'odious to a large and powerful class'.[65] Campbell accepted the condition, but he was certainly not going to be deterred from pursuing the cause. He arranged for William Brougham to bring in the Bill, and he seconded it. But the Bill failed to get a second reading. Bentham's assessment of the opposition to reform of land law appears to have been accurate.

The other seven members of the Commission appointed to serve with Campbell were William Henry Tinney, John Hodgson, Samuel Duckworth, Peter Bellinger Brodie, Francis Sanders, Lewis Duval and John Tyrrell. All were conveyancers and also members of Lincoln's Inn, which is not surprising in itself, and indeed Bentham himself was a Bencher of Lincoln's Inn. But some other connections between them make one query the commonly held view that the Real Property Commissioners were mostly interested in preserving the status quo. Brodie and Duval had been pupils of Charles Butler, as had James Humphreys. Charles Butler was a Roman Catholic, and because of this he was prevented from practising at the bar. Instead he became one of the leading conveyancers of the day, and exerted great influence over his contemporaries. The DNB records that his political beliefs coincided with those of Charles James Fox and that his sympathies were with the French Revolution, although not in its religious aspects. Bentham

and Butler had long been acquaintances, their friendship already having begun at least as early as 1789 when Bentham wrote to Butler suggesting that they share in the expense of subscribing to a foreign newspaper.[66] Bentham and Butler collaborated in drafting the Penitentiary Bill of 1796. Correspondence between Bentham and his brother Samuel refers to Bentham's visits to Butler to work together on the Bill, and on one occasion his exasperation with Butler who was presumably not working fast enough for the impatient Bentham. 'This cursed Roman Catholic fellow with all his promises has not sent me my Bill yet' he wrote to Samuel in December 1796.[67] He was far more generous in 1797 when he wrote that credit for the Bill should be given to Butler, as he had 'worked at it with the zeal of friendship, and took more than common pains with it'.[68]

Sugden, who so strenuously opposed reform, had been a pupil of Duval, and later John Tyrrell, Bentham's friend and colleague, was a pupil of Sugden. An entry in a book of Memoirs of Former Members of a Lincoln's Inn Conveyancing club called the Institute says of Tyrrell, 'His school . . . was that of Mr. Charles Butler, which had to a great degree discarded the mass of verbiage, still too great, that defaced our conveyance of land'.[69] The Memoirs record that the Institute was formed in 1815 and continued to meet until 1861. Vaizey, the editor of the Memoirs, wrote that the first Minute Book of the Club

records that 'On the 1st March 1815, and at the Freemasons' Tavern, Messrs Brodie, as Chairman, Hodgson . . . Tyrrell', and two others resolved to establish a club that would be limited to twelve members. This seems to have been a dining and discussion club. Four of the first members of the Institute were also members of the Real Property Commission by 1829. Records show that in 1828 they had passed a resolution that members individually and collectively should give all possible assistance to the Commission, and that members who were not Commissioners should meet from time to time for that purpose.

Other members of the Club wrote to the Commission or were called before the Commission to give oral evidence. One the most interesting of the original members was Charles Henry Bellenden Ker. He is mentioned by the Memoirs as having been a friend of Romilly in his youth, and as a friend of Brougham associated with him in schemes for parliamentary and other reform and the promotion of education. He wrote for the Edinburgh Review and the Times and was a committee member of the Society for the Diffusion of Useful Knowledge. All of these activities would have brought him into contact with Bentham. The Memoirs record that Ker had been proposed, along with James Humphreys, for membership of the Real Property Commission but that Peel had objected because Ker had 'already expressed an opinion on the subject of the Inquiry'.[70] Peel is supposed to have opposed the

membership of James Humphreys too.[71] Humphreys certainly seems to have expected an invitation to join the Commission, because he delayed accepting an offer to lecture on real property at the new University of London until the Commission was announced in Parliament.[72] Was Peel opposing the membership of lawyers too obviously known to be moving in Bentham's circles? Bellenden Ker continued his public life by acting as a Commissioner in 1831 on a Commission to look into public records, recommending the setting up of a Public Record Office. He prepared a lengthy report in 1837 for Poulett-Thompson on the law of Partnership, when the latter was president of the Board of Trade. Part of this became law in 1890 as the Partnership Act, one of the very few acts codifying English law on the Statute Book. Both Bellenden Ker and Butler gave evidence before the Commission and both discussed the merits and disadvantages of introducing codes of law.

Some of these connections between reforming lawyers and Bentham are tenuous, but it is clear that the lawyers who were Commissioners, or who contributed to the findings of the Commission by giving evidence, were not all as uniformly opposed to reform as they have sometimes been thought to be. In fact their opinions accurately reflect the range of prevailing beliefs about the best way to reform land law, including codification. It is also clear that Bentham played a particular role as a law reformer,

something that becomes even more apparent when Bentham's friendship with Humphreys and John Tyrrell is considered.

4

As we have seen, Bentham had a close working relationship and friendship with James Humphreys which began in 1826 and continued until Humphreys' death in 1830. He was also a friend of John Tyrrell who was a successful conveyancing lawyer who had been called called to the Bar in 1815. Tyrrell was at the height of his career when Bentham made his acquaintance in 1829, at about the same time as Tyrrell's appointment to the Real Property Commission. He was among the lawyers who gave oral evidence to the Real Property Commission in 1828.

James Humphreys also attended the Commissioners for five days in 1828, and two in February and March 1829. Because Humphreys attended the Commissioners in person to give his evidence, and presumably because of the controversy aroused by his book, the Commissioners did not keep to their pre-arranged Questions during their oral examination, and Humphreys' answers are by far the most far-ranging of the answers received. Instead the Commissioners spent most of the time asking Humphreys detailed questions about the code he had proposed. He held up the example of not just the Napoleonic Code, but also codification of the New York Customs and Excise Laws, suggesting that while a complete code of laws would

probably not be endured in this country, an isolated subject, such as the law relating to descents, could be codified.[73] The advantage of a code, he said, was that it could give simplicity and consistency to the whole body of the laws, 'purge them of extraneous matter,and embrace them in one system and one book'.[74] It is interesting that Humphreys mentioned the New York Statutes to the Commissioners because at about the same time in 1828 three New York lawyers had undertaken the task of revising New York property law.[75] Extracts from the Reviser's original Reports make many references to the work of English property law reformers of the time, in particular Humphreys and Brougham.

In addition to his work as a Commissioner, Tyrrell prepared a substantial survey of the whole area of Real Property Law with proposals for reform. This was attached to the First Report and also separately printed by Tyrrell in 1829 under the title Suggestions sent to the Commissioners appointed to inquire into the Laws of Real Property. In these Suggestions Tyrrell acknowledged the debt owed to James Humphreys by himself and indeed by the general public, 'he has rendered this subject interesting, as well as intelligible'.[76] But Tyrrell went on to disagree with Humphreys about the method of effecting reform, predictably rejecting Humphreys' proposed code on the grounds that it would interfere with existing settled rights and cause great differences of opinion. Bentham's

opinions were closer to those of James Humphreys than John Tyrrell.

Tyrrell prepared most of the fourth Report of the Real Property Commission that appeared in 1833 on the subject of wills. He is also credited with drafting a bill on wills that became the Wills Act 1837. Bentham commented extensively on Tyrrell's work, in particular on Tyrrell's Fines and Recoveries Bill in November 1831.[77] He also wrote to Tyrrell on succession,[78] and as a whole the draft papers that Bentham prepared for the Real Property Commission indicate that Bentham and Tyrrell were in close communication during these years.

The correspondence between Bentham and Tyrrell reveals the extent of Bentham's interest and involvement with the deliberations of the Real Property Commission. This correspondence began in 1829, after the printing and circulation of Tyrrell's book, and also after Tyrrell had been appointed to the Commission. Bentham had been sent proposed Codes of law for Louisiana by Edward Livingston, the United States Senator. In February 1830 he wrote back to Livingston regretting that 'the circumstances in which I am placed do not admit of my complying with the wish expressed in [Livingston's] obliging letter with which they are introduced'.[79] This was a request to assist with drafting a penal code. Bentham wrote that he was sending some of his work and also a 'copy of John Tyrrell's work on Real Property Law'. This must have been the book of Suggestions that Tyrrell had prepared for the Real

Property Commission. Bentham introduced Tyrrell as one of the eight Commissioners who had been appointed by the Home Secretary, Peel, to the Commission and wrote:

> The subjoined copy of [Tyrrell's] letter to me on the occasion will speak for itself. I must beg you to keep it from publication . . .. His disposition to coalesce with a person so obnoxious as I am to his superiors -- in particular to Mr. Peel, the patron of his office -- proves at any rate the so much more than expected honesty of his intentions, the sincerity of his desire to see a real reform effected. You will see the prejudices he had to overcome -- a short glance at my Petition will suffice for this.[80]

John Tyrrell had written to Bentham on 12th November 1829, 'I feel a strong ambition to attempt under your guidance, a digest of the present confused and scattered rules [of real property] and shall be most happy if I can follow at a humble distance your exhortations to do good'.[81] A cordial and affectionate friendship based around questions of property law seems to have developed between Tyrrell and Bentham, with many invitations to Tyrrell to join Bentham at Queen's Square Place for dinner. Tyrrell, who was addressed in such terms of affection as 'My dear new found and highly valued friend'[82] or more usually 'my ever dear Tyrrell', was asked to comment on Bentham's work and send him books and information. In June 1830 Tyrrell wrote to Bentham that

he was sorry he had not obtained any petitions for Bentham's Dispatch Court Bill, but that he was pleased that Bentham's name was 'at last received with some part of the respect which is due to it, in the house of commons'.[83] This was a reference to the debate in Parliament on July 8th 1830, when Daniel O'Connell withdrew his notice of a motion to have draft or plans of a code of laws and procedure laid before the House. O'Connell regretted that the Member for Westminster 'was prevented from presenting a petition on this important Question, from a man whose name was his highest eulogy -- he meant Mr. Jeremy Bentham -- to whom the world was so deeply indebted for his work on the subject'.[84]

For his part Tyrrell urged Bentham to send in his 'Suggestions on Registration' to the Commissioners, a request with which Bentham found it impossible to comply. 'To prepare anything for you within the compass you mention, namely that of the present week is altogether impossible', he wrote, 'Neither is it at all necessary or even desirable. Either what I may have to say will be worth absolutely nothing, or it will of itself furnish sufficient matter for a separate Report. Send in therefore the Report which you have in readiness. No Bill in pursuance of it can be brought in this session: and before the next session my communication will be in readiness for you'.[85] Bentham was under pressure to complete other work and relied a great deal on the assistance of his nephew George Bentham. 'After dinner, while I am

vibrating in my ditch, my nephew seated in the chair you occupied, he reads your questions, and I preach answers to him which he drafts down, making in relation to them such observations as occur to him. In this way what I do in relation to 'Real Property' is done thus far as it were in no time as the phrase is: otherwise it could not be done at all'.[86]

It is a measure of Tyrrell's regard for Bentham that he placed so much importance on his friendship at a time when Tyrrell himself was under great pressure from professional, Real Property Commission and parliamentary commitments. The editor of the Memoirs wrote that Tyrrell's work on the Real Property Commission had weakened his health and lessened his practice. It is also interesting that Tyrrell, who was not in favour of codification, sought out the friendship of Bentham, the radical reformer.

5

In his letter to Livingston Bentham mentioned that Tyrrell had drafted for him an 'Analytical Sketch' of the whole field of Real Property.[87] Bentham clearly relied on Tyrrell's outline to produce his own overview of real property which took the form of a chart. Bentham was obviously working on this material as part of his contribution to the Real Property Commission, but he had a larger purpose too. Property law was intended to be part

of the Civil Code, and, therefore, a part of Bentham's planned Pannomion. He attacked legal fictions and examined and elucidated (as he himself said) the nature of a right in property. In his civil law writings Bentham wrote that rights give rise to obligations, and that the two are inseparable:

> Rights and obligations, although distinct and opposite in their nature are simultaneous in their origin, and inseparable in their existence . . . the law cannot grant a benefit to any, without, at the same time, imposing a burden on someone else.[88]

The draft work for the Real Property Commission sets out a scheme for a new basis for property rights. In the place of historical, feudal concepts of tenures and estates is a scheme based on rights and obligations. This is a far more fundamental revision of property law than that envisaged by the Commissioners, and will be examined in greater detail in chapter five.

On 13th July 1830 Bentham wrote to Tyrrell that he had drafted 'in as yet a rough state' a sort of table of '<u>Leading Principles</u>, drawn up by my nephew and me, by the application of which my proposed Code would be drawn into existence. They were deduced . . . from the Questions proposed by your <u>Commission</u>'.[89] George Bentham would read out the question and Bentham would dictate an answer grounded on the greatest happiness principle. 'In this way' wrote Bentham, 'He has drawn up a sort of diagram in

the form of a tree having for its root the Greatest Happiness Principle from which issue branches, of which the principles the denomination of which are narrowest in their extent, on the extreme twigs, present number of them 26'. Bentham had mentioned this Real Property Tree in An Outline of a Plan of a General Register of Real Property, the work on registration completed for the Commissioners: 'In the character of Principle, I might have to submit to your consideration no fewer than seven or twenty words, or sets of words, which in the form of a tree, composed of a trunk with branches and sub-branches, called by logicians in former days the Arbor Porphyrum lie at this moment before my view'.[90] The manuscript Bentham had before him was a sheet of paper divided into four vertical columns. In the far left stands the greatest happiness principle, and this is the trunk or root of the tree. The other columns to the right of this form the main and then subordinate branches and include the disappointment-minimising principle and registration effecting principles. So as part of his work for the Real Property Commission Bentham applied his principle of utility to part of substantive law. Bentham's real property tree will be examined in detail in chapter six.

Although Bentham died before the Real Property Commission had presented its final Report his involvement with the Commission was considerable. He represented the most radical of the reforming lawyers who gave evidence to

the Commission. The Real Property Commission did succeed in engaging in a much wider examination and discussion of substantive law than the other Commissions of the time. Perhaps Bentham contributed to this achievement through his contacts with reforming lawyers and Commissioners such as Tyrrell, and by his direct addresses to the Commission, in his answers to their questions.

The fact that ultimately the Commissioners recommended a cautious and not a radical reform is a reflection of the Commissioners own preference for 'partial reform.' They were largely 'moderate' or 'semi-reformists', for whom a proposal for a code of property law inevitably raised the fearful spectre of republican France. It is also a reflection of the strength of opposition to the reform of property law in nineteenth century England, an opposition that Bentham had accurately described.

Bentham often sounded despondent about the prospect of achieving law reform, or sometimes even bitter about the lack of real commitment on the part of those who were supposed to be working for reform. But he was far more optimistic and enthusiastic about the work of the Real Property Commission. He hoped that his contributions would have some significant influence on the Real Property Commissioners deliberations. In 1829 he wrote that very little more could be expected from the Common Law Court Commission than had resulted from the Chancery Commission, but 'From the Real Property Commission some hope from

their correspondence with JB'.[91]

Notes

1. Bowring, v. 417.

2. Humphreys, 1826.

3. Simpson, 1986, p. 274.

4. Offer, p. 27.

5. See Kelly, 1990. pp. 8-13, which explains that Bentham returned to the Civil Law at different times. The majority of these manuscripts have not been published. Others have been included in 'The Principles of the Civil Code' and 'Pannomial Fragments' which were constructed by the editors for the Bowring edition of the Works of Jeremy Bentham.

6. See Offer, p. 27.

7. Sir Robert Megarry and H. W. R. Wade, Law of Real Property, Stevens, London, 1984, p. 1 write, 'Despite all this reform, the first thing the student must understand is that the basis of the subject remains the 'old' law, and that the elements of this must be mastered before the new statutes can be understood. The approach to this subject . . . is still bound to be historical'.

8. The Law of Property Act 1925 confirmed the Tenures Abolition Act of 1660 and abolished all feudal tenures save free and common socage. S.1 of the Act allows only two estates to exist in law, these are the fee simple absolute in possession and the leasehold estate. Therefore all other estates, such as the life interest or the entailed estate, can only exist in equity. These measures did undoubtedly simplify land law, but at the same time the feudal doctrines of tenures and estates were preserved and continue to exist. Other reforming legislation introduced in 1925 included the Administration of Estates Act, the Settled Land Act, the Trustee Act, and of course the Land Registration Act.

9. Lieberman, 1989.

10. Ibid., p. 13.

11. Ibid., p. 72.

12. Humphreys, p. 209.

13. Ibid., p. 225.

14. Ibid., p. 226.

15. Bowring, v. 418.

16. UC lxxvi. 147.

17. Long, p. 221.

18. Bowring, v. 389.

19. Ibid., 390.

20. UC xi. 29.

21. Ibid.

22. UC xi. 27.

23. UC xi. 21.

24. Ibid.

25. UC xi. 29. Referring to Brougham's great law reform speech in parliament, Bentham wrote that Brougham's 'eyes were directed by a vision of the Rolls [while for Bentham himself] to no Rolls looks he no court butter for his bread.'

26. UC xi. 23.

27. UC xi. 29.

28. See the bound volume of open letters to Peel and comments occasioned by the publication of Humphreys book, BL T. 1176.

29. Simpson, 1986, p. 274; Offer, p. 27.

30. His often quoted remark that nothing would cause him greater pain on leaving his office than to feel he had justified the reproach that 'the equity of this court varies like the Chancellor's foot' is used to criticise his unhurried proceedings as procrastination.

31.The Correspondence of Jeremy Bentham, vol. viii, ed. Stephen Conway, Clarendon Press, Oxford, 1988, (The Collected Works of Jeremy Bentham) p. 146.

32. J. H. Baker, An Introduction to English Legal History, Butterworths, London, 1990, p. 130.

33. House of Commons Sessional Papers, xv, 1826, p. 34.

34. UC xi. 30.

35. UC xi. 29.

36. UC xi. 23.

37. J. M. Collinge, Office-Holders in Modern Britain: Officials of Royal Commissions of Inquiry 1815-70, Institute of Historical Research, University of London, London, 1984.

38. House of Commons Sessional Papers x, 1829. Hereafter to be cited as First Report.

39. First Report, p. 5.

40. Offer, p. 28.

41. First Report, p. 6.

42. Simpson, 1986, p. 275.

43. First Report, p. 7.

44. Ibid., p. 9.

45. Ibid., p. 10.

46. BL Add. MS 34661, fo. 3, discussed below.

47. For example Question 13 First Report, p. 87 asked, 'Do you think it advisable that persons beneficially entitled in fee to gavelkind lands should be enabled to disengavel them by declaration to that effect by deed? Have the goodness to state any objections to this measure that may occur to you'.

48. See Bellenden Ker in First Report, p. 295, on codification. He mentions both Bentham and Humphreys, and advocates using the American model of property legislation as opposed to the French model.

49. First Report, p. 127.

50. UC lxxvi. 145.

51. 'Principles of the Civil Code', Bowring, i. 309.

52. UC lxxvi. 150.

53. UC lxxvi. 143.

54. UC lxxvi. 145.

55. Sugden, p. 5.

56. Ibid., p. 22.

57. Correspondence, (CW), viii. 287. The Pamphlet was on interest rates. Referring to Bentham's 'Defence of Usury'

Sugden's letter called Bentham the 'father of the subject'.

58. Peel to Campbell, 17 May 1828, Stratheden and Campbell Papers. I am grateful to the Hon. Misses Moyra and Fiona Campbell for allowing me access to the papers in this collection.

59. Peel's influence over the composition of the Commission is denied in a letter to Arbothnot, 19 May, 1828, BL Add. MS 40,396, fo. 197 in which Peel declared himself unable to influence the composition for he was 'compelled to be guided by the advice of more competent judges'. But perhaps he was being disingenuous, because in a letter to Robert Gordon, 11 Aug., 1828, BL Add. MS 40,396, fo. 219, Peel showed that he certainly took great pains to select the members of the Commission to consider the lunatic bill.

60. Letter cited, Peel to Campbell, [my emphasis]. See also the Life of John, Lord Campbell, Lord High Chancellor of England, Edited by his Daughter, the Hon. Mrs. Hardcastle, 2 vols., John Murray, London, 1881, i. 454-456.

61. Ibid., p. 503.

62. See: W. R. Cornish and G. de N. Clark, Law and Society in England 1750-1950, Sweet and Maxwell, London, 1989, p. 173; Simpson, 1986, pp. 282-283; Offer, p. 28.

63. UC lxxvi. 28.

64. Life of Campbell, ii. 19.

65. Ibid.

66. Correspondence, (CW), iv. 67.

67. Correspondence, (CW), v. 334. Bentham again complained bitterly to his brother about Butler in Dec. 1796, Correspondence, (CW), v. 338, also mentioning that he was suffering from toothache, so perhaps his physical pain accounts for his irritability.

68. Correspondence, (CW), vi. 4.

69. John Savill Vaizey, The Institute: Memoirs of Former Members, London, 1895.

70. Ibid., p. 223.

71. Offer, p. 28.

72. College Correspondence, University College London, fo.

818.

73. First Report, p. 249.

74. Ibid.

75. Revisers' Notes, 3 New York Revised Statutes, 1836, Appendix, p. 401. The connections between Humphreys and the New York reformers are examined in Rudden, pp. 101-16 and Charles E. Stevenson, 'Influence of Bentham and Humphreys on the New York Property Legislation of 1823', American Journal of Legal History, i (1957), 155-69. Stevenson maintains that Bentham through Humphreys influenced the codification of New York Property legislation.

76. John Tyrrell, Suggestions Sent to the Commissioners Appointed to Inquire into the Laws of Real Property with minutes of the Evidence given before them, privately printed, London, 1829, p. 2.

77. UC lxxvi. 263.

78. UC lxxvi. 287.

79. Livingston Papers, Box 72, 13, Princeton University Library.

80. Ibid.

81. BL Add. MS 33,546, fo. 317.

82. BL Add. MS 34,661, fo. 2.

83. BL Add. MS 33,546, fo. 422.

84. Parliamentary Debates, xxv. 1830, p. 1114.

85. BL Add. MS 34,661, fo. 3.

86. BL Add. MS 34,661, fo. 4.

87. Livingston Papers, Box 72, 13.

88. Bowring, i. 301.

89. BL Add. MS 34,661, fo. 5.

90. Bowring, v. 419.

91. UC xi. 27.

CHAPTER THREE

JEREMY BENTHAM: COUNSEL FOR THE PEOPLE.

At the very beginning of his relationship with the Real Property Commission Bentham announced that he was going to act as 'counsel for the people' in his dealings with the Commissioners. What did he mean by this? He clearly thought that he had a role to play and that he would argue for the universal good and not factional interest. Bentham's view of his special role should colour and inform any readings of answers Bentham made to questions from the Real Property Commissioners, and also the consideration of other work Bentham prepared for the Commission.

This chapter and the next, chapter four, will examine the work that Bentham prepared for the first and second Reports presented by the Real Property Commission to parliament in 1829 and 1830. The materials to be considered include correspondence, answers to questions that the Commissioners had sent to Bentham, and Suggestions that he drafted for the Commissioners. Some of this was clearly intended for publication by Bentham, while other work was obviously intended for his own use. Sometimes it is not clear which category the work falls into, therefore attempts at division of the material on the grounds of Bentham's intentions must be fairly arbitrary in the absence of further information. Whatever

Bentham may have intended, in the event not much of this work was published by the Commission for reasons that are not fully known, although some conjectures can be made. Much of the work that Bentham undertook concerned registration of title to land and related matters, so registration forms the subject matter of much of the discussion in this and the next chapter. This chapter will concentrate on the work that Bentham clearly intended for publication, or which actually was published. The next chapter will look at registration again, but will examine manuscripts that were never published, some of which include material that reflects Bentham's hidden agenda for reform.

This chapter falls into three main sections. First Bentham's correspondence with the Commission is examined to look at the conditions Bentham imposed on the Commission before he agreed to submit work to them, and in order to consider in detail the role he wanted to play in the Commission's deliberations. Secondly, Bentham's replies to the sheets of questions sent to him, and all other respondents, by the Commissioners will be considered. Finally Bentham's published work on registration of title to land will be examined. It is in this chapter that the persona that Bentham wanted to present to the public can be identified most clearly.

1

Bentham's first letter to the Commissioners, accepting their invitation to contribute to the Commission's findings, shows his pleasure at the unique and welcome opportunity that had presented itself to him to take his place as a reformer on the public stage. The Real Property Commission was to report its findings to parliament and to recommend reform, including drafting new legislation. To Bentham this was an opportunity to influence events directly. Despite his evident concern not to alienate the Commissioners by advocating reforms that appeared too radical, this first letter makes plain that he will argue for wide ranging changes in the law of property.

Bentham first wrote to Mr C. J. Swann, the secretary of the Real Property Commission, in a letter dated 15th May 1929,[1] acknowledging receipt of an earlier letter from Mr. Swann of which no copy has survived. It had been a lithographed circular from the Commissioners, with a dated postscript from the secretary asking for as early a return as possible of any suggestions Bentham might have for the reform of property law. The Commission was already sitting and the First Report had been presented to the House of Commons in May 1829. By this time John Tyrrell had been appointed as a Commissioner and had written to Bentham asking for his help in drawing up a digest of the laws of

property.[2] There is therefore a possibility that Tyrrell was instrumental in arranging for Bentham to be invited to contribute to the Commission. In the letter Bentham had been asked if he had any objection to his communications to the Commission being made public. Bentham replied that, far from having any objection to publication, he made it a 'condition sine qua non' of writing proposals for reform that he received an assurance that they would be made public, 'and this without any deletion whatsoever'.[3] Bentham wrote that he had 'a character to bear', having already been continually before the public for half a century in the capacity of a man 'whose wish is to see, in every part of this field, the law of this country approaching what it ought to be'. He reassured the Commissioners that some of his suggestions had been adopted by parliament and he had never yet been accused of 'dangerous designs' on the fabric of the nation, so they would not be exposing themselves to any very serious risk if they agreed to his condition.

It is somewhat ironic that Bentham should have insisted on this condition of unconditional and unrevised publication to his work, because recently he had shown himself most unwilling to agree to a similar request. Only a few years earlier, in 1823, Francis Place, the radical tailor, had been asked to contribute to the new Westminster Review. Place refused unless no alteration was made to his work without his consent, writing to the

editor John Bowring that 'mine must be legitimate children however ugly and ungraceful they may be'. Bowring referred the request to Bentham who was funding the journal. Bentham refused Place's condition and wrote to Bowring that 'Ugly or ungraceful children we cannot adopt, nor can we traffic in pigs in a poke'.[4]

Bentham was aware that the Commissioners would be exposing themselves to the risk of punishment for libel or at least censure by the 'Public Opinion Tribunal' if they agreed unconditionally to his request, despite his assurance of good intentions and good character. So he suggested that just as the Attorney General would disapprove a libel so should they indicate to him their disapproval of any material he submitted if they needed to do so, and he would agree to withdraw it. If the Commissioners remained silent for seven days he would take their silence as declining his proposals. Also he had so many other commitments that he might not find the time to communicate with the Commissioners. However as he was sincere in his wish to undertake the task their agreement to his conditions would act as a stimulant to him.[5]

It is very difficult to know with any degree of certainty whether or not this letter was sent, because any original material connected with the Real Property Commission does not appear to have survived.[6] The next letter from Bentham in the sequence to the Real Property Commissioners is dated August 19th 1829. It is addressed to the Commissioners, at the top of the page is written

'Fair copy presented to them by Mr. Swann this day...and by their command'.[7] So from this, and internal evidence which refers to letters received from the Commissioners, it is assumed that these draft letters were sent.

Bentham evidently received the assurances of publication from the Commissioners that he had wanted because this next letter refers to the 'truly magnanimous...promise' that they had given him,[8] and reported his intention to begin work immediately.

2

Bentham lost no time in letting the Commissioners know he had a special function to perform with respect to the Commission. He intended to 'take up the pen...' and act as 'Counsel for the people - such is the function I have taken upon myself'.[9] This decision to act as the self appointed legal advocate for the people in his dealings with Commissioners was not fanciful posturing on Bentham's part. He saw himself as competent to promote the good of the community, where others were not.

To explain why this was so, it is first necessary to return to Bentham's first principle and to consider the demands made by the principle of utility itself. It is this principle, also called the greatest happiness principle, which decides that any action is right or wrong according to the extent to which that action adds to or

diminishes the happiness of the person affected by it.[10] This is both an ethical principle, and also fundamental to Bentham's explanation of human psychology. According to this 'men's actions were necessarily directed towards increasing their own pleasure...'[11] So the greatest happiness principle explained 'not merely...how an agent ought to conduct himself, but also how human agents actually did conduct themselves'.[12]

Much has been written on the problem of affecting a reconciliation between an individual's greatest happiness and the greatest happiness of the community because there is evidently a possibility of conflict of interests. Bentham's primary interest was in formulating the art and science of legislation, so that a legislator could enact laws that were in accord with the principle of utility. Therefore John Dinwiddy argued that the principle of utility should be regarded as addressed to the legislator and not to an individual.[13] A legislator should create a utilitarian framework of laws, backed by sanctions of punishment and reward, leaving an individual to peruse her interests within that framework.[14]

Bentham recognised the two aspects of the principle of utility at work in the controversial subject of property law reform. He saw opposed to the greatest happiness principle here were two adverse, or as he termed it 'sinister' interests. These were the professional and the aristocratic interest.[15] By the professional Bentham wrote that he meant in particular two classes and

mentioned one 'the conveyancer'.[16] Conveyancers were barristers specialising in property law, and the other class he omitted to mention must have been the attorneys. As there is no explanation of the omission perhaps Bentham merely did not complete the work. The powerful profession of attorneys, whose interest in opposing reform has been examined in detail, particularly by Avner Offer,[17] has been mentioned in chapter two in connection with opposition to proposals for a Registry of Title Deeds to land.

At the time that the Real Property Commission sat the attorneys incurred much professional and public criticism for their method of charging fees based on the length of the deeds they prepared. They were therefore open to the criticism that they had every incentive to increase the length of legal instruments and to resist any attempt to reform either the basis of fee charging or the form taken by deeds. Attorneys, or solicitors, were consolidating themselves into a professional body[18] and had acquired a statutory monopoly of conveyancing work in 1804. Although the conveyancing Bar congregated in Lincoln's Inn were the specialist property lawyers, it was the attorney who did most of the day to day work of transfer of land. As we have seen in chapter two there is no doubt that an element of the conveyancing Bar supported reform, whereas in contrast attorneys have been described as having enormous influence in opposing reform. Recently Stuart Anderson has

questioned this received view and suggested that in fact attorneys were more concerned about the threat posed to their livelihood by competition from the Bar in litigation, semi-contentious work such as bankruptcy, and in county courts offices, than loss of earnings brought about by property law reform.[19] But Bentham seemed convinced that attorneys were serious opponents of reform. His remarks should be seen against this background of the growth of the professions which included action by attorneys to defend traditional spheres of work.

Bentham proposed fundamental changes in the organisation of the professions to eradicate the sinister interests of the attorneys and turned to French law for guidance. When he commented on James Humphreys' book he had discussed the French notary. This official, who was altogether distinct from other lawyers, undertook conveyancing. In the French notary, who was usually a country schoolmaster, Bentham found an example of a close conjunction between interest and duty. The 'poor man's notary' could also be called 'pure notaries' because they were free from the sinister interests of barristers and attorneys who undertook both conveyancing and litigation, which to Bentham presented an immediate conflict of interest. Because they undertook both kinds of work the English attorney was open to the temptation to make more work for themselves. To end the possibility of the conflict of interests Bentham wanted a property code drawn up which included within it an index of authorised

instruments of sale, mortgage, lease, wills of personalty and common contracts such as articles of apprenticeship. These deeds would be used whenever necessary by the English equivalent of the French notary for uncontentious and straightforward matters. The attorney would be left to draft settlements, wills of land and special needs.[20]

By 1830, while he was preparing work for the Commissioners on excluding evidence of title in the event of a system of registered title to land being adopted, Bentham wrote of another two divisions among lawyers. These were the professional and the official lawyers.[21] Under the existing system the sinister interests of both groups worked in the same way, because both extracted fees from the public for the work they undertook. But in the case of official lawyers the sinister interest might be put a stop to by the substitution of an official salary instead of fees as remuneration for the work they did.

By paying a salary to an official, for example a land registry official, instead of letting them charge fees to the public for the performance of their duties, the sinister interest of officials would be prevented from working against the general interest. Officials would no longer have an interest contrary to an individual member of the public, or to the public in general, by increasing the complexities of their function, and so also increasing the cost to the taxpayer of running official establishments. This was encapsulated by Bentham in the

phrase 'official aptitude maximised, expense minimised'.[22]

But unfortunately this was not the case with professional lawyers. They were not public employees. 'In any case for the exclusion of evidence it would be that of professional lawyers whose interest is directly opposite to that of their clients.'[23] In other words the financial interest of professional lawyers in retaining the time consuming complexities of the present system should not be underestimated. Neither should the extent and political power of this interest. 'If the opinion in favour of a measure is preponderantly beneficial to suitors it shows either that no sinister interest operates or that it is subdued by rightly operating interest' Bentham wrote in 1830.[24]

The sinister interest of lawyers extended into parliament itself. Bentham wrote that this 'sinister interest denied by lawyers. True say they it is so at the bar but not in Parliament...sinister interest acts not upon them they are not as other men are'.[25] It even extended to Royal Commissions. In 1831, when writing on registration, he wrote that it had to be remembered that the Commissioners themselves, 'The Learned Public Functionaries', belonged to the same profession as those whose emoluments were in issue. 'By the commission under which they act they were called upon and in appearance expected to make sacrifice of their own particular interest to the universal interest'.[26] But although some may do so it is more likely that 'they will not sacrifice

their own but that of their neighbours'. Who were their neighbours? 'The unlearned publick'.[27]

It is likely that Bentham was referring to the Commissioners' demand for payment for their services which Campbell, the chairman of the Commission, wrote about angrily because the work of the Commission was held up while the Commissioners argued about being paid.[28] Campbell thought that, like him, the Commissioners should provide their time and expertise without charge for the public good. Bentham seems to have agreed with him, but it is unlikely that he intended this particular piece of work to find itself before the Commission, because his implication that the Commissioners were unable to act in a disinterested manner would not have endeared the counsel for the people to the members of the Commission.

Until 1830 it was quite usual, but not inevitable, for Royal Commissions to be appointed with salaried Commissioners. But it is said that after 1830 a change in public attitude towards public service, added to the desire to cut down the costs of government, ended this position. By 1860 all Commissioners gave their services gratuitously. Therefore both Bentham's and Campbell's remarks on payment to salaried officials should be seen against a background of change in the expected behaviour of public servants and public service generally. The Whig Government appointed in 1830 continued paying salaries of one thousand two hundred pounds per annum to the Real

Property Commissioners, but insisted that the Commissions completed their work speedily and managed to secure unpaid work from former Commissioners after the Commission had technically closed.[29]

Now Bentham was both a barrister and a member of Lincoln's Inn, where the conveyancing bar had their chambers, but he evidently did not regard himself as having any sinister professional interest that would preclude him from acting in the interest of the general good. In fact he considered himself the lawyer who was devoid of sinister interest. In 1829, when considering the question of what reforms were desirable in respect to real property, Bentham wrote

> JB having no sinister interest the giving this answer on his part requires no self sacrifice. On the contrary JB having no interest but as one of the community this interest must be a dexter interest.[30]

Because he was a lawyer devoid of sinister interest Bentham was admirably suited to be the people's representative, he could act as counsel for the people. After all the people had no other voice or representation on the Commission, whereas others who had an interest did. 'King and aristocracy and lawyers have their commissioners- subject many no commissioners but the self constituted'.[31] In the England of the unreformed House of Commons it was undeniably true that the interests of the vast mass of people were unrepresented on public bodies. Bentham saw his self-appointed role as crucial if the

greatest happiness of the greatest number was to be secured. Since the people could not appoint him themselves, he would appoint himself and act in their best interests.

3

Bentham prepared several sets of answers to questions that were sent to him by the Commissioners and there is an exact correspondence between the questions set out in the appendix to the First Report[32] and Bentham's manuscript answers. Here his answers to the first set of questions are examined. The Commissioners had prepared the questions which were then sent 'to all persons from whom they were likely to draw forth useful information, with an intimation that we requested answers, either in writing, or by viva voce examinations, as might be most agreeable to those to whom they were addressed'.[33] The Commissioners said this allowed them the opportunity of 'fully canvassing the topics under discussion with men of profound learning and distinguished talent'.[34] Letters Bentham addressed to the Real Property Commission chart the progress of his answers to these questions.

There is no doubt that the Commissioners were in control of the discussion to a great extent because they devised the agenda. They prepared the questions to be discussed, and they chose who should be asked to reply. Presumably they also exercised their discretion on which

replies to include in the final Reports, and which to leave out. If it is accepted that Peel tried to ensure that the lawyers who proposed the most radical reform were excluded from serving on the Commission,[35] then it would seem that from the start that no very startling measures would be proposed by Commission. This could lead to the conclusion that nothing could possibly have been accomplished by a Commission that embodied those very interests, the legal, the political and the land holding aristocracy, that were most opposed to reform. From this perspective Bentham's calls for reform sound like a lone voice. The only mystery seems to be why such a group of men would have sought his contribution to the work in hand in the first place. But this is too narrow a view that fails to take into account either the views of those lawyers who did advocate reform, or evidence of the long continuing debate on law reform in the eighteenth and early nineteenth century, mentioned earlier. An important question to be addressed by the Commissioners was what method should be used to effect reform. Should it be judicial reform or legislative reform or a combination of both? If legislative reform was decided upon then was it necessary to consolidate statutes or should the law be codified?

The Commissioners may not have been representative of the most radical reformers, but the questions they devised for discussion covered aspects of land law that had been

perceived as needing reform during most of the previous century. The questions for all the Reports covered a very wide range of issues. Finding means of increasing security of legal title to land was seen as very important. An insecure title meant the market in land was unduly restricted because of the difficulty in alienating. The legal costs were high because an investigation of title was lengthy and complicated. Various complex devices were drawn up by lawyers whose sole reason for being used was to strengthen a title to protect a purchaser, for example keeping leases in existence, or a trust, in case equity sought to interfere with the title on another's behalf and destroy the purchaser's legal title. All this added to complexity and to cost.

This led to demands and plans for the reform of the law of equity and for reform of the Court of Chancery which administered equity. It also led to experiments and plans for a registry of deeds of title to land which would make title secure, although there were arguments on what form of registration was best suited to the task. Registration will be examined in detail in chapter four. Other debates concerned whether or not to discard the system of tenures and estates that was essentially feudal in conception, how to simplify methods of alienating land so that it was no longer necessary to enter into complicated fictions (lease and release, fines and recoveries,) to convey land. With respect to the distribution of property within a family, what place did

primogeniture have in the nineteenth century scheme of land holding, should all sons inherit equally or even share with their sisters, were married women still to be regarded as incapable of holding land at law in their own right, were widows claims to dower and widowers claims to curtesy an added and unnecessary encumbrance on land and should the rights of the heirs take precedence to dower and curtesy, should the Statute of Uses be repealed, and how could settlements of land under a trust take effect? Some third party interests in land were fiercely debated, because it was not yet generally agreed that creditors could have a right against a debtor's land as well as against his personal property. Was land still to be regarded as exempt from payment for debts as of course it would have been under a feudal system of land holding? How could mortgages take effect so as to be commercially useful within this scheme of things, and still leave a title secure? Other third party rights against land that were of particular concern to the eighteenth and early nineteenth century reformers were the claims of the Church to tithes, and the status of the numerous public rights, such as gleanage, that were being destroyed by many enclosures of formerly public land.

4

The First Report prepared by the Commissioners confined itself to examining the law relating to tenures, inheritance, dower and curtesy, fines and recoveries, prescription and limitation of actions. Bentham had been sent a list of questions on these topics and spent much time in 1829 preparing answers. He also corresponded with the Commissioners about his answers.

Many manuscripts are Bentham's rough drafts, mostly in Bentham's own hand, but there is a fair copy of the answers to the first set of questions written by George Bentham dated 12th July 1830.[36] The amount of the material, the existence of the fair copy and George Bentham's involvement suggest that the work progressed to a high state of readiness for publication, and it is probable that it was finished and sent, whatever happened to it subsequently. The answers enable us to assemble quite a full picture of Bentham's views on detailed aspects of property law. For this reason I intend to go through some of the answers in reasonable detail.

Bentham was working on the answers to the Commissioners first set of questions between August 26th 1829 and June 1830. Finally the rough drafts were copied out in June 1830 by George Bentham whose initials are at the top of each of the several sheets.[37] The first question asked if the respondent thought it desirable that

tenures should be abolished. The Commissioners called it a fiction or rule of law that vested the absolute property of all land in the crown. The next questions asked if it was thought that any inconvenience would result from the abolition of tenures, or if tenures could be retained and any inconveniences could be remedied by specific enactments.

Bentham answered briefly that he thought tenures should be abolished on the principles of 'falsehood-exclusion and complication-minimizing'.[38] The inconveniences that resulted from retaining tenures were 'falsehood, confusion, and thence misconception and disappointment', whereas no inconvenience would result from their abolition and also that the 'universally-applying evils of existing system not remedial by specific enactments'.[39] So what was required was a universal remedy. Bentham was restrained in his answers, but certain that the doctrine was obsolete. If property law were to be subjected to a systematic reform there could be no possible place for such anachronisms. It is significant that he pointed out that specific legislation to remove individual problems was inadequate. Only an all-comprehensive reform would suffice, and as this would deal with inappropriate doctrines, such as tenures, there was no need to say too much here. Just how far Bentham progressed with drawing up a plan for a systematic reform, in which tenures had no place, will be discussed in

chapter five.

Bentham's answers compared to those of other respondents are notable for their brevity. These first questions produced a mixed response from the lawyers, both attorneys and conveyancers, who answered. Some thought it most undesirable to interfere with the ancient doctrine, for example William Cloves, an attorney, wrote

> It would be most injudicious in my opinion, to abolish the doctrine of tenures, the great source of our laws on real property; the system has been too long settled and interwoven with the constitution of the country and the feelings of the people, for such an alteration to be desirable.[40]

Robert Dixon wrote that he saw no inconvenience in the fiction and that

> the only practical effect now arising from it is to give the Crown the right to the property by escheat when the heirs fail, and I see neither the justice nor the necessity of abolishing that right, nor how it is capable of a more effectual or simple recognition.[41]

Another respondent saw any interference with the doctrine as undesirable, because under a monarchical government it harmonised with a system so conducive to the welfare of the state, namely 'the necessary gradation of ranks...it serves to link together all the various modifications of society, having an interest in lands, from the cottager, through the farmer, yeoman, country gentleman and nobleman, up to the crown'.[42] This idealised

picture of an essentially agrarian society that was already fast vanishing represented one extreme of the views given to the Commissioners. It tells us much more about the myths involved in contemporary perceptions of English social life at the time than about legal relations and the need for reform, whether or not the author was a lawyer. It also clearly shows that property law was perceived to be inextricably intertwined with constitutional law. It is an expression of a wish for harmony and stability in a time of change.

Others did agree with Bentham and wrote advocating abolition of the doctrine of tenures, although none were as terse in their reply. For example J. J. Park thought that the abolition of tenures would be highly desirable,[43] while James Humphreys in his examination said that tenures should not be abolished, but reduced to common socage save for grand serjeanty and frankelmoign.[44] This was the course that was eventually followed by the abolition of all tenures save socage, but not until the reforming legislation of 1925.[45]

Charles Butler, the eminent conveyancer and long standing friend of Bentham, mentioned codification

> If the Commissioners should proceed by codification, and thus introduce into the law of England a totally new system of jurisprudence for its landed property, the abolition of the rule or principle in question, <u>may</u> possibly make a necessary part of the system.[46]

But if codification was not introduced then although the principle produced some inconveniences, these were not so great as to make total abolition desirable. Tenure has long survived its purpose, he wrote, but because all the principles and consequences of the doctrine still deeply and extensively pervade the whole system of our Law of Property he feared that the abolition of it would be an innovation too dangerous to be undertaken.[47]

Other questions from the Commissioners dealt with abolition of copyhold, the system of land holding that had developed from the medieval villein tenure. Bentham did not differ from most respondents in considering that copyhold should be abolished by enfranchising the copyholds, although he required compensation to be paid to any one losing a right.[48] But the reasons that he advanced supporting abolition, the need to end unnecessary 'complexity, uncertainty, uncognoscibility' in title did differ because Bentham, as counsel for the people, looked beyond the immediate improvement in conveyancing to the need for 'demystification' of the law.[49]

Similarly, Bentham had no objection to the abolition of anomalous modes of descent existing in different areas of the country, gavelkind and borough english. But although Bentham said that he had no objection to disengavelment, this must not infringe the principle of non disappointment, or infringe independence-promotion, or importantly the benefit of equalising property holding.

Questions on descent dealt with the rule that

property could descend only, and never ascend, and that only the whole blood could inherit, never the half blood. This meant that ancestors such as parents could never inherit, or that inheritance could never descend following the line from an ancestor. Bentham did not differ from most other respondents in wanting to see an end to what he called this 'absurd' rule,[50] and to a certain extent his opinion on this has been examined in connection with his Review of James Humphreys' book in chapter one. Bentham wanted the ascending line postponed to the descending, which was not unusual, and here he announced briefly that he wanted the female line postponed to the male. This answer was Bentham's politic, public response to the vexed question of what role gender should play in succession to property. In chapter two and also in chapter six the manuscripts reveal another picture, one in which Bentham rejected this position. An alternative answer Bentham formulated, but then did not include in the fair copy of answers to these first questions, was that descent should be to the eldest male provisionally, but ultimately to both sexes equally in co-parceny, with power to any other brother or sister to compel a sale.[51] This interesting answer, which Bentham says is in accordance with the transfer-facilitating or transfer-obstruction-removing principles, places the eldest son in the position we would recognise as trustee. His siblings, the beneficiaries, can compel sale. This would simplify conveyancing by removing

the need for the purchaser to investigate numerous titles to the property and so facilitate transfer. But Bentham would not have approved of the modern equitable solution to the problem of co-ownership, as he wanted an end to the dual systems of law and equity. Even the solutions effected by the reforming legislation of the Judicature Acts of 1873-5, which merged law and equity, and Law of Property Act 1925 would probably not have satisfied his wish to end the separate regimes of law and equity. Bentham agreed that for the word trust there was a use and even a need, but of the Statute of Uses and all other real property statutes 'not a particle should remain'.[52] In fact the 'waters of Lethe recommended for the oblivion of statute and common law'.[53] Bentham proposed a code for the laws of inheritance, descent and settlements. He had already investigated this possibility with James Humphreys and prepared considerable material for such a code, and he again recommended such a code for inheritance when he later wrote on with registration of title for the Commissioners.

As for the rule about half blood, Bentham agreed that children and others of the half blood should inherit, but here differed from many other respondents in proposing that the whole blood received twice as much as the half blood, but he gave no reason for this. Humphreys, among others had argued that this distinction should be completely abolished, and this was the course of action eventually proposed by the Commissioners.

The Commissioners asked whether special words were needed to pass a legal interest by conveyance, and whether in fact a legal interest could lie in grant and be passed simply by deed. Although the ancient methods of transferring an interest in land, livery of seisin or public, formalised entry onto the land, were not used, there was uncertainty about the implications of this on seisin or possession.[54] Bentham answered that each disposition of property should be in one of the several modes or forms to be provided by the Commission.[55] The best reason for requiring the use of a deed was if a deed was the thing best suited to the purpose. From this it followed that if one of the main purposes in making a record of the passing of title to property from one person to another was to give notice to third parties, then such notoriety was not achieved by the practice of livery of seisin. After all the only persons actually given notice by livery of seisin were those who were there at the time. 'Proposed substitute' wrote Bentham, 'Registry and advertisements'.[56] But he added that deeds not made in one of these prescribed forms would not thereby be rendered invalid. 'As between the parties legalised obligatory dealings have the effect of law'.[57]

Bentham was therefore opposed to a transaction being declared invalid, at least between the parties, because the correct form was not used. For family settlements, as well as for alienating property generally, Bentham

proposed that forms should be drawn up, but if these were not adhered to then the 'parties took their chance as to construction'.[58] At first sight this appears contrary to Bentham opinions on the need to minimise complexity and for certainty in dealings. But his insistence that evidence of a transaction is not excluded because it is not in the correct form is in accordance with Bentham's writing on evidence. In particular he was opposed to artificial, or scientific evidence, 'lawyers scientific opinion evidence' as he called it in the real property writings.[59] Here this would mean all prescribed deeds. Under a natural system all evidence should be included and heard. Otherwise good evidence would be artificially excluded, and the main beneficiary would be the lawyer, while the innocent client could lose all through no fault of his own. But Bentham did not consider the problem caused by a third party interest in property passed by means of a non prescribed form.

5

A concern of landowners at the time was their wish to increase their powers of management of settled land, so the Commissioners considered how to allow the tenant for life under a settlement of land greater powers management, while still leaving the settlement in place. They asked if tenants for life should be given the power to cut timber, open mines, create a lease, enfranchise copyholds, borrow

against or even sell the settled land. Bentham had no objection, save for the problem of making sure that interests in remainder were not adversely affected. But he thought it 'highly desirable'[60] that limited owners[61] should be able to enfranchise copyholds. Again Bentham's views were not dissimilar to many other lawyers at the time in seeing no major obstacles in the way of allowing land owners to free themselves from the burden of the feudal structure of settlements to this extent. English land owners of the time wanted to exploit the commercial as well as the agricultural value of their land, to adapt to changed circumstances without losing the political privileges traditionally accorded to landed wealth. In these answers while not applauding such reforms for land owners, other than the right to enfranchise copyholds, Bentham showed no objection to the possibilities of such changes, although neither did he argue for the retention of settlements. He only insisted that compensation be properly calculated and paid to those who lost a right, including the land owner whose copyhold tenant gained a right to enfranchise. A series of Acts between 1840 and 1882 conferred various powers on a limited owner with respect to the settled land, until the Settled Land Act 1882 gave more or less full powers of management to the tenant for life.[62]

In these first questions and answers Bentham also argued for an end to interference in law from equity, and

for the 'total destruction' of courts of equity,[63] and the setting up of local judicatures. His most vehement criticism was retained for the clergy in respect to their claim for tithes as a property right. Bentham felt that the payment of clergy based on the performance of service was founded at a time when 'service' meant something different, presumably feudal service. But 'no title have the clergy to their wealth on the ground of the infallibility of their religion', and 'services exacted not proportionate to the degree of emolument',[64] He concluded that dressed up puppets could perform their duties less expensively than bishops, rectors and vicars, who like other sinecurists set a swindling example.

Bentham revealed his knowledge of French Law in his answers to the first set of questions from the Commissioners. He wrote of French 'conseil de famille', and thought such an arrangement would be suitable to deal with the rights of those with disabilities, such as married women, infants and the mentally ill. The 'conseil de famille' would act in the interests of such persons in claims for remedies against adverse possession or limitation of rights of action.[65]

In conclusion, Bentham's replies to this first set of questions from the Commissioners as a whole are short, to the point and politic. There are no scathing references to lawyers, nor to parliament and 'matchless constitution'. This adds weight to the evidence that Bentham must have intended these replies to be published, and that this was

the public face of Bentham, the active reforming lawyer. The questions are mostly specific and technical, and Bentham replies in similar fashion, on one or two occasions writing that he was not answering the question as it was addressed to practitioners and he did not have the necessary experience. Since the answers were made into a fair copy it is fairly clear that they were intended to reach the Commissioners, and perhaps did so.

6

Only one of Bentham's manuscript works on land law produced in response to the work of the Commission was published. This was the 'Suggestions' that Bentham sent to the Commissioners that appeared in the appendix to the third Report of the Commission in 1832. This was reproduced by Bentham's editor, John Bowring, as 'Outline of a Plan of a General Register of Real Property' in volume five of the collected Works in 1843 after Bentham's death. The Commissioners had received several communications from lawyers who responded to their invitation to address them on registration, and although most of these appeared in the Appendix to the Second Report in 1830, Bentham's was not the only one to appear late in the Third Report. Bentham's suggestions on registration represent another aspect of Bentham's public face as a reformer, and so will be examined in some

detail. He prepared this work for publication himself and the published work incorporates most of the manuscript material.

Bentham began the article by saying that the observations that he submits have for their 'immediate, appropriate, and by you expressly authorised subject-matter'[66] the plan for a register for deeds of title to Real Property. He readily acknowledged his limitations as a non practitioner and therefore, not possessing the information and insight of a practising conveyancer, modestly announced that he would confine himself to making a comparatively small number of suggestions, to which the Commissioners could add, or subtract, as they wished. Most importantly he intended to present the Commissioners with the outline of a suitable registration plan, and to preface this with a short exposition of the principles of law which support this plan.[67]

From the outset Bentham placed the observations he made to the Commissioners on registration within the context of the principle of utility. He told them that he would give them his reasons for introducing such a plan, which meant showing them how the proposed plan would add to someone's net happiness, after making any deduction for pain it might cause.[68] Bentham criticised the Commissioners' First Report and draft bill for registration for not giving reasons for their proposals, only a phrase intended to serve in the place of a reason. This was the phrase 'whereas it is expedient', which he

dismissed as having little to do with reason. He went on to propose two principles that should have application in the current discussion on registration, although if he were to address the whole field of real property at a future date there would be more than two. These two principles were the greatest happiness, or happiness maximising principle, and the disappointment minimising principle, also called the disappointment-preventing or the non-disappointment principle. Perhaps predicting their reaction Bentham told the Commissioners not to 'be horrified by it; for here, not only on sure ground do I tread, but ...on authoritative ground.[69] The authority Bentham refers to was that of the Commissioner John Tyrrell.[70] However the references in Tyrrell's book to non-disappointment were to an unpleasant consequence to be avoided in certain specified circumstances. For example, Tyrrell refers to tithes, originally a tax in kind paid to the incumbent of a church by parishioners, but by then much more likely to be claimed as as proprietary right belonging to the local landowner. Title to the tithe was the source of much acrimonious litigation until in 1836 an Act was passed for the commutation of tithes into annual rentcharges, and the establishment of a commission to settle the amount to be paid.[71] Bentham reported Tyrrell as stating that 'The expense, uncertainty and disappointment, which usually attend suits for long forgotten claims, render them....source more of injury

than benefit to the church'.[72] This was not really Bentham's non-disappointment principle, but if he could not claim Tyrrell as a utilitarian Bentham had succeeded in illustrating how his non-disappointment principle was grounded in issues that were familiar to the Commissioners, and provided them with a lesson in applied utilitarian cost/benefit analysis.

In the unpublished manuscripts Bentham was less retrained. He picked out the phrase 'true principles of justice' from the Commissioners' First Report and asked 'what are they? mine are so and so. Are yours the same or different'?[73] Bentham also strongly criticised the Commissioners for remarking in their First Report that real property cannot be made universally intelligible. This was in fact an echo of Humphreys' comment but Bentham did not agree with the use that the Commissioners made of this remark and thought it an weak excuse, 'i. e. they will not attempt it. Intelligibility of the law impossible. By thus stating it impossible they have done the utmost in their power to prevent it. Challenge them to pick holes in JB's draughts'.[74] He took no more kindly to the Commissioners' comment on the difficulties encountered in making alterations to the law, writing that this phrase was a 'vague generality approved by all sincere men because it leaves them at liberty each to make what application best suits their interests and interest begotten prejudice'.[75] In fact earlier attempts at law reform had been frustrated 'not by the state of the times

but by the opposition of interest to duty and professed wishes and endeavours'.[76]

Returning to his published article, Bentham next introduced the Commissioners to the idea of having articulated, defined objectives in mind when proposing legislation, 'ends and means'.[77] It is clear that Bentham was leading the Commissioners gently through the steps to be taken to make a systematic reform of the common law from first principles, which he had long advocated. First it was necessary to have a guiding or leading principle. Then the Commissioners should have an informed consciousness of the desired end or outcome of their reforms. The means of attaining that end also required their attention. There were two ends to be aimed at, one was the prevention of unexpected loss of money, or money's worth. The second was to minimise the burden of delay, expense and vexation to vendors and purchasers. Both could be achieved by establishing a register of title. The means of achieving these ends depended on effective use of both 'materiel', in other words the actual registry building, and 'personnel', the officials who would work there.[78]

Many of the measures Bentham proposed to achieve his ends are familiar from the Constitutional Code. He listed seven objects which included minimising expense, and minimising delay and maximising the aptitude of the officials in the registry whom he called functionaries. To

complete the list, the fourth object is to maximise the aptitude of the machinery for registration; the fifth is to maximise security for the process of registration, and the sixth object is to maximise the extent of the good effect of registration, and lastly the seventh object was to minimise the burden that 'clogs the benefit'. This, for example, could be achieved by using the letter post and not skilled labour for communications.

Bentham had many practical proposals to make to minimise expense in the organisation of the registry. For example restricting the building for lodging deeds to one alone, restricting the number of assistant registrars, minimising the salary of these assistant or deputy registrars by competition and for the probationary year of service to be without pay.

Other means of minimising expense were to have a reference map of the whole territory, a plan which he mentioned again in the discussion of the fifth object, and to use the 'manifold' system of writing, a system of duplicating documents that he had invented and described before in his review of James Humphreys' book in 1826. The manifold system would act to safeguard deeds against fraud, and would save on the costs of producing authenticated, or 'office copies' of registered deeds, and maximise the good effects of registration.

In order to convince the Commissioners of the benefits to be gained from having one building under single management, Bentham referred the Commissioners to an 'experiment which, in days of yore it fell into my way to make'.[79] This was Bentham's planned Panopticon for prison and pauper management. He told the Commissioners that he submitted his plan to Pitt after Pitt had brought in a Bill of his own in about 1796 for pauper management that involved workhouses under local management in every parish in England. Bentham says he showed how the difference in cost between his plan and Pitt's plan amounted to fifteen million pounds. Although Pitt generously laid aside his plan in favour of Bentham's, it came to nothing because it was 'crushed by a veto from on high'. He referred the Commissioners to his articles in Arthur Young's Annals of Agriculture for details of a scheme that he intended to print under the title of Pauper Management, which would be prefaced with a history of the catastrophe that forms 'part and parcel of the war carried on for not less than twenty three years between George the Third, of blessed memory, and one of his rebellious subjects'.[80] So until the last years of his life Bentham remained convinced of the part played by George the Third in the failure of his planned Panopticon, and his deep distress at the failure of his scheme had not faded with

time.

The benefits to the public purse of having salaried officials who competed to reduce their remuneration, instead of officials who charge the public fees for their services and who raised funds by the sale of office, is a proposal that Bentham had first advanced in the Constitutional Code in 1822 and expanded in 1826 in a pamphlet entitled 'Official Aptitude Maximised; Expense Minimised'.[81] This substitution of salary for fees formed an essential part of Bentham's plans for the democratic reform of the organisation of public institutions and bodies, from parliament, to the courts and a land registry. F. Rosen, writing of Bentham's Constitutional Code,[82] has explained that Bentham conceived of an English society with major divisions, but rather than class divisions these were, for example, the 'ruling few' and the 'subject many'. The concept of class did not play an important role in Bentham's thought as it did later for Marx. Bentham believed every society possesses a power-holding class, and a democratic society can be distinguished from a non-democracy because its power-holding class possesses an aptitude for the functions it performs. In non-democracies, which were most countries when Bentham wrote, the 'opulent ruling-few' were unapt, and ruled through hereditary right at the expense of the majority, 'the subject many'. Therefore by replacing the 'inapt' functionaries, who rewarded themselves by

extracting fees from the public whether or not they performed correctly, with apt, salaried, functionaries, a democratic reform of government could be begun.

The work that Bentham did in the 1820s has been identified as marking an development in Bentham's democratic thought. 'By the end of his life, instead of advocating democracy as a particular remedy to particular grievances in particular states, Bentham was attempting to mould his ideas into an universally applicable system'.[83] Again using Bentham's writings on the Constitutional Code Philip Schofield showed how utilitarian principles were employed in the democratic organisation of government, expanding on Bentham's axiom that 'the greatest happiness principle requires on the part of all persons employed by government the maximum of aptitude at the minimum of expense'.[84] 'Aptitude' was defined as having three divisions, moral, intellectual and active. The latter meant conscientious performance of assigned duties by the functionary employed by the state. Such performance was to be secured by a number of means, including making sure the functionary was only paid for the work actually done.

In the Constitutional Code, which he began in 1822 although it was not complete at his death in 1832, Bentham wrote,

> Of a member of the legislature the pecuniary remuneration is { } per day. Added to this are the power and dignity of office. Of ulterior emolument, receipt, if from unwilling hands, is extortion, if

from willing ones corruption.[85]

Extortion meant the action of a functionary in a government department who used the authority attached to his office to extract money from anyone.[86] In the pamphlet extracted from the Constitutional Code and published in 1826 Bentham dealt with a functionary's remuneration by keeping it to the minimum level possible in three ways,

> Expense: problem, how to minimise it....1. In compliance with appropriate calls, offer to take a less salary than that which has been proposed; 2. offer to pay a price for it; 3. Offer to submit to its being reduced to a certain less amount, and then to pay such or such for it, after it has been so reduced.[87]

For the Commissioners Bentham illustrated the savings that can be made by employing salaried officials by contrasting the 864,000 pounds in a year for Louis Phillipe of France from the Civil List, with the 5000 to 6000 pounds a year paid to President Jackson of the United States. 'It is in the fee-gathering system, the syphilis of the law, that all this corruption has its root'.[88]

8

Bentham's means of ensuring the good performance of their duties by the registry functionaries depended on excluding sinister interest by the substituting salaries

for fees, mentioned above, which would ensure the moral branch of appropriate aptitude, and also by requiring a period of probation for the registrars before their appointment, or as Bentham puts it, 'Probationership, antecedently to definitive location'. This would secure the intellectual and active branches of aptitude.[89] He considered that the existing securities for appropriate aptitude on the part of functionaries were worse than useless, in fact they were sham securities. They included qualifications, and restricting the class of candidates to barristers at law. But with the exception of age no other condition was necessary to join this class than eating a certain number of dinners in the same large hall where other men are engaged in the same occupation at the same time.[90] As the recipient of such a legal education Bentham no doubt spoke with feeling from experience, but he must certainly have annoyed some of his readers, and in particular the members of the Real Property Commission and those lawyers who contributed to its findings. In this instance he did not attempt to persuade by argument and was outspoken in his opinions.

Another security was the oath, in this case a promissory rather than a assertory oath which Bentham said he had already shown to be worse than useless.[91] These are sham securities whose use by any legislative draftsman will cover him in a 'wrapper of ridicule',[92] a fate he wanted the Real Property Commissioners to avoid.

In order to minimise delay to the public at the

registry Bentham proposed that no unnecessary deputies were employed, and required a functionary to attend work for a specified number of days in the year, and a specified number of hours in the day before being paid. This is reminiscent of the provisions in the Constitutional Code requiring members of parliament to 'clock in' their attendance at parliament to qualify for their pay.[93] The time of entrance and exit of members of Parliament from the Assembly Chamber was to be stamped by the Door-keeper into an 'Entrance and Departure Book' after consulting a clock. Members were to be paid daily by the Door-keeper on the basis of their attendance. No attendance results in no pay without a sickness note signed by a doctor, and details of non attendance would be published daily and monthly in the Government newspaper, and given to constituents before an Election. Giving his reasons for these stern measures Bentham said that soldiers are punished as deserters by flogging and death for failing in attendance, so why should not legislators be punished by withholding reward? In a foot note the reader is referred to a note made by Bentham that points out that in Parliament on March 16th 1831 eighty members were reported for non attendance and their excuses for absence were not accepted by the Speaker. But Bentham happily was more generous to the functionaries at the Registry and allowed them a specified number of days absence from work for various reasons that included

religious holidays, health and comfort, the need to attend to private business and four weeks holiday a year. In addition absence because of sickness should be taken into account. 'The accidental occurrence of sickness suffices to demonstrate, to any rational mind, the unreasonableness of relying on altogether uninterrupted attendance'.[94]

Bentham had mentioned the fourth object as maximisation of the aptitude of the machinery of the registry in order to minimise delay. For example, once the best arrangements have been devised by parliament, then the head registrar, divested of all sinister interests, should be empowered to make effective amendments to these arrangements, subject to the right of the King or either House of Parliament to disallow the amendment. Bentham criticised the draft registration bill because while the registrar did have power to make regulations concerning the details of business, the Bill did not specify what sort of matters this concerns, and no power to disallow the amendment was given except to the whole legislature.

9

The fifth object was to maximise security for process of registration, and here Bentham considered an 'all-comprehensive map' of the whole territory to be altogether indispensable because without such an anchor as this a vast proportion of the title to the landed property of the

kingdom would be floating on a sea of uncertainty. Because the maps he mentions are now commonplace, Bentham's enthusiasm may seem puzzling, but at the time was probably innovative. He considered that the expense of preparing such maps would be trifling in comparison with their usefulness, and in fact that a map of this sort, for the purpose of defence, was at the time being prepared at public expense under the direction of the Board of Ordinance.

For the map to succeed in maximising security for the process of registration, and so for title to property, it must be accurate in all details. Bentham mentioned the problem that a general all-comprehensive map of an area would not agree with that given by a particular map of the same spot. This is because the earth is a sphere and because of the irregularities on its the surface boundaries frequently follow natural landmarks, but if there are no natural landmarks then the answer is one followed in more than one country in Europe, which is to take account of the number of feet, inches and miles in the actual occupation of a proprietor, divide the particular map into such portions and then do the same for the correspondent mile on the all-comprehensive map. For while in the country a few feet may not matter too much, in a town it is important to be exact because great expense would be involved in pulling down buildings to make corrections. As an example Bentham described the map

of Paris which was divided into parallelograms by lines making a sort of lattice work, each intersection in one direction being lettered a to z, whilst in the other direction the intersections are numbered. An index of street names is preceded by the letters and numbers, for ease of reference. Bentham suggested that such a scheme could easily be used for manors and parishes as well as towns as well. He concluded 'give me but a map to point to, and I will give rest and quiet to 'all that inherit' this our portion of the earth's surface'.[95]

What is not clear was whether or not Bentham suggested that, in each case where title to property is in dispute, reference is made to the all-comprehensive map, or to particular maps, in order to decide the extent of a claimant's property instead of to deeds of title. The proposal discussed by the Commissioners, and by those who appeared before them, was mostly for a non compulsory register of documents of title. This is not the same thing as a register of title such as the modern one where each proprietor has a title number given by the registrar, although the system has only just been implemented throughout England despite the enabling legislation in 1925. In previously unregistered land title to land must still be proved by an examination of deeds of title beginning with a good root of title in the past and extending to the present holders title in an unbroken chain, much as it would have been when Bentham wrote.

Was Bentham's Registry merely a voluntary safe deposit for deeds of title, or did he envisage something more? Bentham's article tantalises by not addressing matters that we would identify as important albeit with the benefit of hindsight. Probably Bentham and his fellow lawyers in the early nineteenth century had not appreciated the difference between a Land Registry that functioned as a voluntary safe deposit for title deeds, and a system that required compulsory registration of title to property, and then gave a state guarantee of that registered title. Some years were to elapse before either lawyers or the legislature understood the differences between these two approaches to the problem of registering title to land. Even the Deed Registration Bill proposed by the Real Property Commission suggested registering an index to an Abstract or Epitome of Title. The index was to have been alphabetical list of each proprietors name, and from this one could find the appropriate abstract of title.[96] These problems of registration are discussed in more detail in chapter four.

Put into this context Bentham's comments on the function of a land registry can seem far-sighted rather than limited, because although he did not completely formulate his ideas, he does stress the need for security of title as the working out of the non-disappointment

principle applied to property. This was achieved by the 'all-comprehensive' maps he mentions which accurately set out the exact extent of a landholding, and which he said were used in 'foreign instances' as an auxiliary or 'appendage' to the all-comprehensive 'cadastre', or muniment, containing a body of information. It is not known which country he referred to. The 'all-comprehensive' muniment known as the Doomsday book as an inchoate example of this idea, although imperfect and inadequate because of its early date.[97]

Security of title was also achieved by registering all subject matter of property and all proprietors too. But as for what information is actually registered Bentham evidently agreed with Tyrrell that all deeds, wills or documents brought to be registered should be accompanied by a short synopsis or abstract, and it is this synopsis that is copied into the register book as a marginal index to the deeds themselves. So proof of title would ultimately depends on the satisfactory evidence provided by production of the deeds, and on nothing else.[98]

In his manuscript writings Bentham discussed what instruments should be registered and thought all instruments in which a third party had an interest, or which were sufficiently important should be registered, and that in some instances the registered memorial of the deed ought to be open to public inspection. Such deeds would be intervivos transactions for the sale of land,

judgements, settlements and mortgages. Other deeds once registered would not be open to public inspection, and these included wills during the lifetime of the testator, or agreements, apprenticeships and marriage settlements.[99] The modern Land Registry was not open to public inspection, pre 1990 although a will, once admitted to probate is available to such inspection.

11

The problems of securing title to land had occupied Bentham as long ago as 1780 when he had written on Indirect Legislation.[100] Forty years later Bentham returned to this subject again and produced a detailed application of his principle of utility to the substantive law and to the procedural problems of establishing a land registry. He wrote in 1780 of the need for evidence of title to all kinds of property to be committed to writing, which Mahomet had recommended to his followers,[101] and of the need for a Registry to preserve evidence of title which would protect proprietors against forgery, against accidental loss or destruction, or from conveying the same interest in land to two different purchasers. In 1826 he echoed these reasons for the need to establish a registry in more or less the same words, but added a further one, which was to enable the government to compile statistical information which could be used to benefit the public in a number of ways.[102] Bentham would regret that the modern

Registry does not see this as part of its function and that in a short while the program of computerisation, which is otherwise beneficial, will have the adverse effect of destroying the remaining limited records.

In 1780 he had written that in order to succeed in protecting proprietors from loss registration should be compulsory, and failure to register should render the deed void. But mere failure to comply with certain formalities in the preparation of the deed should not do so, instead a fine should be imposed on the defaulter.

In 1826 when he reviewed James Humphreys' book, Bentham went into more detail and revealed that he had changed his mind since 1780. He was strongly opposed to compulsory registration. The reasons were that when Humphreys said that the consequence of non registration was that a deed was utterly void, it would be the innocent client who suffered, while the offending lawyer who had failed to register went unpunished and might even receive more payment to deal with the ensuing litigation.[103]

James Humphreys had written in 1826 'A memorial...shall be registered of every deed affecting land...otherwise every such deed shall be utterly void'.[104] This part of Humphreys book particularly annoyed Edward Sugden who wrote that this 'would be as mischievous a law as was ever passed' and that no law had gone beyond the purpose of protecting purchasers who register their deeds against prior deeds that have not

been registered.[105] Tyrrell, in his address to the Commissioners, agreed that title to land should be registered, but did not consider whether or not registration should be compulsory. So we must conclude that Bentham's opinions on the benefit or otherwise conferred by compulsory registration were close to other lawyers of the time, and that these opinions were not the most radical by any means. Bentham did however offer an incentive, if not a compulsion, to register title by suggesting that the necessity for the public to pay registration fees be removed, so that the 'Relatively inopulent are not excluded from the possibility of securing their title by registration'.[106]

When Bentham returned to the subject of registration in 1829 he wrote to the Commissioners that the proof that registration acts for the benefit of landowners was shown by the fact that in Yorkshire and Middlesex, where compulsory registration was in force, land values increased, but he did not deal with the important issue of whether or not registration should be compulsory, and what penalties would lie for failure to register.

Bentham's long held interest in these details of property law, and in registration of title in particular, suggests that we should reject at least part of Douglas Long's argument that Bentham failed to develop his thoughts on real property after after his early writings because 'he was simply unable to to sustain an analysis of one specific and narrow aspect of property or of law

without gravitating towards a more general study in more fundamental terms'.[107] Bentham demonstrated that he was able to sustain an interest in a detailed legal analysis of property law over many years, but it may be that we must agree that his interest did ultimately gravitate to the political dimension of land law reform. His address to the Commissioners in 1831 is taken up with very detailed suggestions for the management of the registry rather than discussion of some of the legal problems which may underlie the need for the registry at all. Bentham was aware of this and wrote, 'The subject matter committed to our consideration (says somebody) is, not how justice may be administered at the least expense, but how the respective owners of what is called real property may be best secured against the loss of it'. So how does Bentham answer his own criticism that this is not what he has done? 'True' he remarked,

> But if the instrument in question, be it what it may, is good for the purpose in question, its being also good for another purpose, or for other purposes in any number, is most assuredly, to any intelligent mind, no reason why use should be made of that same instrument to that same purpose.[108]

When Bentham presented the Commissioners with his 'Outline of a Plan' for a Land Registry his intention was not to enter into detailed legal argument about what instruments of title should be registered, and what effect

registration would have on title, although he did enter into discussions on these matters elsewhere. Instead his purpose was to put before the Commissioners a plan for a working institution, one that could be effective and economic. Bentham's plan for a Registry should be recognised as part of his intention to provide for a uniform, national set of institutions of various sorts, for example plans for local courts, or the prison houses that he mentioned in the 'Outline'. L. J. Hume identifies such plans as Bentham's concern with the structure of government, to make the Executive dependent on the Legislature.[109] In his plans for local courts, or local government, Bentham wanted to ensure that a hierarchical system of institutions were set up which reflected and were responsive to the Legislative and not the Executive. The latter should be 'stripped of independence and rendered totally responsive to the Legislature',[110] and therefore unable to usurp legislative functions of law making. Bentham believed that good government would result when all power holders were dependent on the people, and not vice versa. These ideas are clearly visible in Bentham's plans for the Registry, both the building itself and its officials, because Bentham believed that institutions, such as a land registry, were political societies in miniature.[111] To make sure that the Commissioners understood the context in which he presented his plans, Bentham referred them to his other work on pauper management, the Constitutional Code and to Official

Aptitude Maximised for more detail. In part Bentham's work followed the same pattern as other respondents to the Commissioners because he was, after all, answering the same questions. But Bentham's plans for a registry differ from those of the others because of his insistence on systematic reform guided by the greatest happiness principle. This reform would be one part of an overall reform of government.

Notes

1. UC lxxvi. 14.

2. BL Add. MS 33,546, fo. 317; see chapter two.

3. UC lxxvi. 14.

4. Quoted by Graham Wallas, p. 86-87.

5. UC lxxvi. 16.

6. See chapter two.

7. UC lxxvi. 20.

8. UC lxxvi. 20.

9. UC lxxvi. 20.

10. An Introduction to the Principles of Morals and Legislation, ed. J. H. Burns and H. L. A. Hart, Methuen, London, 1970, (CW) p. 12.

11. P. Schofield, 'Jeremy Bentham and Nineteenth Century Jurisprudence', The Journal of Legal History, xii (1991), 58.

12. Ibid., p. 59.

13. See Dinwiddy, pp. 26-32.

14. Kelly, 1990, pp. 39-70.

15. UC lxxvi. 29.

16. UC lxxvi. 29.

17. Offer; Spring, 1977, 57.

18. The Incorporated Law Society had formed as a Deed of Settlement company in 1827 and acquired its charter in 1831.

19. Anderson, pp. 3-40.

20. Bowring, v. 408.

21. UC lxxvi. 241.

22. Bowring, v. 263.

23. UC lxxvi. 261.

24. UC lxxvi. 263.

25. UC lxxvi. 265.

26. UC lxxvi. 273.

27. UC lxxvi. 273.

28. Life of John, Lord Campbell, Lord High Chancellor of Great Britain, edited by his daughter the Hon. Mrs. Hardcastle, John Murray, London, 1881, p. 464.

29. Collinge, p. 4.

30. UC lxxvi. 147.

31. UC lxxvi. 145.

32. First Report, Appendix 1, p. 87.

33. First Report, p. 6.

34. Ibid.

35. See chapter two.

36. UC lxxvi. 150.

37. UC lxxvi. 150-157.

38. UC lxxvi. 150.

39. UC lxxvi 150.

40. First Report, p. 153.

41. First Report, p. 181.

42. First Report, p. 196.

43. Ibid., p.167.

44. First Report, Appendix 2, p. 248.

45. Law of Property Act 1922, s.128 and Schd. 12, para (1).

46. First Report, Appendix 1, p. 113.

47. Ibid.

48. UC lxxvi. 150.

49. H. L. A. Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory, Clarendon Press, Oxford, 1982, pp. 21-39.

50. UC lxxvi. 152.

51. UC lxxvi. 26.

52. UC lxxvi. 153.

53. UC lxxvi. 153.

54. First Report, p. 90.

55. UC lxxvi. 153.

56. UC lxxvi. 153.

57. Ibid.

58. UC lxxvi. 153.

59. UC lxxvi. 262.

60. UC lxxvi. 154.

61. Owners with less than an absolute interest in their land, for example the owner of a life estate.

62. Simpson, 1986, pp. 284-285; Spring, 1977, pp. 41-59.

63. UC lxxvi. 154.

64. UC lxxvi. 157.

65. UC lxxvi. 156.

66. Bowring, v. 417.

67. Bowring, v. 417.

68. Bowring, v. 418.

69. Bowring, v. 419.

70. Tyrrell; see also First Report, Appendix 3, p. 471.

71. W. R. Cornish and G. de N. Clark, p.141.

72. Bowring, v. 419.

73. UC lxxvi. 144.

74. UC lxxvi. 144.

75. UC lxxvi. 144.

76. UC lxxvi. 144.

77. Bowring, v. 420.

78. Bowring, v. 420.

79. Bowring, v. 422.

80. Bowring, v. 422.

81. Second version in Bowring, v. 273; see Official Aptitude Maximised; Expense Minimised, ed. Philip Schofield, Clarendon Press, Oxford, 1993 (CW).

82. Rosen, p. 19.

83. T. P. Schofield, 'Economy as Applied to Office' and the Development of Bentham's Democratic Thought', History of Ideas Colloquium, Newcastle upon Tyne Polytechnic, 1986, p. 49.

84. Ibid., p. 50.

85. Constitutional Code, pp. 49-50.

86. Constitutional Code, p. 410.

87. Official Aptitude Maximised; Expense Minimised, Bowring, v. 273; now see Official Aptitude Maximised; Expense Minimised, ed. Philip Schofield, Oxford, 1993.

88. Bowring, v. 426.

89. Bowring, v. 422.

90. See Bowring, v. 427, referring to a work entitled Jocular Customs of Divers Manors, written to instruct these same barristers at law, Bentham remarked on the custom of eating dinners, adding that as far as eating is concerned 'egesta' would not seem to provide any greater security for appropriate aptitude on the part of barristers than 'ingesta'.

91. Bowring, v. 427.

92. Bowring, v. 427.

93. Constitutional Code, 49-50.

94. Bowring, v. 424.

95. Bowring, v. 430.

96. Simpson, 1986, p. 254; Anderson, pp. 41-84, see specially p. 64. I am indebted to Stuart Anderson for this understanding of the problem.

97. Bowring, v. 429.

98. Bowring, v. 434.

99. UC lxxvi. 164.

100. UC lxxxvii. 157.

101. UC lxxxvi. 157.

102. Bowring, v. 406.

103. Bowring, v. 409.

104. Humphreys, p. 356.

105. Sugden, p. 31.

106. Bowring, v. 422.

107. Long, p.231.

108. Bowring, v. 435.

109. Hume, p. 121.

110. Hume, p. 120.

111. Hume, p. 246.

CHAPTER FOUR

BENTHAM AND REGISTRATION

It is evident from an examination of Bentham's unpublished manuscripts on registration, and other material, that although Bentham and the Commissioners were in broad agreement on the need to introduce a system for registration of title, Bentham frequently did not share the same concerns. Bentham saw registration as one part of an all-comprehensive reform of property law, including codification, but despite the Commissioners announcement in their First Report in 1829 that they intended to bring in legislation based on their suggestions 'at one time as part of a systematic reform',[1] their inclination was towards piecemeal reform and this was reflected in the questions they sent Bentham and their other respondents.

Bentham was not at all sympathetic to a reform undertaken on this basis. He did not approve an incremental, piecemeal approach to reform that patched up defects wrongly perceived as standing independent of one another, believing that the time would be better spent in drawing up parliamentary enactments than in describing improvements.[2] Despite this fundamental difference in outlook Bentham seems to have taken pains not to alienate the Commissioners because he did not want to lose the opportunity of influencing the Commissioner's final recommendations.

For their part, the Commissioners were in broad agreement that the introduction of some form of title registration was the answer to most problems in land transfer, but, despite their best efforts, legislation for a national system of title registration was not introduced until 1925. This was a failure not only for the Commissioners but also for Bentham and for the other lawyers who had argued the benefits of registration before the Commission. In order to follow the story of this failure this chapter will contrast Bentham's ideas on registration with those of the Commissioners. His opinions are mostly to be found in draft answers to questions sent by the Commissioners on registration to title and to births, deaths and marriages. Bentham also commented on a draft registration bill produced by the Commission. These materials and other published work will also be referred to in order to reconstruct and chart the course of the early nineteenth century debate on registration.

1

Bentham's plans for property law reform, including registration, inevitably had to differ from those of the Commissioners because he wanted a systematic radical reform of English property law, continually writing of the need for reform of the common law based on principle. Once the need for a radical reform was accepted, then reform of archaic, unnecessary procedures could be undertaken. Any

reform needed to be 'all-comprehensive', and it would be recognised that to have two rival jurisdictions, common law and equity, made no sense at all. In contrast the Commissioners had already decided to concentrate on land registration by the time the First Report was published, and largely rejected systematic reform, including codification, in favour of an incremental approach. As part of his comprehensive approach to reform Bentham had already set out his proposals for the reform of adjectival law. His writings on evidence date between 1803 and 1812, and the Rationale of Judicial Evidence had been published in 1827. He wanted to see the adoption of a new system of procedure, both civil and criminal, although 'to establish a new system of procedure, and allow misshapen laws to subsist, is to build upon foundations which are crumbling, it is to rebuild a falling house by beginning at the top'.[3] It is therefore impossible to establish a good system of procedure without good laws and an all-comprehensive approach was needed.

It has been said that the adjectival law of the early nineteenth century hardly deserved to be called a system, 'it was the confused and confusing product of largely ad hoc and often arbitrary growth, developed very largely by lawyers and judges with little regard for principle or consistency'.[4] Bentham realised that no system of substantive law, however good, would be of any use unless it was supported by adequate means for its application

and enforcement.[5] So he proposed replacing the existing confused arrangements with a system that utilised summary procedure, and rules of evidence that relied on 'natural' as opposed to 'artificial' evidence. These simplified and rationalised procedures and rules of evidence would be used in a system of local courts.

Finally in order to put the new unified system into practice a code should be drawn up. For property law this should take the form of a particular property code. This could be referred to for all questions relating to property. So such a code would cover all property rights, and would contain tables of descent to be referred to and rights during marriage. Bentham had discussed details for such a code with James Humphreys, both in relation to Humphreys' code, and later on other plans that were probably a development from this work on the property code which was discussed in chapter one.

So it is quite apparent that the plan to set up a general registry of deeds of title to property was but one aspect of this all-comprehensive reform of property law, and that Bentham did not accord registration the pre-eminent place that the Commissioners did. They had whole heartedly advocated registration of title to land as the cure for most ills besetting the transfer of land in their Second Report in 1830. They wrote that a general register of deeds 'has appeared to us to exceed in magnitude and importance all the other subjects within the scope of our Commission'.[6] In fact any improvements recommended by them

'greatly depended' on the whether title to land was registered, or whether security of title was still to rest on other expedients.

A registry would achieve the Commissioners' object of making the transfer of land less complex, less likely to result in an insecure title, and less expensive. Falling land values were causing concern, and the defective laws regulating the transfer and creation of legal estates were blamed for the slump in property prices.[7]

The difference between Bentham and the Commissioners can in part be explained as reflections of opposing sides of the nineteenth century debate on whether codification or consolidation was the best method of implementing reform,[8] mentioned above. The Commissioners' preferred method of piecemeal reform involved introducing amendments to statutes, or new statutes to reform individual defects, and then existing statutes would be consolidated to clarify the law and reduce the bulk of authorities.

But other commentators on the law who wanted systematic reform rejected this approach, and some argued for codification, the most energetic arguments being made by Bentham.[9] Bentham criticised Peel for being a 'pseudo-reformist'[10] because Peel favoured reform by consolidation of statutes. He wrote to Peel deploring Peel's moves to introduce consolidation bills into parliament.[11] As we have seen in chapter one, in 1827 Bentham had wanted to include an essay on codification in the second edition of

James Humphreys' book, but Humphreys disappointed him by abandoning codification in the face of strong opposition.[12] Bentham rejected consolidation because firstly, his positivist legal philosophy insisted that the common law was not law at all. A law was the command of a sovereign body, and therefore statute. Secondly, Bentham's ambition was to construct a complete body of law, a pannomion, which could not be achieved by merely consolidating statutes. Instead Bentham urged all who would listen that it was necessary to codify the law.[13]

Bentham, as counsel for the people, saw part of his task as advising and encouraging the Commissioners. The other part was providing them with ready made schemes, such as the plan for a Registry. There are draft letters to the Commissioners among the manuscripts addressed to them offering advice on how to undertake reform, setting out what Bentham called 'tasks for the Commissioners'. It was particularly in the context of his work on registration of title to land that Bentham explained and himself undertook some of the tasks that he had set out for the Commissioners.

In August 1829 he set out such a list. He wrote that the Commissioners should 'collect and report' the circumstances in which equity differed from common law in the field of property law. Then a code should be drawn up: 'Let one of you draw up a Code. A code in terminis will be very advantageous-'.[14] Then Bentham went on to suggest the means of obtaining necessary information that the

Commissioners needed before setting up registries of title to land. The population reports had recently been completed, these showed each parish, so it should be possible to obtain the information about each manor from them. Then the Commissioners could call for either written or oral evidence. So the advice Bentham offered was detailed and practical.

2

Bentham answered the first questions from the Commissioners on registration towards the end of March 1830, and had dealt with the later questions shortly before. There were one hundred and sixty four questions,[15] slightly fewer than the first set of questions for the First Report. Questions one to twenty six were designed to find out about the legal, financial and administrative problems encountered on the transfer of land, for example the accidental or fraudulent suppression of title deeds. Bentham answered with these by writing that 'these questions were all addressed to persons having had practical experience', as he did not have such experience he would give no answer.[16] This may seem surprising because the issues addressed by the Commissioners in these questions were regarded as important by land lawyers. Nevertheless Bentham did not give answers, although as he discussed these issues elsewhere it is clear that he did recognise their importance.

It may be that he felt the way the questions were formulated prevented him from making the response he felt appropriate, because all set out a particular defect in the law and asked for information on the particular measure proposed to remedy that defect. As a whole the questions displayed all the defects in property law that the reforming lawyers of the time considered to be in need of attention. For example, question seven asked if the respondent had experience of title deeds relating to one parcel land that had been produced to claim title to quite another parcel of land. Or question ten, which wanted to know if it was necessary to make numerous searches and enquiries before any purchase, mortgage or settlement. Bentham did not have the necessary practical experience to answer these questions and also considered that they could only elicit answers that led to piecemeal reform and, as we have seen, he opposed this method of proceeding. Although Bentham, and others, may have wished other matters to be brought into the discussion, the introduction of a system of registration of title deeds was the Commissioner's universal cure.

One matter that was notable by its absence from the Commissioners' list of questions was any general discussion on settlements of land. There were specific questions, for example question three asked about instances of fraudulent suppression of settlements by trustees for sale attempting to sell as absolute owners.

Another broader question, fifty one, asked if disclosure of family settlements was more productive of good or evil.[17] But because the Commissioners had decided that only the transfer and creation of property needed reform, they did not discuss settlements in general. By the mid nineteenth century opinion had changed and settlements were regarded as one of the major causes of difficulty in alienating land. In 1829 the Commissioners had been pleased to report that the English law relating to settlements was well suited to the political temperament of the country and therefore not to be in any need of any reform.[18] Any interference with the law relating to settlements was unwelcome. In fact such interference was regarded as a disguised attempt to weaken the power of the aristocracy and so bring in the kind of political and social upheaval witnessed in post revolutionary France. In chapter two we saw that in 1826 James Humphreys took care to stress the importance to the English constitution of maintaining a strong, independent aristocracy. Earlier in 1817 when Bentham had published his Codification proposals he warned that codification would be seen as interfering with and disturbing existing rights, and that it would be opposed as an attempt to 'republicanise' the country.[19] So the Commissioners, in common with most men of influence and power, were alert to what they considered the dangers that could be set in motion by an interference with the law relating to settlements and did not invite discussion. Whether or not they were justified in their opinions, and

what factors led to the late century reversal of this view cannot be discussed here, but it should be noted that Bentham made no direct comments on settlements because he was not asked to do so by the Commissioners.

In the late nineteenth century liberal commentators such as de Villiers[20] and Sir Frederick Pollock[21] argued that an opportunity had been lost by the Commissioners in 1829 and that English land owners could not continue to have secret conveyances, informal modes of raising money and complicated settlements and at the same time have inexpensive and efficient methods of transferring property. But views such as these did not surface in 1829.

3

Both the Commissioner's questions and the answers given by Bentham need to be set against the background of the problems encountered by reforming lawyers, what they perceived the problems to be and therefore what reforms they proposed.

The first question asked whether it was possible in the present state of the law to be certain that a title was safe, and the subsequent questions looked at the problem for a prospective purchaser of obtaining and investigating all necessary documents of title from a vendor.[22] Difficulty was made by either the fraudulent or negligent production, suppression or counterfeiting of

title deeds and mortgage deeds. Then the Commissioners went on to ask questions dealing with the consequences of the lack of a method of establishing a safe title to land. For example because of the insecurity of title great expense was incurred in lengthy searches that were necessary against the deeds. To search back for a hundred years was not regarded as excessive at the time. It was also necessary to search in the four courts at Westminster and other Courts of Record for judgements against any person who was the owner of the estate. Such a judgement became a lien on present or future acquired estate. Over the centuries, in order to gain security, lawyers had invented various legal devices, such as the granting and keeping on foot of leases which would defeat a later title. The Commissioners asked if the investigation of these attendant terms was not as, if not more, lengthy than investigation of the title deeds, and whether the protection offered by these outstanding terms was really effective or was it rather precarious. They also wanted to know what effect the equitable doctrine of notice had on security of title, and whether the lack of an executor appointed to administer a deceased's real estate made it difficult to administer the estate.

Bentham answered question twenty seven perhaps not in the manner expected. This question asked if a general register which showed what estates and charges had been created and which were outstanding and which had been satisfied would not give complete satisfaction against the

suppression of deeds?[23] To Bentham the answer was not to give 'superior trustworthyness to registered evidence' by excluding all other evidence of title such as unregistered deeds, because just as much disappointment would be prevented by allowing unregistered evidence as would be achieved by insisting on registration. He wrote that in this case, as in every other, the leading principle, the 'criterion of right and wrong, and touchstone of appropriate propriety and aptitude in practice is afforded by the non-disappointment principle'.[24]

When the Commissioners asked if any other mode could be suggested for obtaining the object, (facilitating conveyances) and 'superseding the necessity of keeping on foot and getting in satisfied legal estates',[25] Bentham replied by making a note in the margin that by getting in a legal estate 'a small part only of the morbid mess relieved. See Dispatch Court Bill'.[26]

Here as elsewhere Bentham insisted that a larger reform was necessary, and this larger or more radical reform should look to the non-disappointment principle as the source of the remedy. Although in most cases complete prevention of disappointment is not possible, in almost all cases it is possible to minimise the quantity of disappointment, and this is done by

> laying the burthen of the loss upon the shoulder of him to whom disappointment from the loss will give less of the pain of disappointment than would be

suffered by the competitor were the burden laid on him- further than this the tutelary care of the legislator cannot go and thus far it might go in every instance'.[27]

Apart from the light this remark sheds on Bentham's theories of adjudication, his comments are interesting because he has moved the discussion away from specific legal rules to general principles, to reform based on the non-disappointment principle. He continued that 'as to the question how the quality of the pain of disappointment is ascertained', the answer is that while the absolute quantity cannot be ascertained in any case, the comparative quantity can be established in most cases. This is done by the judge placing himself alternatively in the position of the parties on both sides. Then the judge asks himself in which of the two positions his expectation of success would be strongest, and in which his suffering of the pain of disappointment would be most acute. Then the judge would measure by degrees of probability, and for further information Bentham refers the reader to the Rationale of Evidence.

It may appear surprising that Bentham should deal with this issue in this manner. He has not mentioned the necessity of establishing the better title, and therefore the better claim to the land. Instead according to the non-disappointment principle what is of most importance is to establish who would suffer the greatest disappointment. It could be argued that the party with the weaker legal

claim might suffer the most disappointment, for example the heir whose expectation of succeeding to property was dashed by the will leaving all to charity. So Bentham's answer appears wrong in law in law, it does not address the question asked and answers one that was not asked. Morally the answer appears uncomfortably wrong too, after all, what is the moral basis for establishing title on such a criterion? Bentham appears to pay scant respect to the priority that he elsewhere accords to the right to private property. Where is the principle of security and what about the importance of established expectations?

However an alternative understanding of Bentham's answer can be formulated. His comments should be placed in the context of his theory of adjudication and its relationship to the non-disappointment principle. The principle of security, one of four subservient to the greatest happiness principle,[28] in this case requires existing legal rules to be followed. If these expectations are not met, neither an individual nor society at large could function effectively. An individual would not be able to pursue his interests and social organisation would not be possible.[29] Therefore the non-disappointment principle, the relevant principle in property law, acts in relation to existing legal rules. Disappointment would result if existing legal rules are abrogated, and the non-disappointment principle acts to prevent this.

A legislator will therefore need to pay attention to

two 'mischiefs', or unwanted consequences, in devising a system of adjudication. The primary mischief would be the harm caused to the main protagonists expectations if existing legal rules were not followed, while 'evil of the second order' would be suffered by the public at large if existing legal rules were not followed.[30] In an essay entitled 'On Retrenchment' Bentham gave an example of an adjudicator putting himself into the position of the party who has suffered the greatest disappointment in order to decide a dispute. First, a distinction has to be made between two situations, in the first place the pain of loss suffered by a party whose title to lost property was not in doubt, and secondly that suffered by those parties where title was more doubtful. In the first situation, for example a theft from a rightful owner, the party suffers the pain of loss and has an expectation that the law not only protects his expectation of continuing in possession of his property but will restore it. The non-disappointment principle protects the party whose pain of disappointment is greater, and that person will be the person with good title.

In the second situation, where title is in dispute and no party has the undisputed good title, then one party or another will inevitably suffer the pain of disappointment. The non-disappointment principle accords with conceptions of justice by requiring the judge to act to prevent 'second order' mischief. This evil is the alarm and disappointment caused to the whole community if the

judge did not act in accordance with common conceptions of justice, normally following existing legal rules. So the judge must again take into consideration the strength of expectation of each party to the dispute, because 'in exact proportion to the strength of expectation derivable from the thing, will be that of the disappointment produced by the loss of it'.[31] Therefore in estimating both first and second order evils and the pain of disappointment the judge takes into account existing legal rules.[32]

Bentham's answer accords with the greatest happiness principle and illustrates its application to adjudication. The party who bears the loss will be the party least likely to feel the pain of disappointment, inevitably the party with the weaker legal claim. The legislator's task, and here the Commissioners were acting as quasi-legislators, was to draft legal rules for property law based on the greatest happiness principle.

4

One of the main issues facing the Commissioners and all interested lawyers was what form the planned Register of deeds should take. But they did not directly address this issue, probably because, as we noted in chapter three, they did not completely appreciate all the possibilities. They did ask many questions about the

Registry's function however, for example they asked if an open or a closed register of deeds would be preferable, and whether disclosure of mortgages and encumbrances would be productive of more good or evil. Bentham was sure that disclosure would be better, because it prevented fraud. 'At the present the landed estate of every man who borrows is a trap ready to be employed for caching the money of every other man. A rat trap having for its ratcatchers the whole tribe of equity lawyers'.[33]

Bentham was also asked whether a general register would relieve pressure on the Courts of Equity by getting rid of the doctrine of notice, and so reducing litigation about the priority of charges, Bentham said that 'unquestionably' the register would have such an effect. But he went on to point out that the real issue was the existence of two different and mutually conflicting jurisdictions that dealt with dispositions of property. 'an arrangement by the mischievousness of which a just reproach/a disgrace/is cast on the morality and by the absurdity of it upon the intellectuality of this co(country) and its laws'.[34] The remedy that he proposed was setting up a new court, the Equity Dispatch Court, as an interim measure. This court would deal with the backlog of equity cases hastening the ultimate abolition of the dual systems of common law and equity.

But Bentham did not directly address what form the Registry should take partly because the Commissioners

never asked a direct question on the point. As we have seen the main issue was whether the proposed registry should act as a muniment, or safe deposit for title deeds registered at full length, or whether it should record title in the form of 'memorials'. A memorial would have been considerably shorter in length, it was more like an abstract of title, or even a memorandum. If, under the first idea, documents, or 'assurances', were deposited at the land registry, a prospective purchaser would still have to undertake all the usual lengthy searches, but should be reasonably certain that all the documents of title were available to him. A further security would be achieved if registration was made compulsory, so that an unregistered document of title would have no legal effect, and could not be used in evidence. But neither the Commissioners, nor Bentham, were in favour of this approach, though for quite different reasons. If under the second scheme a 'memorial' was lodged, this would be all that a purchaser would need to search, and past deeds would not be considered of importance. Bentham, James Humphreys and others preferred the registration of memorials, but eventually the Commissioners decided in favour of registration of deeds at length. In the Bills that Campbell presented to parliament in 1830, 1831, and the following years provision was always for the registration of deeds at length.

The Commissioners had produced their own plan for a register in the Second Report, 'An Outline of a Plan of a

General Register'.[35] The plan was for one General Office to be set up in London for England and Wales. Then England and Wales were to be divided into districts, and each district was to consist of one county, or part of a county. Subject to certain exceptions, documents of title were to be registered in the register for the district in which the land was situated. Every time a grantor derived title from a document that had not been registered before, a new entry was to be made. Otherwise entry would be made under the existing entry. Then in each district an alphabetical list of the names of the title holders was to be kept, with a symbol by their name cross referencing to the general index, and as each different type of title was to be kept on a separate index, cross referencing to these other indices. This was a complex and probably unworkable system that the Commissioners devised, involving registration of deeds at length.

Similarly, under the provisions of all the Bills introduced as a result of the Commissioner's Report, registration was for deeds at length. Again England and Wales were to be divided into districts, and assurances executed post December 1832, or, if a will, where the deceased died after December 1832, could be registered by depositing the original. The deposited documents were to be made up into books or numbered parcels. Then an alphabetical index was to be established for each district which was to be called 'The Index to the Roots of Titles'.

An assurance would be indexed in the General Index under numbered heads. If a grantor did not derive title under any registered assurance, then the title would need to be registered under a new head. Then on transfer the title would be registered under the same head. Bentham expressed doubts about the method of registration chosen by the Commissioners, and wrote 'mode of registration reserved for consideration'.[36] But he approved clauses that set up other indices, such as an index of the assignment of charges.

But there was a third method of registering title to land, one that the Commissioners did not seem to consider. This was for the registration of title to constitute the mechanism by which the property is actually transferred from vendor to purchaser. This is the system that was eventually adopted by the Land Transfer Act 1897, which however only imposed compulsory registration on London. This was followed by the Land Registration Act 1925, which divided England and Wales into areas of compulsory registration (the metropolitan areas) and voluntary registration. It was not until 1990 that the whole of England and Wales was declared an area of compulsory registration. Under this system it is entry on the land register that confers title, and prior deeds of title have no worth. In the evidence given by respondents to the Commission, one lawyer, J. Fonnereau of Angel Court, did propose the modern system. But the Commissioners did not discuss his idea.[37]

Bentham appears to have had conflicting ideas on the function of registration. On the one hand he approved of the registration of memorials, but he thought that unregistered deeds should not be excluded from consideration. Under a summary system of adjudication, all evidence should be put to the judge, who should decide what to exclude on the basis of credibility. He felt that if registration were to be made compulsory then the only beneficiaries would be lawyers. But the lawyers would not suffer for their negligence in failing to register. It would be the innocent client who would suffer all the loss. 'In order to afford sufficient motive for registration it is not necessary to put a peremptory exclusion upon non registered evidence'.[38]

There may also be cases where registration is physically impossible for some good reason, and 'in such cases exclusion of unregistered dealing would be pregnant with fraud to an indefinite amount'.[39] Bentham continued that the use of registration was as a security against disappointment, but by excluding all unregistered evidence, whether fraudulent or otherwise, disappointment would be caused to an indefinite amount. 'Thus in one person may be seen united two characters to a hasty view incompatible that of a zealous advocate of registration and that of a no less zealous opponent of the principle and practice by which exclusion is put upon all written evidence to which this security against falsification and

misapplication is not attached'.[40] On the other hand elsewhere he wrote that 'if registration is not necessary to validity where is to be the use of it?'[41] He concluded that by the very fact of registering title, the belief in the 'superior probability of genuiness' would attach itself to registered title, and this would lead to elevation in the scale of probability. 'This and nothing more is that which by the judge ad hoc ought to be ascribed to it'.[42] Still later when commenting on the Commissioners own Report on registration, Bentham wrote that a more simple manner of achieving their object would be for registration to be as necessary to validity of a deed as a signature was.[43]

5

The Commissioners asked many questions on what documents should be regarded as a document of title, and therefor in need of registration. Bentham answered all the particular questions, but then, probably exasperated, wrote, 'One general rule grounded on an appropriate principle preferable to ever so long a list of particular cases...Whatever be the efficient cause of title should be registered'.[44]

In other papers in which he dealt with registration generally, Bentham asked what constituted the proper subject matter of registration?[45] He answered the question 'in two words- obligatory dealing'. This was defined as

either a 'conveyance at large', or 'an obligatory engagement'. The latter is a conveyance, where one person enters into an agreement for certain rights or services specified by another. By the obligatory engagement is probably meant a conveyance of property by agreement, while the conveyance at large covers the wider areas of conveyance by court order, or by descent, where transfer does not depend on agreement between the parties.

Elsewhere in work addressed to the Commissioners Bentham wrote that as to security of title no improvement would be adequate unless it embraced all kinds of title, including title by succession. He argued that under the existing system security of title was no better than nominal for all but the most wealthy, because of the enormous cost involved. The cause of title can be one of two kinds, either initiative, or consummative. This latter refers to the power of the law to decide title in a disputed case. The efficient causes of initiative title are acts of nature or acts of man. Acts of nature include death and insanity, while acts of man are either authorised or unauthorised.[46] Going on to discuss methods and objects, Bentham said that title should be by transfer, and could be by mortgage, succession, or forfeiture. The term transferring includes alienating or conveying.[47] This discussion of the efficient causes of title and of method of transfer is interesting because of the break with historical tradition, title should instead

be acquired by simple transfer in certain circumstances.

6

Many of the Commissioners' questions dealt with the benefit or otherwise of establishing other registers than those to contain title to land. These were registers of births, deaths, and marriages. The Commissioners asked whether it would be desirable to establish a civil register of births, marriages and deaths, in every parish.[48] Most respondents believed that it was, but Bentham was particularly enthusiastic. He wrote that a civil register without distinction as to religion, profession or otherwise was unquestionably favourable. Any distinction on such grounds was an act of 'injustice, oppression and tyranny'.[49] Oppression was defined as injustice practised on a larger scale.

Setting up such registers was a subject for discussion because of the varied requirements for recording these events that existed at the time. Marriage was registered indirectly because an act of 1694 had imposed a duty on marriage licences, and a marriage licence, preceded by published banns, was necessary for a valid marriage. So the church was made a collector of taxes and had a duty to keep records. All births should have been notified to the parish priest, and he should keep records of deaths because a tax was due for burials.

The emphasis on the role to be played by the parish priest meant that the established church was given a state administrative role in these matters. Large numbers of people who did not belong to the established church were excluded or excluded themselves, and the whole system was somewhat haphazard.

In 1831 a cholera epidemic led to concern about public health and mortality. An Act was passed in 1836 to set up a register of births and deaths under the control of a secretary of state. This was used to supply statistics to the Poor Law Commissioners to enable them to investigate causes of mortality. Then in 1871 the Local Government Health Board was created. It took over the business of the Poor Law Board, which was the successor to Chadwick's Poor Law Commission. The Board also dealt with the registration of births, deaths and marriages.[50]

What role did Bentham play in this gradual assumption by central government for responsibility for recording births, deaths, and marriages? Holdsworth was unequivocal in tracing reform of this area of administrative law to Bentham's ideas.[51] He quoted John Hill Burton, who wrote the introduction to the 1843 Bowring edition of Bentham's collected works. Burton mentioned 'a complete and uniform Register of Births, Marriages and Deaths' as one of the suggestions for reform that could be credited to Bentham's ideas that were either wholly or partly carried out.

L. J. Hume, in his work on Bentham's constitutional code, places the development of a theory of government

administrative activity to Bentham's need to delineate powers and functions of government.[52] Between 1823 to 1827 Bentham was working on these ideas in connection with his work on the Constitutional Code. He prepared tables of the functions undertaken by the functionaries of government, and then divided them into classes. These were the locative and the dislocative, the directive, the procurative, statistic and melioration-suggestive. So in the process of his analysis of judicial functions of government, Bentham set out the administrative functions of government. Government would be responsible for such matters as monetary policy, and arrangements for the health, wealth and welfare of the community. To undertake these activities meant an extension of the contact of the community with government and made governments more dependent on the collection and analysis of information.

Records of births, deaths and marriages therefore played a role in administrative law, providing the necessary information to enable the legislature to act in the best interest of the community according to the greatest happiness principle. Such records also provided the judiciary with 'pre-appointed evidence',[53] that is evidence that was created and preserved which would cover a wide range of events and was acceptable in court, and it was a legislator's duty to provide for the creation of such evidence.[54] Having perceived the value of creating such evidence, Bentham 'argued for a substantial extension

of record keeping',[55] but at the same time was aware of the danger of treating such records as sacrosanct. He considered that evidence that had not been registered should still be put before a court and the court should decide what weight to accord to it. So 'Bentham advised the legislator to facilitate the creation and the preservation of evidence through writing, but to leave it to the trier of facts to assess the credibility of the contents in each case'.[56]

The Commissioners also wanted to know, if the existing ecclesiastical registries for births, marriages and deaths were to be continued, whether births and deaths of dissenters, and the marriages of Quakers and Jews could be entered on them. Bentham gave this question considerable attention, writing that at the time of the restoration of Charles the Second all religions save that preferred by government were suppressed with zeal.[57] The expectation was that suppression would be effective, and little attention was paid to human suffering. So when the English system of registration was set up the expectation was that either a dissenter would be converted and so wish to be included on the register of established church members, or they would not want to be included on the register at all and might leave the parish.

But Bentham said that history had proved those who set up the system of registration to be incorrect. Members of the supposedly dominant religion taken together form at most about two thirds of the population, and at the least

about one third. Therefore to provide a separate receptacle for the records of every different sect would be 'a vast and needless expense'.[58] The record books of the dominant sect should be made to accommodate the dissenting sects. Although each sect could at its own expense provide record books, in default 'the obligation of the vestry' belongs to the Established Church.[59] Bentham, as often when setting out plans, went into great detail. Each sect should have its own 'little bookcase under lock and key', but each sect should also have a key opening the door to the vestry, where a seat should be placed to shelter those who came to consult the record books from inclement weather.[60]

Then Bentham went on to consider how the country should be divided up in order to effect registration districts. Local districts should be equalised by consolidation or division. England at this time of fast growing population did not have any rationally organised local administrative districts. The smallest administrative unit had been the manor and the parish, but villages had turned into towns, and towns into cities. Some of these were without any established church at all because none had ever existed, while others had only a village church for a greatly enlarged population. Parliament had voted to allow the expenditure of funds on the building of new churches, which would eventually result in the building of the numerous Victorian churches

in cities, many of which lie empty today. The many dissenting chapels that were built in the late eighteenth and early nineteenth century must have been subscribed for and built by the dissenters themselves. Bentham was angry that parliament could so readily find the necessary funds for Lord Liverpool to build churches, but not for other reforms that he felt were more important.[61]

When Bentham wrote some parts of the country were called parishes, but other areas had never been put into the parochial system. Acts of Parliament therefor referred to such areas as 'extra parochial' places.[62] He thought that this situation should be remedied and these 'extra parochial' places should have vestries created for them. The minister of the parish should be paid a fee to officiate as the functionary in respect of the record keeping, and should have the power to appoint a deputy. Sometimes for some ceremonies the vestry would not be large enough for all the people who attended, and in these cases they should be able to use the room at present in exclusive possession of the dominant sect. Bentham wrote that in other countries this 'species of joint tenancy' was not the cause of any problems, and mentioned Germany where Protestants and Catholics, Lutherans and Calvinists shared such accommodation for such a purpose.

Bentham was strongly opposed to any official role being played by an established church, and used the question from the Commissioners to express outrage for the suffering imposed on people in the name of established

religion. England, a Protestant country, vied in intolerance with the two most bigoted Catholic countries, Spain and Portugal.[63]

Arguing against religious marriages, or christenings, he wrote 'Why is it that religion should be thought to have anything more to do with the contract by the execution of which the species is preserved any more than by a contract for (by) the execution of which the individual is preserved. A contract for example by the day or by the meal for food and drink it rests with those who think that sufficient reasons are to be found to find and bring them to view'.[64]

Bentham continued his discussion of the role of established religion in the administrative law of the state in reply to the Commissioners questions which asked whether the registers should contain any other details than already required on parish registers. Also whether the register of baptism should contain the time of birth and the maiden name of the mother. Bentham thought it necessary to give sufficient information to make identification possible, which would not be achieved by merely mentioning the christian and surname of either sex.[65]

The Commissioners wanted to know if the register should contain the record of the birth of an illegitimate child. Bentham replied that because of the ungrounded contempt in which such disadvantaged persons were already

held this was a difficult question.

> This case presents to view one of the examples unhappily but too numerous in which the law of the popular or say moral sanction is at variance with the dictates of the greatest happiness principle.[66]

In 1836, not so long after Bentham's death in 1832, a Royal Commission was set up to inquire into the state, custody and authenticity of records of births, deaths and marriages which had previously been kept in other than Parochial Registers. In particular the Commissioners were to consider the possibility of establishing an office of Registrar General of births deaths and marriages. They examined a vast number of records of dissenting sects, Roman Catholics and Jews and recommended in most cases that the records should be retained by the Registrar General and that all records so deposited should be accepted in evidence in a court of law. The Registrar was to allow searches to be made of the Register on payment of a fee, and would provide certified copies.[67] The recommendations of the Commission accord with Bentham's ideas and is evidence that he did influence the development of such government functions. One of the Commissioners was John Bowring, Bentham's friend and editor, which should be further evidence, but Bowring did not sign the Report so must not have agreed with some part at least. Also Bowring was a Unitarian and may have been asked to sit on the Commission for this reason. Nevertheless the Commissioners findings do reflect the

same concerns as Bentham's writings for the Real Property Commission.

7

The Commissioners questions then moved away from a discussion of registers for births, deaths and marriages to questions which asked who should have the right to deposit deeds at the registry, and what evidence should be required of such a right. Bentham answered that requiring evidence for the mere right to deposit was like trying a cause for the purpose of a cause.[68] A more pertinent question was who was entitled to take the deeds back. Deposit of a will at the registry was generally regarded favourably, but to Bentham this was a dangerous experiment if it were to be decided that no later registered will could be valid. The principle of the 'ambulatory' will was introduced by the Wills Act 1837. John Tyrrell was responsible for the drafting of most of the Fourth Report that dealt with wills, and with the Wills Act.[69]

According to the act the will does not take effect until death, and the last one made is valid. All prior wills have no effect. The act did not require a registration, but to be valid the will must be witnessed and take a prescribed form.[70] But in 1830 Bentham felt that a plan to require registration of wills could be an invitation to murder if a relative discovered either that

they, or another before them, were to benefit under the terms of the will. It could be an instantaneous or lingering death. The lurid details meant that this was an outcome to be avoided in either case. So wills should certainly not be registered.

8

In the year following his answers to the real property Commissioners' questions on registration, Bentham undertook further work in connection with registration. First he spent some weeks between January and March 1831 summarising and commenting on a Registration Bill, and secondly in April 1831 he commented on the Commissioners own proposals for registration contained in the Second Report, entitled 'An Outline of a Plan for a General Register', the same title that Bentham was to use for his own work.[71]

There are two Registration Bills printed by the House of Commons among the manuscripts, dated September 1831[72] and December 1831.[73] There are minor differences between them. But the summary of numbered clauses of a Registration Bill in George Bentham's hand[74] does not seem to refer directly to either although the similarities in subject matter and ordering are very great. All three Bills, the printed bills and George Bentham's summary bill, must be variations on another missing bill. This can only be one of the bills drafted by Campbell to

present to parliament. There are only minor differences, mostly in the ordering of the clauses, between either of the two printed Bills and the draught summary by Bentham's nephew.

The draft summary is headed in Bentham's hand: 'Registration Bill== Use of this table mostly superseded by GB's Draught'.[75] Then follow several pages of continuous numbered clauses on detailed provisions for a registry of deeds. Later Bentham made careful and detailed comments on the different clauses of the Registration Bill on sheets of papers headed 'Registration Bill Observations'.[76] Bentham seemed to be broadly in agreement with the provisions of the Bill, for example plans for a building for the registry to be provided by the Treasury, and for the employment of a Registrar General and assistants were all marked 'approved'.[77] With respect to other proposals Bentham wanted changes, for example instead of requiring officials to take an oath he suggested 'substitute inaugural declaration'.[78] Bentham had long opposed the imposition of religious oaths, both as a requirement for holding public office, and for the purpose of establishing evidence in court. In fact he had thought it wrong to be forced into a lie ever since he had been forced to sign a declaration of allegiance to the Thirty Nine Articles as a young undergraduate at Oxford.[79] Such a lie was subversive to the private conscience of the individual and therefor ultimately subversive to public

morality.

Another clause of the Bill stated that the grantor of an equity of redemption was not to be considered as deriving his title under the Mortgage Deed. The modern mortgage by way of legal charge did not exist before the Law of Property Act 1925. At the time the bill was drafted mortgages could take one of two forms. One was mortgage by devise. This was the method by which the whole estate was conveyed to the lender as security for the loan. On repayment the property was reconveyed to the borrower. The other method that was in fact in general use was for the borrower to grant a long lease to the lender. The lender then granted a sub lease to the borrower for a rent. Eventually by the eighteenth century equity had intervened to assist a borrower, whose interest became known as the equity of redemption. This equity of redemption was seen as so important that it was treated as an estate in the land. This was done in order to assert the main purpose of a mortgage which was to borrow money on the security of land, not to pass the land to the lender.

A note in George Bentham's hand pointed out that the grantor's right must depend on the mortgage deed, because unless there was such a deed there was no equity of redemption. This is logically correct, but the framers of the Bill were trying to ensure that where land was conveyed as security for a loan, equity did not create an estate in land. Bentham, or possibly George, wrote that the regulation was intended to obviate the fiction of the

whole estate passing. But instead of employing a fiction the whole thing should be abolished and the form of mortgage deed altered.[80] George Bentham played a larger part in Bentham's writings on registration than has been appreciated, writing a pamphlet on a 'Registration Bill' which he distributed to several people, for example Charles Butler.[81] He also corresponded with Peel on registration,[82] and George's role is examined in Appendix 2.

Bentham and Humphreys had both drawn up mortgage deeds. Humphreys in his book,[83] and Bentham in his review of Humphreys' book,[84] where he set out both his deed and Humphreys' deed. Bentham suggested that the mortgage be called a land pledge, because the term mortgage was understood by no one. He believed that a pledge of movable property should be in the same form as a pledge of jewels at the pawn brokers. His form is certainly clear and concise with no legal fiction involved. But the provision for repayment, apart from naming a repayment day and the rate of interest, is interesting. The receiver of the rent from the land was to be constituted a trustee. His duty was to deliver either the money on the appointed day to one of the parties, or the land to the other party in case the borrower defaulted. It is not clear who would be the receiver of rent from the land, but it is an interesting use of the trust device in a commercial context.

On the whole the comments Bentham made on the Bill

were of a detailed and practical legal nature. In fact one could say far more so than his answers to the second set of questions on registration from the Commissioners. For example, commenting on the plan in the Bill to stop all business in the existing Middlesex and Yorkshire registries, Bentham wrote that the aim of transferring all business to the General Office by the end of the year was quite impossible because it would not be possible to accomplish the task so quickly.

Bentham wrote that the Commissioners aims of securing title against suppression of deeds whether by design or accident was accomplished by their plans, and title secured against extinction by the subsequent acts of third parties. Titles would be simplified and expense lessened.[85] But he queried how registration was actually to be effected.[86] There could be problems in connection with the mechanics of registration under different heads, and of prior title, and he wrote

> The arguments here given afford additional reasons in favour of indexing the registers according to the parcels of land forming the subject matter of registration and not according to prior titles or heads.[87]

As was noted above, a few of the comments are initialled GB, so George Bentham must have worked with Bentham on producing this commentary on the Bill, most of which seems to have been approved. There is no indication of the use that was made of the comments. Perhaps they

were sent to the Commissioners, or to Campbell, or perhaps Tyrrell was the recipient. Bentham certainly conferred with Tyrrell during his work on registration. Sometimes Tyrrell's hand written comments appear on Bentham's manuscripts,[88] and sometimes a note written by Bentham refers to Tyrrell.[89] A fair copy of the comments on the Bill, expanded into numbered and comprehensive paragraphs, was prepared by George Bentham entitled 'JB on Registration' dated April 1831, so it would seem that the work Bentham did on the Bill was for more than his own use as a draft for other work.

9

To conclude the discussion of the work that Bentham undertook for the Commission on registration, some remarks should be added about an issue that was in fact not extensively dealt with in the Second Report on registration, but in the First Report. This was the limitation of actions with respect to land.

As we have noted, the Commissioners had set out in 1829 with the intention of reforming the transfer of land, as they announced in their First Report. They believed that once the object of transactions respecting land had been accomplished, and the required estate or interest in land actually created, then English land law came 'as near to perfection as can be expected in any human

institution', except in a few comparatively unimportant particulars.[90] Therefore there was no need to make any radical changes in the system of tenures, or the ability of landowners to secure their estates to their descendants in settlements.

However certain aspects of the unreformed law did cause concern. An example was the working of what is known as the rule against perpetuities. The law of perpetuities allowed property to be settled for a life or lives in being. Since the Duke of Norfolk's Case[91] in 1685, it was settled that a devise that was bound to take effect, if it took effect at all, during the life of a named person, was valid. By 1736 it had been settled that this time limit for vesting the devise could extend beyond the life in being by twenty one years, in other words the length of a life plus a minority.[92] Contemporary opinion was worried about the implications of this rule, particularly after Thelluson's case in 1805 had shown that the rule applied to accumulations of capital as well as settlements of land. It was possible for a direction that money should be accumulated for a life and a minority still be valid.[93] This meant that property could be accumulated for most of a century.

But as Megarry and Wade point out both the rule against perpetuities, and the rule against accumulations,[94] were essentially rules against remoteness of control over property and not remoteness of vesting.[95] The concern expressed was not so much that landowners

could tie up land in settlements, but that they could continue to exert control over the land so long after their death. It was this aspect that was seen as undesirable, the 'control of the dead hand', or control 'from beyond the grave'. Money and land could be kept from rightful heirs, and be kept from the market and kept from any use or enjoyment, while the unfortunate possible beneficiaries waited out the years to see which one of them would outlive the rest and so inherit all. There was great sympathy for Thelluson's heirs.

Therefore the concern about the validity of directions for lengthy periods of accumulation was not necessarily seen as part of the problem of settlements. So the Commissioners did not see any need to interfere with the law respecting settlements, which was seen to be the necessary basis for the English political system, a parliamentary system that compared with other European countries was regarded as the epitome of civilised security, and the guarantor of the rights of Englishmen against tyranny. The fact that it was the possibility of secret settlements that was one of the major causes of difficulty in transferring land, and of insecurity of title, was not sufficient to make the Commissioners re-consider. Instead their answer to the problem of security of title to land was to recommend setting up a land registry.

If title deeds were registered everyone would have

the means of investigating title, all rights would prevail according to priority of registration, the use of outstanding legal estates merely as a device to increase security of title would be unnecessary, and fraud from secret transactions effectively prevented.[96] The Commissioners considered registration to be so important that they devoted a whole Report to a full discussion of it.

But the Commissioners failed in their attempt to introduce their great reform. Registration Bills introduced by Campbell in 1830, 1831, 1845, and 1851 were all rejected by parliament. Land registration was not a subject that excited much public interest. As mentioned in chapter two, no record was even made of the debates in parliament when the Commissioners presented their Reports. But the Commissioners met with opposition that proved too much to be overcome by their carefully marshalled arguments about the benefits to be gained from registering title.

Registration was strenuously and successfully opposed by the Incorporated Law Society, who were under pressure from country solicitors. These country solicitors feared loss of revenue to the city specialist or conveyancing barristers, who would benefit from registration. They claimed that there would be a 'dangerous disclosure'[97] of family arrangements and settlements, which managed to alarm the landowners into opposition to the Bill. Finally rumours circulated which linked the proposal to introduce

registration of land to the first step of a plan to bring in a land tax.[98] J. Stuart Anderson has charted the story of opposition[99] and in the face of this opposition registration could not succeed.

The failure to implement the plan for registration can be seen as a failure of Bentham's proposals for reform. This is not intended to mean either that he initiated plans for registration, or that he was the only advocate of registration, but he was closely associated with the Commissioners plans. As we have seen he undertook much work on registration plans, and made detailed comments on the registration bill that was before parliament in 1831, for either the Commissioners or even possibly Campbell.

But more than this, the failure of the proposal to implement registration was a failure of Bentham's methods of reform. These methods involved a careful survey of the subject in question, and then the collection and analysis of information received. Once these tasks were completed then, on the basis of this informed opinion, reform could be undertaken in accordance with the dictates of the greatest happiness principle. Failure meant that there was to be no reform based on principle, no demystifying of the language of law, no abolition of the dual system of common law and equity, and no codification of property law.

Michael Lobban has claimed the sittings of the Real Property Commission as a key test for Benthamism which

failed, together with the idea of codification.[100] Bentham himself was personally involved and had great hopes and expectations from the Commission, so this was undoubtedly a failure for Bentham but it was also a failure for those members of the Commission and those lawyers who gave evidence to the Commission. Some of these men, including Bentham, had favoured fundamental legislative reform and introduction of a code. Even those who did not want codification were more or less united in their wish to see a land registry in operation. Campbell, the chairman of the Commission, documented his hopes for registration and his frustration at failure in his Autobiography.[101]

But while plans for a general registry failed, ironically another measure proposed by the Commissioners did succeed in alleviating many of the problems concerned with the transfer of land that the Commissioners had sought to eradicate through registration. This was the Real Property Limitation Act of 1833, which Holdsworth describes as 'one of the most important of the Acts which were directly due to the proposals of the real property commissioners'.[102]

The drafting of this statute has been credited to John Tyrrell. It abolished the ancient real actions, except for writs for dower and advowson. But more importantly, it established one standard period of limitation of actions affecting land. This was twenty years. Martin Dockray has carefully documented the intention of the drafter of this statute, and its effect,

in an article that investigates the necessity of retaining the modern law of adverse possession.[103] He suggests that to the usual reasons, such as encouraging plaintiffs not to sleep on their rights, for having a law that allows a mere squatter on land to acquire a title that extinguishes the rights of the paper title owner should be added another. This was the desire to facilitate the investigation of title to unregistered land.[104]

To prove his assertion of the conveyancing objective of the framers of the legislation, Dockray turns to the Real Property Commission and to the Real property Limitation Act of 1833. There is evidence that the intention of the act was to cut down the necessity of making numerous and lengthy searches against all possible owners.

Contemporary opinion accepted without question that the purpose of the act was to facilitate unregistered conveyancing.[105] The need to search title deeds for at least a hundred years has been mentioned, and the result was great expense to a purchaser in legal costs to make the searches, and in the cost of delay and uncertainty to both vendor and purchaser. Dockray credits the Act with succeeding in its objective because after the Act the number of years searched was greatly reduced. Forty years or less quickly became the usual period searched. Therefore statute achieved the Commissioners aims of facilitating and lessening the cost of the transfer of

land.

But the method used by the Commissioners to achieve their aims was the time honoured method of the invention of an ingenious legal device, a fiction. This was the traditional method used by conveyancing lawyers and the courts of the common law and equity. For example from such methods had grown up the device of lease and release to convey land, a device that achieved its object but only indirectly. This time the traditional method of the invention of an ingenious legal device was allied to a successful act of parliament. But it was still the use of a fiction to indirectly achieve what perhaps could have been more directly achieved by registration and codification, in fact by more radical reform.

Bentham thought that a period of limitation should be fixed, although it was difficult to be rigid about this. There should be one proper mode for ascertaining the rights of the contending parties, and one court to hear the case. The principle on the one hand was non disappointment, and on the other 'not holding out a premium on fraud'.[106] He mentioned twenty years as the time after which an action would be barred, and this was the time chosen. This time limit should be the same in every case, following the complication-minimising principle. Time for some one under a disability should run from the time the disability ceased.

Bentham's answers dealt briefly with the main issues in connection with the limitation of actions, but it is

unlikely that he intended the act to take on the significance that it did. None of his answers indicate that he expected the result that Tyrrell presumably did intend in the Real Property Limitation Act. Bentham's answers indicate that he thought that the proposal for registering title would be successfully introduced. Therefore there were some matters that he did not propose to deal with in detail because they were practitioners questions, questions that would cease to be relevant once registration and other reforms were in place.

Perhaps we should not be too quick to condemn Bentham for failing to consider an alternative to registration. He did have good reason for his optimism. Registration was supported by the most influential conveyancing lawyers of the time, and by those like Campbell who were able to exert political influence. There did not seem to be any great interest, let alone opposition, to the measure, although Bentham did correctly warn of the opposition to be expected from lawyers and landowners. He died before Campbell's attempts to bring a Bill for registration before parliament would have to be acknowledged as a failure by the Commissioners. It is only with hindsight that we are able to make the judgement that Bentham concentrated too much hope and effort into registration, and failed to pursue other means of strengthening title.

Notes

1. First Report, p. 5.

2. UC lxxv. 13.

3. View of a Complete Code of the Laws, Bowring, iii. 162.

4. William Twining, Theories of Evidence: Bentham and Wigmore, Weidenfeld and Nicolson, London, 1985, p. 21; Bowring, vi. 205-206.

5. Ibid., p. 23; Bowring, vi. 7-8.

6. Second Report, p. 3.

7. J. E. R. de Villiers, The History of the Legislation concerning Real and Personal Property in England during the Reign of Queen Victoria, C. J. Clay and Sons, London, 1901, p. 3., and Second Report, p. 17.

8. Lieberman, p. 182.

9. Bowring, v. 451.

10. UC xi. 23.

11. UC xi. 201-3.

12. BL Add. MS 33,546, fo. 128.

13. Petition for Codification, Bowring, v. 546.

14. UC lxxvi. 26.

15. Second Report, 1830, Appendix 3, pp. 138-142.

16. UC lxxvi. 120.

17. Second Report, Appendix 3, p. 139.

18. First Report, p. 7.

19. Bowring, v. 466.

20. De Villiers.

21. Sir Frederick Pollock, The Land Laws: The English Citizen, His Rights and Responsibilities, Macmillan and Co., London, 1886, p. 175.

22. Second Report, appendix 3, p. 138.

23. Second Report, Appendix 3, p. 139.

24. UC lxxvi. 120.

25. Second Report, Appendix 3, p. 139.

26. UC lxxvi. 120.

27. UC lxxvi. 121.

28. Bowring, i. 302.

29. Kelly, pp. 85-94.

30. Official Aptitude Maximised, Expense Minimised, pp. 353-358.

31. Ibid., p. 355.

32. I am grateful to Philip Schofield for this understanding of the issues involved in adjudicating rival claims.

33. UC lxxvi. 126.

34. UC lxxvi. 124.

35. Second Report, appendix 3, p. 134.

36. UC lxxvi. 73.

37. Second Report, appendix 1, p. 11.

38. UC lxxvi. 117.

39. UC lxxvi. 118.

40. UC lxxvi. 118.

41. UC lxxvi. 76.

42. UC lxxvi. 119.

43. UC lxxvi. 245.

44. UC lxxvi. 99.

45. UC lxxvi. 268.

46. UC lxxv. 13.

47. UC lxxv. 13.

48. Second Report, Appendix 3. Question 141, p. 142.

49. UC lxxvi. 101.

50. Holdsworth, xiv. 117.

51. Holdsworth, xiii. 64, 132.

52. Hume, p. 229

53. Bowring, vi. 60-61.

54. Bowring, vi. 62-63.

55. Twining, p. 32.

56. Twining, p. 32.

57. UC lxxvi. 104.

58. UC lxxvi. 105.

59. UC lxxvi. 105.

60. UC lxxvi. 106.

61. Bowring, v. 410.

62. UC lxxvi. 107.

63. UC lxxvi. 109.

64. UC lxxvi. 109; he went on to a somewhat scurrilous discussion of the tradition in some households of saying grace before some meals during the day, but not others. Predictably Bentham found no rational basis for this.

65. UC lxxvi. 110.

66. UC lxxvi. 111.

67. House of Commons Sessional Papers, xxviii. 1837-8, 377.

68. UC lxxvi. 113.

69. UC lxxvi. 116.

70. Wills Act s. 9.

71. Second Report, appendix 3, p. 134.

72. UC lxxvi. 387.

73. UC lxxvi. 385.

74. UC lxxvi. 67.

75. UC lxxvi. 67.

76. UC lxxvi. 73.

77. UC lxxvi. 73.

78. UC lxxvi. 73.

79. Bowring, x. 37.

80. UC lxxvi. 75.

81. BL Add. MS 33,546. fo. 485.

82. BL Add. MS 33,546, fo. 124.

83. Humphreys, p. 393.

84. Bowring, v. 398-399.

85. UC lxxvi. 322.

86. UC lxxvi. 317.

87. UC lxxvi. 317.

88. UC lxxvi. 7.

89. For example UC lxxvi. 331: 'To RD and JT. Query whether to omit this next paragraph'; also see UC lxxvi. 27.

90. First Report, p. 6.

91. (1681) 2 Swans 454; (1685) 3 Ch. Ca. 1; H. E. L. vii. 223-225.

92. Stephens v Stephens, (1736) Ca.t. Talb. 228.

93. Thelluson v Woodford (1799) 4 Ves. 227; 11 Ves. 112.

94. The period of time allowed for accumulation was reduced by the Accumulation Act 1800 as a result of Thelluson's Case.

95. Megarry and Wade, p. 300.

96. First Report, p. 60.

97. Cornish and Clark, p. 174.

98. De Villiers, p. 15; see also Offer, p. 30.

99. Anderson, pp. 44-56.

100. Lobban, p. 200.

101. See chapter two.

102. Holdsworth, xv. 176.

103. Martin Dockray, 'Why Do We Need Adverse Possession?', Conv. (1985), 272.

104. Ibid., p. 277.

105. Hodgkinson v Cooper, (1846) 9 Beav. 309.

106. UC lxxvi. 156.

CHAPTER FIVE

RIGHTS IN PROPERTY:

BENTHAM AND BLACKSTONE ON INCORPOREAL HEREDITAMENTS

Bentham undertook three detailed pieces of work for the Real Property Commission, in addition to the more general work of answering questions. One was the plan for a Register of Deeds, examined in chapter three. Another was Bentham's 'tree' of the principles applicable to property, which forms the entire subject matter of the next chapter. This chapter will examine in detail Bentham's work on the substitution of a rational system for property law in place of the historically derived doctrines of tenures and estates.

Traditionally writers on property law often compiled lists of various forms of property. When Bentham wrote, as indeed today, certain kinds of intangible property called incorporeal hereditaments[1] were invariably to be found on lists of real property but more often than not these lists did not include company shares or copyright. Neither did company shares appear in discussions on personal property. Property lawyers were unwilling or unable to accept new[2] forms of property into the traditional categories. Yet shares were growing in importance as a form of wealth holding[3] while a fiercely argued debate was taking place about the nature of a right in copyright. Bentham decided to consider these issues, and between the years 1828 to

1832 undertook an investigation into the intricacies of property law.

Why did he undertake such a vast and complex task in the last years of his life? Did he succeed? Bentham addressed this late work to the Real Property Commission, frequently advising them on the need for systematic reform based on principle and calling for a 'universal jurisprudence'. He wanted to offer a working model of English property law, one that would successfully incorporate real and personal property and newer proprietary interests such as shares in companies and copyright into a unified system of property law.

Bentham was aware that William Blackstone had discussed some of these problems and considered that Blackstone had failed to accommodate traditional and new property law within a rational system.[4] Blackstone's work was not the inspiration for Bentham's interest, but it was important because it provided him with a striking example of the inability of the common law to provide adequate definitions of property. In the course of his detailed work for the Commissioners Bentham moved away from the construct of an historical, essentially feudal, basis for rights in property, and provided instead an outline for a law of property based on rights and obligations. His writing on incorporeal hereditaments provides the key to an understanding of Bentham's concepts of a universal jurisprudence and utilitarian rights and obligations in the context of property law.

Soon after accepting the Commissioners invitation[5] Bentham drew up a programme of proposed work for his own use. On a sheet of paper headed Agenda he listed five different matters he intended to consider.[6] These went well beyond the relatively specific questions on property law that the Commissioners had sent him[7] and is support for the argument that Bentham had two purposes in mind when he answered the Commissioner's call for help and began to answer their questions. One was simply to comply with their requests for information by answering their questions concisely. His other larger purpose, his 'hidden agenda', was to draft rules for a reformed law of property based on utilitarian principles. His work on incorporeal hereditaments should be seen in this latter context.

The first item on Bentham's written Agenda was to 'state the modifications of which the situation of families is susceptible'.[8] The second was to list 'The extent and particulars of the powers which the leading principles prescribe the establishment of', in other words the leading utilitarian principles. The third was to set out a similar list, but by way of contrast this was to be a list of the powers that aristocratic proprietors wanted to establish. The fourth was to draw up a list of the technical terms in use in property law for the purpose of

abolishing them.[9] This is because 'the only terms and phrases proper for the purpose are terms and phrases that belonging to universal jurisprudence will serve for the explanation of the law of all nations' and act as 'the highest language over all nations'.[10] Bentham went on that he could have done this 'long ago' if he had received the necessary encouragement. By this he meant public recognition for his work and attention from government. Instead he had received only discouragement because of 'Interests and interest begotten prejudice irreconcilable to improvement in any shape'.

In addition to the Agenda for his own use Bentham also set out general instructions for the Commissioners on how to proceed.[11] They should give

> in the first place the proper enactments in common language. Then the abolitions which would follow - abolitions of Common Law Rules - then the statutes and parts of statutes to be repealed. Then a list of technical terms and phrases that require to be abolished.[12]

The list of technical terms should be drawn up, preferably by a non-lawyer, then Bentham would look it over. From 'technical locutions' it should be possible to draw up a list of 'correspondent appropriate locutions'.[13] The revised list would be 'a vocabulary of universal jurisprudence...the vocabulary equally applicable to every form of government'.[14]

2

What did Bentham mean when he wrote about 'a vocabulary of universal jurisprudence'? He had long worked on plans for codes of law,[15] but 'codification of the law' and 'universal jurisprudence' are not interchangeable concepts. He had discussed his concept of universal jurisprudence elsewhere, as part of his work on legal vocabulary, codes of law and an analytical system of law.[16] These matters had long been of interest to him and are undoubtedly the central concerns of his work. There is moreover a connection between these apparently separate activities. Early nineteenth-century English law lacked both an adequate analytic vocabulary and 'clear substantive rules' or concepts. Therefore in order to create his code of law Bentham had at the same time to consider legal vocabulary, methods of classification and principle.[17] In the 1780s Bentham had explained that he wanted to lay the foundation 'for the plan of the complete body of laws supposing it to have been constructed ab origine, according to a method of division grounded on natural and universal principles',[18] Once language and logic had been clarified, because 'between what is commonly called logic and what is commonly called grammar there seems to be no clear line of separation',[19] then

> a sort of school might be established; a school, of which the business should be to teach, not the art of

> forensic disputation for the emolument of individuals, but the art of legislation for the benefit of empires.[20]

He argued that a model of a complete code of laws could be formed so that students of law from various nations could meet together under one roof, as was often the case in schools of medicine, or the sciences. Then from a general model it would be possible to frame complete codes of laws that would be suitable for the particular 'manners, sentiments and exterior circumstances of each respective state',[21] because like Montesquieu, Bentham considered the laws of a state should reflect the nature and interests of its people.[22] Writing in 1826 he explained that universal jurisprudence was 'in law what is common to all nations. In the matter of law - the ideas are common, not the signs'.[23]. For example the term 'command...designates the radical idea of jurisprudence'[24] and is understood by every child.[25]

Therefore for property law as much as any other branch of law, a complete code of law differed from universal jurisprudence in that the latter concerned an abstract term such as 'right' rather than specific rules of law. In 1830 Bentham's writings on incorporeal hereditaments show how Bentham applied these ideas of universal jurisprudence to property law.

During 1830 Bentham together with John Tyrrell, a leading conveyancer and a Real Property Commissioner, devised a list or table of incorporeal hereditaments of property. Bentham's immediate purpose in drawing up this list was to answer the questions sent to him by the Real Property Commissioners.[26] They were concerned about the status of a range of rights in land, and in particular with the position of such rights in the event of an action for possession of the land by adverse possession, or the extinction of such rights by statutes of limitation of actions.[27] A successful claim to land by adverse possession allows a squatter on land to gain a title, extinguishing the title of the paper or legal owner to the land. A statute of limitation of actions prevents ancient, long-forgotten, legal claims being brought against someone presently in possession. The Commissioners' purpose in investigating these questions was twofold, to find ways of making title to land secure, and to make conveyancing easier and less expensive. There was a degree of urgency in addressing these questions because of the continuing enclosure of open fields, common land and waste land by private and public acts of parliament during this period.[28] The enclosure movement made precarious many traditional rights in common land, for example grazing

animals. One of the Commissioners' questions concerned the problem of incorporeal rights acquired by 'prescription', which is by the legal fiction of a presumed grant of the right. They wanted to know if the time used to calculate the 'long usage' necessary to establish a presumed grant could be limited to enjoyment for a specific number of years instead of having to prove long use running from the coronation of Richard I in 1189. At common law, if long use could be shown then a rebuttable presumption arose that there had been such a grant. But if a fixed period of years was to be substituted, was it still to be necessary to establish whether a grant could really have been made or whether it would have been an impossibility?[29] Other similar questions sought answers for the acquisition of such rights as profit a prendre, easements, and other incorporeal rights.

Bentham answered that for an answer to all these questions a list of 'incorporeal subject matters of property' should be drawn up.[30] Following this, Bentham and John Tyrrell prepared a list or table of incorporeal hereditaments. First Tyrrell supplied Bentham with a detailed list of incorporeal property, probably drafted by his clerk, which Bentham used as a basis for his own list. Bentham's correspondence with Tyrrell mentions progress with the work,[31] and there are comments on Bentham's manuscript work in Tyrrell's hand.[32] The finally resulting table of incorporeal hereditaments is dated August 17th 1830. There are two copies, one by Bentham,[33] and a second

in a copyist's hand which is incomplete and contains minor inaccuracies.[34] Each copy consists of large single sheet divided into two. The left side is headed 'Tyrrells List', and underneath are listed in columns the main subject matters of incorporeal property, such as manors or signories, franchises, sporting rights, rents, commons, easements, advowsons, tithes and corodies. These main subject areas are broken down into subdivisions. Under commons, for example, are rights of pasture, estover, turbary and piscage. Opposite Tyrrell's list of incorporeal property is set out Bentham's work on it, in tables or lists, under the headings of 'Subject matters-incorporeal' and 'Correspondent Subject-matter corporeal'. What was the purpose of these detailed tables?

There is a note pinned to the page in Bentham's hand stating,

> Order transposed; and, from each incorporeal right, reference made to the corporeal subject matter, operated upon, in some circumstances, by the exercise of the right; and in other instances by the inhibition of it.[35]

It is not the list prepared by Tyrrell which is of interest but the use Bentham made of it. Lists such as Tyrrell's were standard in a discussion of property and they appear in modern texts on land law.[36] Bentham used the traditional list of incorporeal hereditaments he had drawn up with Tyrrell to attack the legal fiction that

calls them land, and showed, as we shall see, that really they owed their existence to an accepted legal right. Because of this he was able to include shares in joint stock companies[37] and other forms of property that did not fit into traditional schemes.

4

Bentham was familiar with Blackstone's Commentaries, which gives a similar list of ten different kinds of incorporeal property,[38] and he had commented on Blackstone's failure to include certain kinds of property. The Commentaries was divided into four Books, Of The Rights of Persons, Of The Rights of Things, Of Private Wrongs and Of Public Wrongs.[39]The second book, on the Rights of Things, divided property into real property and personal property. In 1776 Bentham had criticised Blackstone's attempt to fit the common law into a civilian framework,[40] and he was very aware of the deficiencies and omissions in Blackstone's work on property. When he drew up his own list of incorporeal hereditaments for the Real Property Commissioners Bentham also set out a list headed 'Blackstones Incorporeal Hereditaments'. Under this heading appears the traditional list of advowsons and corodies. There then follows another heading, 'Things Incorporeal not in Blackstone'. Under this Bentham listed

1 Money sums of

2 Shares in a Joint Stock Company

3 Government annuities

4 Miscellaneous services of all sorts...'[41]

In this manner Bentham underlined the difficulty Blackstone experienced in incorporating such common forms of property as shares in a company into a historical model of property laws.

There was a pressing need to bring shares in companies within some recognisable model of property law because the early 1820s had seen an outbreak of speculation in shares not seen since the early eighteenth century. In 1720 the Bubble Act had put an end to hectic speculation, but in doing so precipitated a stock market crash which distorted the development of English company law for about a century. The corporate form was regarded with extreme suspicion as a vehicle for deception, wild schemes and the very 'antithesis of the solid and respectable'.[42]

At the beginning of the nineteenth century external pressures combined to demand a review of the law relating to corporations. The war, raising government loans through Bank of England stock, the need to accumulate large amounts of capital to fund the development of canals and the railways, the London Stock Exchange's position as a regulatory institution, all these factors led to an outbreak of company promotion and general speculation.[43] A slump in 1808 was considered to have been caused by prosecutions under the Bubble Act.[44] Confidence was

restored but a boom in trading in shares in 1824-5 was again followed by a slump because of renewed prosecutions under the Act.[45] The underlying problem was the failure to enact legislation allowing a company to incorporate with limited liability, but failure to repeal the Bubble Act compounded the difficulties. This Act purported to forbid trade in the shares of unincorporated associations which added to the general uncertainty about the legality of any issue of, or trading in, company shares.

Bentham did not address all these issues about company shares but the fact that he included the shares of a joint stock company at all on his table of incorporeal hereditaments is evidence that he was aware of the problems caused by the growth in company promotion and trading. It is also evidence of Bentham's determination to produce a comprehensive scheme of property law. He used an analytical approach to the problem of incorporating shares into a scheme of property. Once all incorporeal hereditaments are properly understood as rights of inhibition or permission, then whatever form they take they can be incorporated into a rational framework of property law. 'The subject matter of a right [is] susceptible of numerous diversifications'.[46] Referring to a bill of exchange passing from hand to hand Bentham wrote that all it was necessary to know was 'the causes of commencement and cessation of [the] right.'[47]

Blackstone had failed to achieve a rational scheme because despite his frequent references to Roman law and

to Locke, Blackstone's property laws are only understandable within the feudal context. He wrote that it is not possible to understand English property laws 'without some general acquaintance with the nature and doctrine of feuds, or the feudal law.'[48] In contrast Bentham applied to property law a theory of rights he had outlined in 1780 in An Introduction to the Principles of Morals and Legislation' and developed in 1782 in the work now known as Of Laws in General. He had written that there are two different kinds of rights, permissive rights that owe their existence to the absence of legal obligation, and conversely rights that owe their existence to an obligation imposed by law, which are therefore rights to 'services' owed by others. These latter are rights to have an action performed or not performed by another as the case may be.[49]

Returning to Bentham's table, each incorporeal right in fact consists of a benefit in or over some other corporeal property. He wrote that the burdened property can be affected by the exercise of the right, or by an inhibition. As an example of an exercise of a right Bentham mentions easements, which are certain rights over another's land. Bentham names these 'Fractional positive rights of occupation' and includes, together with rights of way, rights of water and commons of pasture and gleanage. He also includes mineral rights. Here appears an objecting note on Bentham's manuscript in Tyrrell's hand,

saying that mines were considered corporeal. Presumably Bentham's point was that the right to extract minerals from another's land was incorporeal.

Bentham gave an explanation of rights to light as an example of an inhibition,

> Now this is but one instance of the class of rights which may be denominated Rights by Inhibition or say interdiction; the benefit having for its efficient cause a service of the negative kind rendered by the party burdened: say oneratee or oneree.[50]

The service owed by the burdened party was to abstain from blocking the 'benefitee's' light by building, or any other way. He wrote that a right to light was one of the category of incorporeal rights known as easements.[51] The correspondent corporeal or immovable property to this right is 'anothers edifice' or 'possibly land: viz by means of lofty vegetation' which would interfere with the right to light. So the owner of an easement of light could stop the obstruction of the light, because the true nature of an easement was a right of inhibition or 'interdiction'.

5

Blackstone's treatment of personal property was defective for the same reason as his treatment of real property. In both property is defined by the history of its development. Accordingly Blackstone mentions that

personal property has not been as highly esteemed by the law or had as much regard paid to it as real property.[52] He divides personal property into chattels real and chattels personal. The latter are things movable.[53] As examples Blackstone includes jewels and garments, but much of his discussion of personal property concerns animals. These, of course, are the traditional movable property of the landed gentleman, regarded as less important than real property.

In contrast Bentham's treatment of personal property is far more radical. Bentham thought English law confused real and personal property, and that the distinction between real and personal property should be abolished, particularly in relation to debt and inheritance. He wrote that 'manor' is the denomination given to an actual subject matter of property, and to the interest in that property that the owner holds.[54] In other words, the term covers both immovable corporeal property, and incorporeal property. 'This combination is productive of confusion in the ideas presented by it'. Instead all the modifications to which property is susceptible should be considered, and then the interests in them.

Bentham referred to Roman Law, which distinguished between the subject matter of property and an interest in that subject matter because it is from that law are deduced the 'several distinctions by which subject matter of property are distinguished in the first place into

things and persons, things into corporeal and incorporeal, corporeal into immovable and immovable'.[55] But in English law 'these objects are confounded'.[56] To both an interest in immovable property (for example a lease) and a 'mass of movable subjects' the same term is applied indiscriminately, which is personal property. Similarly the term real property applies to 'not only an interest in an immovable subject but ...an interest in movable subject matters', for example an heirloom, which is treated as attached to the immovable subject matter.[57] In this way the language of the law reflected the conceptual confusion over what was a subject matter of real property and what was a subject matter of personal property.

6

It was because Blackstone's definition of real and personal property was historically derived that he had difficulty dealing with certain intangible forms of property. For example he did not treat copyright as personal property. Instead claiming the authority of Locke on acquiring title to property by occupancy and personal labour, Blackstone treated copyright as a right acquired by occupancy.[58] Neither are bills of exchange or promissory notes, 'paper credit' as Blackstone calls them, considered to be personal property but they are mentioned in a chapter on acquiring title by 'Gift, Grant and Contract'.[59] Blackstone's treatment of personal property

included none of the newer forms of property. On the contrary, his 'whole account of personal property, with its discussions of the problems of the beekeeper and the legal position of partridges in a mew, smells of the countryside'.[60]

Bentham had examined the idea of copyright as a proprietary right in IPML in 1780, in connection with his discussion of offences against what he termed 'condition', which is civil status such as that belonging to rank or profession. Here Bentham said that the exclusive privilege or monopoly conferred by 'copyright' was considered an article of incorporeal property, rather than for example condition, probably because the chief value of it arises from it being capable of being a source of property in the more ordinary sense of the word, such as money.[61] In this way Bentham attempted to rationalise the apparent arbitrary but really historical categorisation of incorporeal hereditaments as real property.

He returned to this point in 1830, mentioning copyright in the context of his table of incorporeal hereditaments. Rights to certain incorporeal property could consist in the benefit of the exclusive right to deal in a certain way with 'all things of a certain species'.[62] In such a case 'efficient cause of title' could be by '1. Inventorship 2. Fabricatorship 3. Vendorship'. So one could deal with a 'thing' by fabrication, or by 'vendition' (as Bentham termed it), or

by loan.[63] Sometimes the subject matter of property was an 'operation', and could be dealt with by means of performance. Here Bentham mentioned exhibitions of all sorts, theatrical 'exhibitions of the production of words', sculpture, and didactic 'instructional discourses'. Then he added: 'Note, every operation susceptible of absolute inhibition is so (susceptible of being) limited and modified by special exemption from (absolute inhibition): viz license'.[64] This is a very clear discussion of the rights belonging to all those who created property in some way, whether by physically making it (or 'fabrication' as he called it), or by inventorship. This latter could presumably refer to movable tangible property, but Bentham also mentions matters that we would consider to be capable of existing as intellectual property, protected by copyright, for example authorship of plays or 'instructional discourse'.[65]

There is no mention of such definitions of property in the report of the Real Property Commissioners, and the subject was not discussed by James Humphreys,[66] or in the work of John Tyrrell[67] although at the time rights to intellectual property were the subject of fierce debate and legal battles.[68] Copyright in published works did exist, but the extent to which it offered protection to authors and booksellers was not settled. The Copyright Act 1709 of Queen Anne had attempted to regulate the position by enacting that an author, or bookseller, had a right for fourteen years in the work after publication. After this

if the author was still alive then he had another fourteen years of right in the work. But a number of issues were left unresolved. For example, what protection did an author have before publication? Was there a common law right that subsisted during the statutory period? If so, was an author still protected after it ended? If a common law right did still exist then did it confer a limited or a perpetual right on the author? The battle was fought out between the stationers, mostly in London, who argued for a perpetual natural right of property in books, and the country booksellers, often Scottish, who wanted limited copyright. The arguments were not confined to lawyers, Dr. Johnson opposed perpetual rights on the grounds that although an author may very well have a perpetual metaphysical right of creation, it was for the general good of the world that it should not be upheld.[69]

It can safely be assumed that Bentham would not have been sympathetic to the notion of perpetual, natural rights in anything. But he would have been aware of these arguments because he followed the work of Lord Mansfield who heard many of the leading cases and favoured perpetual rights.[70] Also Bentham would have seen some of these issues discussed in Blackstone.[71] There is no doubt that Blackstone had made an attempt to widen the range of property discussed at a time when most discussions of property were restricted to land, interests in land, and money in so far as it was to be regarded as a debt that

could be charged against the debtors land. He was ultimately unsuccessful because of the limitations he imposed on himself by confining his discussion to a historically derived definition of property.

Further legislation was passed in 1814, and then 1842, extending the statutory period of protection and statutes were enacted during this period that protected certain trades, for example the Engraving Copyright Acts of 1734, 1776, 1777 and 1836. There was also an Act of 1833 which conferred a use right on the performance of dramatic art, and, interestingly, a Lectures Copyright Act of 1835. Bentham made mention of both dramatic art and public lectures in his work on rights in property so he was aware of the issues and he may have been aware of the impending legislation. Patent law, which protected 'inventorship' as Bentham termed it, was also undergoing change. There was litigation in the late eighteenth century about the right to enforce patents, such as R v Arkwright[72] A parliamentary committee looked into the issue in 1829[73] but no legislation resulted until the Patent Law Amendment Act 1852, after Bentham's death, although he may have been aware of the work of the Committee.

Bentham's table of incorporeal hereditaments contains some surprising entries. For example immediately after comments on rights to light Bentham suddenly and unexpectedly entered into a discussion on the tort of nuisance, which he defined as a juridical term in familiar use to describe those operations guarded against by house owners in towns. Of course the connection that exists in this context between the tort of nuisance and an easement, such as a right to light, is that someone who found that his easement of light has been infringed could sue for the interference with the easement, which is an interest in land. Alternatively they could sue in tort, because the tort of nuisance makes actionable an interference by another with the enjoyment of land.

Bentham's table made a still more radical departure from traditional land law by including in its discussion of nuisance 'maleficent acts' against the body or mind of another.[74] Such civil offences against the mind or body or property of another are remedied today in actions for trespass to the person, or goods, or an action in negligence. In contrast the tort of nuisance never departed from its early close association with land. As a result at first sight Bentham's juxtaposition of offences against person and property is surprising and perplexing. But an explanation can be found both in the history of

nuisance and in an examination of Bentham's other work.

Bentham's treatment of nuisance is in accordance with his analysis of the proper distinction between the civil and penal law which he begun in 1780 and completed in 1782.[75] A penal law for Bentham meant any law imposing obligations and sanctions. In the process of investigating the difference between civil and penal laws Bentham found that it was first necessary to settle the question of what an individual law was. What were the different elements to be found in one single complete law? He went on to formulate his imperative theory of law, deontic logic and theory of the individuation of the law.[76] To be a complete law, complete in an intellectual, logical or ideal sense, a law must be the expression of a law maker's volition. This definition of a law is similar to John Austin's imperative theory of law,[77] but is wider because it includes as law general legislative statutes, judicial orders, administrative orders and permissions. A complete law therefore will include both civil and penal elements. The civil law sets out the expository material relating to the lawmaker's will, while the imperative matter is found in the penal code.[78] Once formulated as an expression of the lawmaker's volition each individual law should stand 'complete in itself' and be both clear and comprehensive. One complete law should then apply to one class of acts. So if it should happen that one law conflicts with another law, or an action in question falls within the scope of

more than one law, then it is the legal system that is at fault.[79]

If this theory is applied to the comments on nuisance that Bentham included on his list of incorporeal hereditaments it will be seen that the class of acts here in question are offences against mind or body or property of another. A 'complete' law should include a prohibition against all these offences because Bentham has made the point that a nuisance committed against a property owner may very well interfere with her enjoyment of her land and cause her physical injury at the same time. For example, a factory built close to domestic housing could produce poisonous vapours damaging people, livestock and the land itself. The interference with the enjoyment of the land could be remedied by the tort of nuisance but the physical injury to people could not be pleaded in nuisance. But Bentham saw no reason why an action in nuisance should be limited by its historical development to apply to land alone. Instead, once it is understood as a 'complete law', then it can be applied to that class of acts whether or not they fall within the traditional range of nuisance. In 1826 he had written that the subject matter of a right could be the body, mind, reputation, property or condition in life of the right holder.[80] Bentham's treatment of nuisance can therefore be seen as part of his fundamental reorganisation of the law of property.

Bentham's comments on the tort of nuisance in part reflect its historical development. At the time Bentham wrote the boundaries of nuisance were not settled, and the tort might very well have extended its scope, though it did not. In particular the distinction between nuisance and negligence was confused in the situation where a plaintiff suffered injury on the public highway because of some act of the defendant. A frequent source of litigation was the open cellar door in a pavement. The plaintiff fell through the unguarded door and then pursued the defendant for damages for injuries suffered. This sort of accident could be pleaded as public nuisance, but a series of cases in the early nineteenth century found for the plaintiff in negligence in similar sorts of circumstance.[81] The problem for plaintiffs was most acute in the context of urban growth in the early nineteenth century, when some towns had more than doubled in size within twenty years. With the invention of the steam engine in 1760, industry, which had previously been sited in the countryside near good supplies of water power, moved into the towns.[82] The resulting increased population brought with it a variety of problems including overcrowding, noise, and pollution from sewage and waste which continued to be dealt with in the time honoured manner of dumping it into streams and rivers. The move of industry to the city brought with it

even more fearful problems of pollution from noise, smoke and poisonous chemical vapours. Legislation to control some of the worst effects of the industrial revolution did not begin to be enacted until the mid to late nineteenth century.[83]

In theory it would have been possible for the common law to utilise the torts of public or private nuisance to deal with some of these problems, but commentators have shown that there was a remarkable lack of case law about industrial pollution during the period 1770 to 1870.[84] Then in 1865, in the case of St. Helen's Smelting Co v Tipping,[85] the court held that for nuisance to be actionable the defendant's actions must be shown to have visibly diminished the value of the plaintiff's property and his use and enjoyment of it. So Tipping succeeded in his action for damages and an injunction for the damage to his property from the copper-smelting factory, but obtained nothing for any personal physical injury. So while an action in nuisance was available to the estate owner for damages to property, a property-less town dweller had no remedy in nuisance and none in negligence.[86]

9

To what extent was Bentham aware of, or even remotely interested in, these current legal decisions, 'judge made'

law? The fact that he mentioned nuisance and negligence in the context of land law indicates that he knew about the case law. He certainly also knew about the doctrine of prior appropriation applied by the courts, because this was discussed by Blackstone.[87] In this, if the plaintiff 'came to the nuisance', in other words came to a pre-existing situation, the plaintiff had no cause of action for the nuisance.[88] This doctrine is applicable to rights to light to which Bentham had referred in his discussion on incorporeal hereditaments. Such rights were in issue in the context of new buildings in towns. Bentham would have known two cases, Fishmongers Co v East India Co[89], and Attorney General v Nicol.[90] In the latter, argued by Bentham's colleague and friend Sir Samuel Romilly for the defendant, the court declined to accept that a certain degree of obstruction of the plaintiff's light constituted a private nuisance, for if this were so nothing could ever be built in a city. The court held that such obstruction was not a sufficient nuisance, or reason, to justify interfering with someone's right to build on their own land, and so upheld private property rights.

It could be argued that because he showed a knowledge of contemporary decisions and proposed an extension to the tort of nuisance, Bentham was interested in 'judge made' law. From this evidence it might be said that he accepted the existing common law structure of property law contained in the case law. The reforms he proposed would merely attach to this structure, but would form no

alternative system of their own. Was Bentham therefore, as has been suggested, basically a common law revisionist?[91] Against such a conclusion it could be said that the fact that Bentham was aware of current case-law does not mean that he was content with the common law as a system of law. Bentham worked within the common law, but by doing so he was not constrained or prevented from pursuing his hidden, larger purpose. In property law this was to reveal the true nature of rights in property as a system of utilitarian rights and obligations. Property law would take its place in the civil law, forming part of a code of law coherent in all its parts and comprehensible to all. The existing fictional ideas of incorporeal hereditaments as real property had no place in such a system. Bentham was willing to accept some of the structures of the common law, but not its philosophical basis. A universal jurisprudence would provide the necessary concepts of rights on which to base a rational utilitarian system of property law.

10

What was Bentham's purpose in drawing up his detailed 'elucidations' on incorporeal property? Of course part of his purpose was to answer the Commissioners' questions. He certainly succeeded in another of his stated purposes, which was to extend the discussion of rights in property

beyond the artificial boundary imposed by the legal categories of real property and personal property. A third purpose was to develop the vocabulary of universal jurisprudence for property law.

In his approach to property law Bentham took account of the historical development of the law only in so far as it was necessary to offer explanations for the present state of the law. Unlike the Real Property Commissioners and most of their respondents, Bentham was not interested in perpetuating the 'wisdom of our ancestors' when it came to proposals for reform.[92] This does not mean that he wanted an abrupt and total departure from the past. Quite to the contrary, with respect to property law Bentham emphasised the primary importance of 'security of expectations' over and over again. 'With respect to property, security consists in no shock or derangement being given to the expectation which has been founded on the laws, of enjoying a certain portion of good'.[93]

Because of the importance of securing expectations Bentham wanted the holders of rights to be compensated for their loss. For example, the owner of a fee simple whose copyhold tenant was to be allowed to enfranchise must be compensated.[94] Bentham made his point forcibly when he wrote that 'The actual happiness of existing should not be sacrificed to the supposed happiness of future contingent beings'.[95]

The importance Bentham placed on securing expectations did not mean a reverence for the past when it

came to establishing a basis for reform. Bentham's proposals for reform were based not on historical precedent, but on a detailed conceptual analysis of property law. Such an analysis of property relations would be universally applicable wherever a right to private property exists and for Bentham the right to private property is fundamental to 'civilised society'. By this he meant a society with developed political institutions.

Resting his argument on the right to private property, Bentham addressed the question of what in law actually constitutes a right to property. To answer this he turned to the analysis of rights and duties that he had formulated in the 1780s and applied this to property. In order to do this it was necessary to prepare a list of all misleading, misexpressive technical terms currently in use and these should then be abolished. Only the terms belonging to universal jurisprudence would remain. 'Now Rights, obligations etc these are words of universal jurisprudence-ask any lawyer and Blackstone's Ghost, they will not deny it', but ask what the words mean and 'they will only stare'.[96] Bentham would provide a remedy. His terms of universal jurisprudence would explain the property law of every land and be 'of the highest language of all nations'.[97] This was what Bentham had attempted for the Real Property Commissioners.

Notes

1. An inheritable, intangible right in property, for example an easement or right to light.

2. These forms of property were not 'new' and often had a long history. But they had achieved greater economic significance by the early nineteenth century and there was a need to reconcile them with traditional definitions of property.

3. M. R. Chesterman, 'Family Settlements on Trust: Landowners and the Rising Bourgeoisie,' Law, Economy and Society, ed. G. R. Rubin and David Sugarman, Professional Books Abingdon, 1981, pp. 124-167; Cornish and Clark, p. 251.

4. Blackstone, Commentaries .

5. UC lxxvi. 14.

6. UC lxxvi. 25.

7. For a list of the Commissioners' questions see First Report, Appendix 1, p. 87.

8. UC lxxvi. 25.

9. Bentham was to write on all these matters during the course of his involvement with the Real Property Commission.

10. UC lxxvi. 25.

11. There is no evidence extant that the Commissioners received these instructions.

12. UC lxxvi. 145.

13. UC lxxvi. 148.

14. UC lxxvi. 148.

15. Bowring, iv. 451; Dean Alfrange Jr., 'Jeremy Bentham and the Codification of the Law', Cornell Law Review, iv (1970), 58-77; Terry Difillippo, 'Jeremy Bentham's Codification Proposals and some remarks on their place in History', Buffalo Law Review, xxii (1972), 239-251.

16. An Introduction to the Principles of Morals and Legislation, ed. J. H. Burns and H. L. A. Hart, Methuen, London, 1982, (hereafter cited as IPML), (CW), p. 295; Hart, p. 163; William Twining, 'Reading Bentham', Proceedings of the British Academy, lxxv (1989), 97-141; M. Lobban, The Common Law and English Jurisprudence 1760-

1850, Clarendon Press, Oxford, 1991, p. 156.

17. Lobban, pp. 116-118; Dinwiddy, pp. 48-53; Hume, p. 60, pp. 246-247; Long, p. 222; see also C. K. Ogden, Bentham's Theory of Fictions, Keegan Paul, Trench and Trubner and Co., London, 1932, pp. lxx-lxxi, pp. cxiii-cxviii; Ross Harrison, Bentham, Routledge and Keegan Paul, London, 1983, pp. 47-75.

18. Of Laws in General, ed. H. L. A. Hart, Athlone Press, London, 1970, (CW), p. 232, hereafter OLG; Lieberman, p. 220.

19. OLG, p. 243; see Harrison, p. 52.

20. OLG, p. 244.

21. OLG, p. 244.

22. 'Of Time and Place', Bowring, i. 173; John Cairns, 'Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State', Oxford Journal of Legal Studies, iv (1984), 323; Alfrange, 72-73.

23. UC xxx. 56

24. UC xxx. 57.

25. 'To command is to order is to bid. Two first from Latin, the other Saxon'.UC xxx. 58.

26. First Report, Appendix, p. 87. There is an exact correspondence between these questions and Bentham's sheets of answers in the manuscripts.

27. First Report, Appendix p. 95.

28. Michael Turner, Enclosures in Britain 1750-1850, Macmillan, London, 1984, pp. 16-17; W. R. Cornish and G. de N. Clark, pp. 137-140.

29. First Report, Appendix p. 95.

30. UC lxxvi. 157.

31. BL Add. MS 34,661 fo. 4.

32. UC lxxvi. 6.

33. UC lxxvi 6.

34. lxxvi. 7.

35. UC lxxvi. 6.

36. See Megarry and Wade, p. 813.

37. UC lxxvi. 6. This does not appear on the copyist's table.

38. Blackstone, ii. 20.

39. he Commentaries were an institutional work, following the organisation of Justinian's Institutes. John Cairns, 318-360; Alan Watson, 'The Structure of Blackstone's Commentaries', Yale Law Journal, 97 (1988), 795-821; Lobban, p. 34.

40. 'A Comment on the Commentaries and a Fragment on Government', ed. J. H. Burns and H. L. A. Hart, Athlone Press, London, 1977, (CW), 391-501.

41. BL Add. MS 33,549, fo. 157.

42. W. R. Cornish and G. de N. Clark, p. 246.

43. C. B. Gower, Principles of Modern Company Law, Sweet and Maxwell, London, 1992, p. 31; W. R. Cornish and G. de N. Clark, pp. 246-247; Holdsworth, viii. pp. 192-222; R. R. Formoy, Historical Foundations of Modern Company Law, Sweet and Maxwell, London, 1923, pp. 31-61; Leslie Hannah, The Rise of the Corporate Economy, London, 1983, pp. 8-23.

44. R v Dodd (1808) 9 East 516.

45. R v Webb (1811) 14 East 406; Pratt v Hutchinson (1812) 15 East 511; Josephs v Pebrer (1825) 3 B and C 639.

46. UC xxxi. 72.

47. UC xxvi. 74.

48. Blackstone, ii. 44; see Lobban, pp. 36-37 and Simpson, 'Introduction to Book ii', Commentaries on the Laws of England by William Blackstone, ii. iii-xv, Chicago University Press, Chicago, 1979, ix-xi.

49. Bowring, iii. 159; OLG 57-58; Hart, pp. 162-193.

50. UC lxxvi. 6.

51. UC lxxvi. 6.

52. Blackstone, ii. 384.

53. Blackstone, ii. 387.

54. UC lxxvi. 283.

55. UC lxxvi. 283.

56. UC lxxvi. 283.

57. UC lxxvi. 283.

58. Blackstone, ii. 404-7.

59. Blackstone, ii. 467.

60. Simpson, 1979, xii.

61. IPML, p. 267.

62. UC lxxvi. 57.

63. Bentham had looked at these ideas in 'Official Aptitude Maximised; Expense Minimised', ed. Philip Schofield, Clarendon Press, 1993, (CW).

64. Bentham's emphasis.

65. UC lxxvi. 57.

66. Humphreys, 1826.

67. Tyrrell, 1826.

68. See W. R. Cornish, Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, Sweet and Maxwell, London, 1981; A. Birrell, Seven Lectures on Copyright, Cassell and Company Ltd., London, 1898.

69. James Boswell, Life of Dr. Johnson, ed. Sir Sidney Roberts, 2 vols., Everyman-Dent, London, i. 1960, 486; Birrell, p. 121.

70. See the leading case of Tonson v Collins (1760) W. Blackstone's Reports, 1., p. 300; Millar v Taylor (1760) 4 Burr. 1303; Donaldson v Beckett (1774) 4 Burr. 2408.

71. Blackstone, ii. 405-407.

72. (1785) 1 Webster's PC 64.

73. House of Commons Sessional Papers, iii. 1829.

74. UC lxxvi. 6.

75. IPML, p. 301; OLG, p. 248.

76. M. H. James, 'Individuation of the Laws', Northern Ireland Legal Quarterly, xxiv (1973), 357-382.

77. John Austin, Province of Jurisprudence Determined, ed. H. L. A. Hart, Weidenfeld and Nicolson, London, 1954.

78. IPML, p. 306; Hart, p. 105-126.

79. James, p. 360.

80. UC xxx. 9.

81. Bush v Steinman (1799) 1 Bos & Pul 404; Sly v Edgley (1806) 6 Esp 6; Butterfield v Forrester (1809) 11 East 60; Flower v Adams (1810) 2 Taunt 314; Leslie v Pounds (1812) 4 Taunt 649; Coupland v Hardingham (1813) 3 Camp 398; David v Potter (1830) 4 C & P 262; Proctor v Harris (1830) 4 C & P 331.

82. J. P. S. McLaren, 'Nuisance Law and the Industrial Revolution -- Some Lessons from Social History', Oxford Journal of Legal Studies, iii (1983), 155; W. R. Cornish and G. de N. Clark, pp. 154-158; J. F. Brenner, 'Nuisance Law and the Industrial Revolution', Journal of Legal Studies, iii (1973), 403.

83. For example the Sewage Utilisation Act of 1865.

84. For comments on the courts' compromise with industrialisation see Brenner, 1973.

85. (1865) 11 HL Cas 642.

86. F. H. Newark, Law Quarterly Review, lxv (1949), 480.

87. Blackstone, ii. 402-403.

88. R v Cross (1826) 2 C & P 483; 172 ER 219; Bliss v Hale (1838) LJCP 122; R v Russell (1827) 6 B & C 566; R v Ward (1836) 4 Ad & E 384.

89. (1752) Dick 163; see Blackstone, ii. 402.

90. (1809) 16 Ves 338.

91. Lobban, p. 145.

92. Bentham, The Book of Fallacies, John and H. L. Hunt, London, 1824, p. 69.

93. 'Principles of the Civil Code', Bowring, i. 309.

94. In fact this reform proved too much for the Commissioners, and had to wait until 1925.

95. UC lxxvi. 27. See also Kelly, 1990, pp. 174-180.

96. UC xxxi. 64.

97. UC lxxvi. 25.

CHAPTER SIX

THE REAL PROPERTY TREE

Bentham's real property tree, discovered amongst his unpublished manuscripts at University College London, provides a conclusion to Bentham's work on the principles of property law. Looked at alongside Bentham's earlier work it will be seen to be a completed working out, or systematisation, of some of the ideas that Bentham had formulated first for Of Laws in General in 1782, and secondly for the Civil Code, which he worked on at various dates between 1786 to about 1828. In these works Bentham had set out his ideas on the nature of proprietary rights and obligations, and had attempted a reconciliation of the concept of a right to private property with plans for distributive justice and an increase in equality of ownership. All these concerns can be recognised in the real property tree.

The real property tree, which Bentham completed in 1830, was his last work on the principles of property law. It was also the most comprehensive because it drew on his earlier theoretical ideas on property law and in addition reflected on the substantive work on property law that Bentham was undertaking for the Real Property Commission in the late eighteen twenties and early eighteen thirties. The Real Property Commissioners had not asked Bentham, or, as far as it is possible to tell, any other respondent to

their questionnaires, to provide them with a comment on first principles of property law. As we have seen, this was not their main concern. Despite this Bentham addressed the work to the Commission. But although the tree appeared to have been created for the Commissioners and it purported to be for their use, it will be seen that it was really a part of Bentham's hidden agenda, to prepare and present the Commissioners with a utilitarian scheme for property law reform.

In this chapter I intend to address several issues raised by Bentham's intriguing tree of real property principles. First I will examine Bentham's other writing on real property in order to see how Bentham relied on and incorporated his earlier theoretical work, and then I will show that it was the stimulus provided by the Real Property Commissioners evident lack of guiding principle that led Bentham to draft the tree. Why should Bentham have chosen to set out his utilitarian principles in this particular form rather than any other? In fact such schematic or diagrammatic representations of information have an ancient history, and I will show that Bentham was aware of their existence and that he had used such diagrams in the past. So the real property tree should be considered as an example, possible the best example, of Bentham's attempt to provide the Common Law with an analytical methodology, which together with his analysis of language, would aid the utilitarian legislator in drafting utilitarian codes of law. Finally in this chapter

I will ask whether in drafting the real property tree Bentham succeeded in his objective of providing the legislators with an analytical device with which to take the first steps necessary to reform the law of real property.

1

Bentham had completed detailed work on property law in the early part of his life, in Of Laws in General and the Civil Code. The Civil Code was written at various times, although not published until after Bentham's death by Bowring in 1839.[1] The editor was Etienne Dumont who informs us in a brief footnote note[2] that he edited the work from the Traites de Legislation, and from original manuscripts left by Bentham. 'In Mr. Bentham's manuscripts,' he wrote[3] 'there are frequent references to the Laws of England'. But, he continued, for the sake of clarity he has omitted some of this material and developed other parts. Dumont's actions in selecting manuscripts probably would explain one of the more puzzling aspects of the Civil Code, which is the sudden inclusion of fairly detailed, and in some ways standard, material on acquisition of title to property in Part II[4] after a more general theoretical discussion of rights and obligations in Part 1. It was traditional at the time to begin a legal treatise or book with some discussion of the philosophical

basis for the particular rules of law that were to be set out before the reader. Blackstone had done so and it was Blackstone's 'Introduction' to his Commentaries that had so angered Bentham because of its claim that the laws of England were based on natural law. It could be argued that Bentham was following in this tradition of legal writers but nevertheless because the theoretical discussion in the Civil Code far outweighs any substantive legal rules the balance between moral philosophy and legal rules is not the usual one.

The Code begins a discussion of rights and obligations, and then main object of the legislator planning the civil law, which is securing the happiness of the body politic. This is followed by a lengthy discussion on the subordinate objects for the legislator, ensuring subsistence, abundance, equality and security. 'The more perfect the enjoyment of all these particulars, the greater the the sum of social happiness'.[5] It is in Part II that Bentham addresses problems of title to property at length, and the discussion is not theoretical. For Bentham title to property is actual possession. In some ways Bentham's work on acquisition of title to property in the Civil Code is a traditional exposition. For example the problem caused by water leaving land. To whom does this new land belong? Blackstone had discussed the doctrine of accretion[6] and similar discussions can be found in modern texts.[7] Although Bentham's discussion may be traditional in the choice of topics to discuss he differed from others

by grounding his support for the doctrine of accretion on the non-disappointment principle. The owner of adjoining land will have expected that the new land will be added to theirs and the new land could not be reached without encroaching on theirs. 'They only can have formed any hope respecting these lands, and previously considered considered them as belonging to themselves'.[8]

Although Of Laws in General was completed in 1782 it remained unknown among Bentham's papers until correctly identified in 1945 by Professor Charles Everett. The present edition of the work, edited by H. L. A. Hart in 1970[9] made an interesting change to the 1945 edition. Hart removed the work on property law principles from the main body of the text and instead set it out in an Appendix.[10] Hart gives as his reason for doing so the fact that he believes that these pages were in fact part of an earlier draft of chapter xvi of An Introduction to the Principles of Morals and Legislation, completed in 1780, and not part of the last chapter of Of Laws in General, as the earlier editor of the work, Charles Everett, had thought in 1945.[11] In Chapter xvi of IPML, the Division of Offences, Bentham had set out the classification of offences against property. Some time later he developed some of this material on property, particularly that on incorporeal property and trusts, but he did not include it in IPML, even though it bears a clear relation to this chapter. Instead the work on property law lay among Bentham's

papers, and is now included as an Appendix to OLG.

Hart mentions in a footnote that in 1826 Bentham returned to this early work on property law, marking one of the manuscripts with the date, 2nd June 1826.[12] It was at this date that Bentham began his final work on property law, so this can be considered as evidence of his intention to utilise his earlier, theoretical, work on property law in addressing questions of substantive property law, and of the continuity of his thought on property law. It was in 1826 that Bentham began to work on property law again, writing a review of James Humphreys' book on property law for the Westminster Review. He had developed his theory of utilitarian rights and obligations in 1782 for OLG, and it was to this work that he then returned in order to apply the principles to substantive property law, first in response to James Humphreys' book and then in response to his wish to provide the Real Property Commissioners with a complete utilitarian scheme of property law.

2

Even if Bentham did not prepare the real property tree in response to a direct request from the Commissioners, he undoubtedly had the Commission in mind when doing so. As we shall see he addressed his preliminary remarks on the tree to the Commissioners and it was to them that he announced its creation. What

prompted Bentham to do so was his disquiet about the total lack of principle in their proposals for reform. He had read the Real Property Commission's First Report in 1829 and had prepared written comments on it, criticising the Commissioners' failure to provide any rational basis, or reasons based on principle, for the reforms that they proposed. It is not known whether Bentham made these comments for his own use only, or whether he sent a fair copy to the Commission. Perhaps alternatively the comments were for use in the work he was about to undertake with John Tyrrell.

In the period following the publication of the Commissioners' First Report Bentham frequently reiterated his concern about their lack of any principle on which to base their reform plans. For example in August 14th 1829 he addressed the Commissioners, noting that[13] their Report had indeed mentioned principle, and so he would have thought that such principle should then guide their practical reforms. But even though he had looked carefully he had not been able to find any such thing set out in the Commissioners' Report.

The comments Bentham made about the Commissioners' lack of guiding principle illustrate aspects of Bentham's own understanding of the nature of the working of the principle of utility in relation to all law in general and property law in particular. It is also possible to see certain well documented problems that Bentham had

encountered in formulating the principle of utility at the time also making their appearance in property law. For instance on the 19th December 1829 Bentham again commented on the need for some guiding principle to underlie their deliberations, 'Quere the Rationale of these Propositions?' he wrote in a document on the Commissioner's 1829 Report,

> or is the law to be considered as a matter of taste. Standard of good taste, as in case of soups and sauces, the taste of those who make it. The Greatest Happiness of the many? of the few, of the one? or of none?[14]

Here Bentham questioned whose interests, expressed as happiness, the Commissioner's had in mind when proposing reform measures. Was it the interests of the majority of people, the minority, or in no ones interests? They should make this explicit. At about the same time that Bentham wrote this he had written an article in which he discussed the problems he had recently discovered with his original formulation of the principle of utility, 'the Greatest Happiness of the Greatest Number'.[15] He wrote that

> Some years have now elapsed since, upon a greater scrutiny, reason, altogether incontestable, was found for discarding this appendage.[16]

Bentham wrote that he was not prepared to accept that the happiness of a simple majority of people, say 2001 out of a total of 4001, could justify the sacrifice of the happiness of the remaining 2000. Rejecting this position

Bentham reformulated the principle of the 'greatest happiness of the greatest number' to be instead simply the 'greatest happiness principle'. It seems clear that Bentham had in mind these problems of how to formulate the greatest happiness principle when he considered the Commissioner's Report, and when he queried in whose interests the Commissioner's intended reforms were to be made.

Later Bentham returned to the same theme of the Commissioner's lack of underlying principle, writing

> Excuse me gentlemen but as yet it seems to me that for want of this leading principle you have been building without a plan -- wandering in a labyrinth without a clew -- shooting in the air without a mark to aim at. 'Give a reason of the faith that is in you'.[17]

Eventually, shortly after writing this, Bentham prepared some 'Suggestions' for the Commissioners to help them make good their deficiencies in principle for the reform of property law. 'On this occasion the question is what it is desirable should have place in regard to real property'. His starting point was that the Commissioners should make such arrangements as would on each occasion be productive of the greatest happiness to all concerned. The only way to determine this was to observe existing arrangements for real property and then consider how far they appear calculated to produce the greatest happiness. Defects in the existing laws would then be obvious and

reform could follow from this. This time Bentham explained the greatest happiness principle as meaning the principle that would allow the production of the greatest pleasure with the least pain, 'so the greatest unhappiness is the greatest pain with the least pleasure'.[18]

However the problem was how to achieve this through the medium of the law. 'Pleasures and pains are empty sounds when composed of individual sensations' he wrote in the same manuscript, but 'in truth law cannot act without producing pain in the shape of constraint or restraint'. It is not possible ultimately to know what gives another individual pleasure, 'To administer pleasure in a direct way belongs only to the individual himself -- laws can only place the means within his reach'. So the legislator's task is to make the calculation of pleasures and pains necessary to achieve the greatest happiness, and then to create utilitarian rules of law. The individual can operate as he pleases to achieve his own greatest happiness. P. J. Kelly has pointed out that 'the principle of utility works through the institution of law as the means of co-ordinating social interaction and creating the framework within which each individual can pursue his own conception of well-being'.[19]

As part of his plans for preparing the utilitarian principles underlying the law of property Bentham addressed the Commissioners on the question of what constituted a rule of law, starting with the statement 'Axioms Pathological the source of all rules'.[20] By

pathology Bentham meant the study of the passions or emotions, while an axiom is a self evident proposition or first principle.[21] So by this means Bentham underlined his rejection of such traditional concepts as natural or divine law as the source of all laws, including in this case property law, and replaced them with the principle of utility as the universally received or self evident first principle. In contrast, other legal treatise writers, for example William Blackstone, referred to natural law, or divine law as the source of law. So rather than an externally or divinely mandated essential truth Bentham offered a utilitarian philosophy grounded on his psychological theory of pleasures and pains.[22]

Bentham discussed what he meant by an axiom of law elsewhere in greater detail. In the Pannomial Fragments, which was written at various dates over a long period of time, in chapter iv, entitled 'Axioms of Mental Pathology Bentham wrote that these axioms of mental pathology were the necessary ground for all legislative arrangements. By this is meant,

> a proposition expressive of the consequences in respect of pleasure, or pain, or both, found by experience to result from certain sorts of occurrence, and in particular from such in which human agency bears a part.[23]

Returning to Bentham's discussion of what constituted a rule of property law, he first stated that the source of

all rules of law were axioms, and then he continued by writing that a rule can be contained in a sentence but that a principle, being only a term, can enter into a composition of that sentence. 'So by a principle allusion is made to a corresponding rule and so to the corresponding axiom'.[24] To give an example Bentham mentions the 'positive pain arresting principle'. This principle presides over the rule of law that prohibits an act which produces suffering to one party without enjoyment to the other, and here Bentham added 'Note the case of the Roman Gladiators'.[25] The non-disappointment principle presides over imperative law. Bentham did not give an explanation of the pathological axiom 'made reference to' here, but it would presumably have been the greatest happiness principle itself, and also the principle of security, this being one of the four principles, or objects, of the civil law that are subservient to the greatest happiness principle.[26] Bentham stressed that the whole point of using a term, such as the 'positive pain preventing principle', as a description was to act as a kind of shorthand, to give a conception of the principle without overburdening the discussion with the insertion of the whole sentence containing the rule. Bentham added 'note the advantage of shortness in instruments of communication',[27] so he had in mind the practical purposes of drafting concise rules of law.

Bentham finally told the Commissioners that he considered it necessary that he made reference to 'some

principle or set of principles'.[28] in order to meet their request for his observations on plans to introduce the registration of property, so he proceeded to list the greatest happiness, or happiness maximising principle, and the disappointment minimising principle as the ones he believed to be relevant, telling the Commissioners not to be 'horrified' by the sound of the non-disappointment principle,[29] because they would find that John Tyrrell referred to this in his Suggestions.

3

Eventually Bentham's own 'Suggestions' on registration of property were published in 1832, under the title of the 'Outline of a Plan of a General Register of Real Property'. In this Bentham told the Commissioners that he was going to 'take the preliminary liberty of submitting to you the leading features of the sort of plan which, to myself, presents itself as the most eligible, prefaced by a short exposition of the principles from which they emanated, and to which they look for their support'.[30] He said that he hoped in the future to address the Commissioners on the principles appropriate to the whole subject matter of Real Property. 'In that case,' he wrote,

> In the character of principle, I might have to submit to your consideration no fewer than seven-and-twenty

> words, or sets of words, which, in the form of a tree, composed of a trunk with branches and sub-branches, called by logicians in former days the arbor porphyrum, lie at this moment before my view.[31]

Such a carefully drafted table or diagram, dated July 1830 and exactly matching Bentham's description of a 'tree' with twenty seven numbered sets of words, is to be found among the papers on property law in the manuscript collection of Bentham's work. The original diagram is in two different hands, mostly written by a copyist with some additions added by Bentham.[32] There is also a fair copy of the same diagram of the same date[33] almost certainly written by Bentham's nephew, George Bentham, who was acting as Bentham's secretary at that time. Other manuscripts bear the initials G. B. which must refer to George Bentham.[34] It appears to be identical to the original in most respects, although Bentham's numbering is missing from the fair copy, but it is easier to read because Bentham's hand writing had deteriorated, and so it is to this version that I shall refer.

The sheet of paper is divided into four columns running vertically from top to bottom of the page. In the far left is written 'All pervading principle the Greatest Happiness Principle to which the principles immediately subordinate are either Matter regarding including the ...Hyloscopic or Form regarding or Eidoscopic'. Other principles in the columns moving across the page to the right are variously entitled, for example the

'Disappointment minimising', and the 'value maximising'. Underneath this are the 'aristocratic influence restraining' and 'sense of relative indigence restraining' and so on for a total of twenty seven numbered principles. However, in the copy, Bentham has added another three additional principles in his own hand. If the sheet of paper is turned on its side then it could be considered to be a tree, with the 'all pervading principle the Greatest Happiness Principle'[35] as the trunk, and the other principles leading off from it as the branches, increasing in number in each column to the right.

A number of questions are raised by the discovery of Bentham's diagram. I would like to address in particular questions about Bentham's purpose in drafting this schematic representation of property law principles, the provenance of such trees and whether he succeeded in his purpose. First, in order to investigate what Bentham's purpose it is helpful to look at Bentham's other work because he is reported to have made use of such a device before. First in connection with his work on the penal code in 1776,[36] which he called an Encyclopaedical Sketch, although I was not able to locate this among the manuscripts, and then much later on he drafted such a tree in connection with his work on education. This was his proposal and detailed plans to set up a day school for the children of 'middling and higher ranks', which was first published as Chrestomathia in 1817.[37] In his work on

property law Bentham offered little explanation for such a device, although of course he may have intended to go into more detail at some future stage. So it to Chrestomathia that we must turn in order to discover what Bentham intended to achieve by his diagram because it was in this work in particular that he gave a far more detailed account about the provenance and the purpose of such 'trees'.

4

Chrestomathia was originally published by Bentham in two parts during 1817. After Bentham's death a fuller version was put together by Thomas Southwood Smith for the Bowring edition of Bentham's collected work in 1843. The work consisted of proposals for the setting up of the school, lengthy expositions of the syllabus to be followed in the school, the stages of instruction, several 'instruction tables', and also included an essay entitled 'Nomenclature and Classification', in which Bentham discussed the classification of knowledge, the analysis of language and included several examples of trees.[38]

There is no doubt that Bentham's work on the analysis of language is significant both on its own terms and also because it occupies a central position in his thought,[39] but nevertheless the logical analysis of language is here considered only briefly and then only in relation to

Bentham's device of the real property tree. For Bentham an analysis of language and concepts were part of the two-fold exercise necessary to reform any law. The first step was analysis, which includes linguistic analysis, and this is then to be followed by synthesis, which for Bentham included drafting utilitarian codes of law.^O A. W. B. Simpson has placed such a progression of events into the wider context of nineteenth century legal treatise writing. A discursive treatise on one particular branch of the law, for example property law, undertook the primary and difficult task of systématisation of the common law. This is the analytical stage and the next step, the synthesis, was to write the treatises in the form of codes, a plan that was to be followed by Pollock, Chalmers and especially Stephen in the late nineteenth century. Simpson writes that the development is in a sense an obvious one because once the law has been set out in a 'discursive manner as a methodological scheme of principles, rules, and exceptions...' then the next step was to attempt to reduce the bulk and complexity treatises by replacing them with codes. It should come as no surprise that Bentham, the arch codifier, was the precursor of this late nineteenth century movement to codify treatises on particular branches of the law.*^

But if a closer examination is made of the first, preparatory stage of Bentham's analytical jurisprudence then it is clear that this stage in fact consists of two different but connected undertakings. These are the

analysis of language and the classification of information. This is because Bentham considered it to be of great importance to construct a methodology in order to organise and systematise the common law, in addition to an analysis of language which would lead to the creation of clear definitions. It has been said recently that Bentham's work shared with that of D'Alembert, the French encyclopaedist, the twin concerns 'of forming a clear definition of concepts and terms...and a clear methodological arrangement' of, in Bentham's case, the art and science of law.[44] In fact the distinction between analysis and synthesis is not so clear cut. Bentham himself wrote that linguistic analysis involved synthesis, and that providing a clear methodology also involved synthesis.[45] Because he regarded them as important aspects of the same enterprise both these analytical undertakings, linguistic analysis and methodology, need to be investigated in turn in order to make an assessment of Bentham's tree.

5

It is well known that Bentham work on linguistic analysis had been one of his major concerns since he had worked on OLG in 1782, and that language continued to occupy him until he died. From the headings and dates on the manuscripts it is possible to see that towards the end

of his life Bentham was working on several different subjects, often at the same time, including the Civil Code, property law for the Real Property Commission, the Equity Dispatch Court proposal, the Pannomium, and Nomography. What united all these these disparate projects was the inclusion of analytical work on language. In 1832, in work headed 'Pannomium', Bentham wrote that it was essential to have in mind during a 'reading or recollection' of every part of the body of law certain instructional matter on language, which was that

> Language is for ideas of all sorts the instrument of communication between man and man: as also of fixation in the minds of each. Pregnant with evil in all its shapes are the imperfections of which language is susceptible. Of the number of these imperfections are obscurity, ambiguity and indistinctiveness.[46]

Bentham's work on linguistic analysis eventually led to his revision of Locke's thesis that all ideas could be traced to simple ideas, from which can be assembled complex ideas. So ideas can be clarified by being 'decomposed into their elementary parts, which in turn can be explained in terms of their origin, principally in sense perception'.[47] Bentham acknowledged the work of Locke and of D'Alembert and intended to bring clarity to the science of jurisprudence by constructing chains of definitions of terms ending in simple ideas. This proved to be inadequate to deal with what Bentham called

'fictional entities', such as a right, because there is no simple idea into which they can be decomposed. Bentham's solution was utilise the Aristotelian idea of definition by genus and differentia. This would enable real entities to be defined, but again not abstract or 'fictitious' entities. But by creating his new instrument of paraphrasis[48] Bentham was able to solve these problems to his satisfaction. 'The device of paraphrasis consists in explaining a sentence by means of another sentence, and it is particularly to be employed when it is impossible to explain a word by means of other words'.[49] This allowed Bentham to define abstract entities and propositions. For example the words right, duty and obligation refer to fictitious entities. An obligation can be defined by paraphrasis as follows: someone is under an obligation if they must act, or not act, in a certain manner, failing which they will incur the pain of punishment or loss of pleasure.

6

Achieving clarity in language was only part of the task that the legislator faced when drafting utilitarian laws. To an analysis of language must be added some means of organising the information, whatever it happened to be, 'as grammar is taught by sentences... and geography by dissected maps, in like manner might the art of legislation'.[50] In such a 'map of the law' there would be

no 'terrae incognitae, no blank spaces'.[51] but the legislator was hampered by the imprecisions and ambiguities in language which 'has thrown a veil of mystery over the face of every science',[52] So first it would be necessary to pierce this veil of mystery to 'obtain a clear perception of the real state of things'[53] and then to draw up a 'map' of information to aid the legislator in drafting utilitarian codes of law. This was the second aspect of Bentham's analytical jurisprudential activity. Some form of classification of information must be undertaken, and it was to provide an answer to this need to establish a system for arranging information that Bentham turned to D'Alembert's Encyclopaedical Sketch in Chrestomathia.

Bentham was concerned to present to view a 'clear, correct and complete' conception of whatever branch of art and science was in question,[54] because the purpose of the exercise in Chrestomathia was of course to set up a school for children. In his plans for the school Bentham included an Encyclopaedical Sketch of art and science, and readily acknowledged his debt to others, most of all to D'Alembert,[55] for the design of his Encyclopaedical Sketch and in his essay included a copy of D'Alembert's table, completed in 1767 and called a 'figured system of human knowledge' which set out the field of human knowledge in columns. Despite his praise Bentham was critical of D'Alembert's table for a number of reasons, among these

being an inadequate design, needless repetitions, groundless distinctions and 'the primary source of division, unhappily chosen'.[56] Expanding on his criticisms, Bentham argued that D'Alembert's table lacked the capacity to offer generalisations, or synthesis, nor did it offer induction, or analysis, which he defined as the converse of generalisation.[57]

While he disapproved of D'Alembert's Encyclopaedical Sketch Bentham expressed approval for another type of diagrammatic display, which he identified as the 'logical tree of Ramus, improperly attributed...to Porphryrius'.[58] He included an example of such a tree included a table entitled 'Arbor Porphyriana seu potius Ramea'.[59] Bentham explained his preference by pointing out that the term Encyclopaedical Table refers to two different but nearly related objects. One is really a continuing discourse about a subject which takes the form of a table, while the other, something quite different, is a 'Systematic Table or Diagram'.[60] The latter is an emblematic diagram that has the advantage of presenting all aspects of the subject under discussion to the viewer at the same time. As a result of this panoramic view not only the subject as a whole, but also the relations between the different aspects of the subject can be perceived at the same time. This is preferable because it facilitates conception of the whole field surveyed and it allows reciprocal comparisons to be made.

In a chapter entitled 'How to plant a Ramean

Encyclopaedical Tree...'[61] Bentham gave practical instructions on how to set out a schematic diagram. First, all aspects of the subject under discussion should be listed. Each tree should have as its 'universal trunk' the word or term, chosen from the list, which has the greatest import to the subject as a whole. Once the trunk has been found then the next step is to find two words, the 'imports' of which are contained in the trunk, which are the next most extensive of all the words listed, apart from the trunk. These will be the first pair of branches. Then at every joint another two words should be added, these are to be words in common use and one word should always be contradictory to the other. These will be the other branches and this should be repeated until at some point the import of the furthest branches will be less than the main ones.[62] Once the information has been organised and systematised in such a manner, then many advantages will automatically follow. Building on his analogy of a tree Bentham wrote humorously,

> Conception, retention, combination, generalisation, analysis, distribution, comparison, methodisation, invention-for all or any of these purposes, with an Encyclopedical tree in his hand, suited to the particular object which he has in view, skipping backwards and forwards, with the rapidity of thought, from twig to twig, hunting out and pursuing whatsoever analogies it appears to afford, the eye of the artist

> or the man of science may, at pleasure, make its profit, of the labour expended on this field.[63]

Bentham explained that it was of fundamental importance to such methods of analysis that the subject chosen should be a 'logical whole', in other words a concept rather than a physical reality, and that this logical whole should then be exhaustively defined by dichotomous or bifurcate division. He posed the question about whether there was any advantage in a bifurcate as opposed to a multifurcate mode of division, and answered

> To the <u>bifurcate</u> mode alone,...and not to the multifurcate, is the test of all comprehensiveness and distinctness, viz. the <u>contradictory formula</u>, applicable'.[64]

Bentham stressed the overriding importance of this bifurcate mode of division in his schematic trees, and it was this aspect of the whole exercise that he claimed to have invented, although it has been suggested that rather than originating a method of analysis he confused Ramean bifurcation with a Porphryian tree.[65]

7

What was the origin of these tables or 'trees'? They were frequently used in medieval logic and were commonly called 'Porphyry's Tree'. The Porphyrian tree had been familiar since antiquity in logic as one kind of a

diagrammatic display which allowed a schematic representation of the relationship between genus and differentia. The other form of diagram was 'a square of opposition[66] and they were much used in medieval scholasticism.

Bentham called his tree a 'Ramean tree', and gave an illustration of such a tree in Chrestomathia.[67] which set out a scheme for the analysis of a subject by means of dichotomous division of the information at each stage. So, for example, in Bentham's illustration of a 'Ramean tree' substances are divided into corporeal and incorporeal. Bentham made express mention of Ramus in the text and in the footnotes and so clearly held his work in high esteem. Petrus Ramus, who lived from 1515 to 1572, was the most famous of the early modern humanist scholars who opposed medieval scholasticism, Aristotelianism in particular. He was a Professor at the University of Paris, with Protestant sympathies, who made many professional enemies. Mystery and conflicting theories surround the dramatic end of his life. He was murdered in the St. Bartholomew Day Massacre in 1572 in a particularly horrible manner.[68] Bentham remarked that Ramus, as an anti Aristotelian and as a Protestant, had by his death 'suffered for both sins at once'.[69]

Ramus is particularly associated with the humanist movement which emphasised the importance of rhetoric and methodology over medieval dialectic. One effect of this

movement was to promote the analysis of information by dichotomous division and this method is often described as Ramism, taking the name of its founder. The impetus behind the development of Ramus' ideas is considered to have been the pedagogical needs of university students.[70] Bentham's interests in Chrestomathia were also pedagogical, and in particular the monitorial system of education whereby students became teachers as soon as they had acquired sufficient knowledge to impart to others. Clarity of selection and presentation had an extra significance in this particular situation, but when Bentham prepared the real property tree he did not have a pedagogical objective in mind. He took the device of the tree and made use of it for other analytical purposes. He wanted a method for organising and classifying knowledge, one that would be of use to a legislator, and it seems to have been the work of Ramus on dichotomous division, and his own Chrestomathic tables, that provided him with a ready illustration of such a plan.[71] At the same time Bentham was quite clear about the limitations to this activity, writing that the logic of Ramus with its divisions has only the power to arrange and display information

> What it can do is, to methodise; and in that unimmediate way to promote creation; -- what it can not do is, to create.[72]

Therefore Bentham credited the Ramean device with providing a model for his method of 'exhaustive

bifurcation', which would give an 'all comprehensive', exhaustive and so complete definition of any subject, and a panoramic picture of all knowledge,[73]

8

Whether Bentham had actually read Ramus has been doubted,[74] and there is not much evidence that he had, nevertheless Bentham may have known about Ramus and his methodology indirectly because he was familiar with the work of the French Encyclopaedists and D'Alembert, and so his research on trees could have lead him in that way to Ramus. Also although it may very well be true that Bentham was not familiar with the body of Ramus' philosophical work and maybe never read any at all, he may still have been familiar with Ramus' anti-aristotelianism because of the considerable influence that Ramus is said to have had on the development of English common law. The emergence of a specifically English jurisprudential literature has been traced to the reception in England of Ramus' ideas and it is said that it was to Ramism that the systematizers of common law turned in order to produce a dogmatic science.[75] So Ramism is considered to be the influence behind the 'new literature on the study and method of law associated with Doctor John Cowell, Sir John Doderidge, Sir John Ferne, Henry Finch, Abraham Faunce, William Fulbecke and others'.[76]

Sir Henry Finch is of particular interest in connection with Bentham's interest in trees. Until the publication of Blackstone's Commentaries in 1766 one of the most influential and widely read texts on the common law was Henry Finch's Nomotexnia, or 'Art of the Law', which was published in 1613 and was written in law-French, and an English version, Law, or a Discourse thereof, which was first published posthumously in 1627. Blackstone is said to have placed Finch at the top of a list of books 'proper to be read by every gentleman', who should of course in the first place have attended Blackstone's own lectures.[77] In 1831 a writer in The Law Magazine wrote that Finch's books had been considered the most suitable for students, until the publication of Blackstone's Commentaries.[78] By the beginning of the eighteenth century Finch's book no longer served its purpose, so to meet the need for an institutional book Thomas Wood published An Institute of the Laws of England,[79] but this book, which reached a ninth edition in 1763, was considered to be merely an enlargement of Finch's work. Blackstone's Commentaries were published in 1765 and it is said that Finch's work influenced their composition.[80]

Henry Finch's purpose was to set out a comprehensive picture of the common law using Ramus' methodology. He included a 'Short Table of the Common Law', which is a good example of a Ramean dichotomous tree.[81] In 1673 what was termed a 'summary' of Finch's book appeared edited by 'E. W.'[82] In the introduction E. W. informs the reader

that Henry Finch 'cloathed the common law with an exact logical method paralleled with, if not extolled above, that of Ramus for Geometry'. The entire book consists of a summary of the common law in the form of trees without any text or commentary whatsoever. But it is not only in his use of tree's that Henry Finch showed his debt to Ramus. He explicitly aimed to encompass the complexities of the common law into a comprehensible system, using the Ramean 'method of nature' by which the different parts of a body of knowledge were arranged in descending order of generality.[83] Whereas Bacon had provided the common law with rules or maxims, Finch provided both maxims and an overview of the substantive law in a systematising exposition of the common law.

The organisation of Finch's later book, Law, or a Discourse thereof, published in 1627,[84] is indeed interesting. Book One consists of chapters dealing with such matters as the Laws of Nature and of Reason, Rules taken from other Learning, Constructions which are general in Law, Fictions and Positive Laws. Book Two deals with the substantive law, customs, prerogatives possessions. Book Three considers actions, for example writs, trespass, while the fourth Book outlines the courts. Finch makes an attempt to explain the substantive law by means of maxims, and most interestingly for a consideration of Bentham's later work, Finch rejected the historical, feudal basis for the common law, writing

> Hee that will take the whole body of the Law before him, and goe really and indically to worke, must not lay the foundation of his building in Estates, Tenures, the gift of Writs, and such like, but at those currant and sound principles which our bookes are full of.[85]

Blackstone's Commentaries, described as the publishing event of the century[86] certainly did not go so far as to discard the doctrines of tenures and estates, and instead stated that it was impossible to understand parts of the law, for example property law, unless the doctrines of tenures and estates was used as a starting point.

Sir Henry Finch's books were well known and read, and he was mentioned by other legal writers, and therefore it is possible to conclude that Bentham would have read or in some way have been familiar with Finch's work, even though he does not seem to have made express mention of it, and that Bentham would have known about Finch's Ramist methodology. Finch wrote that 'Law is an Art of well ordering a ...civil societie'[87] and Bentham would have been sympathetic to Finch's rejection of the feudal, historical basis for the common law and of his attempt at a rational reorganisation of the common law, but not with his description of the 'two fold nature' of law. This was first, 'the law of nature' which is that 'soueraigne' reason fixed in man's nature dealing with principles of good and evil. Second is the law of reason which deducts principles 'by the discourse of found reason'.[88] Finch was

a theologian as well as a lawyer and Bentham, while no doubt approving of Finch's bold re-organisation of the common law, would no more approve of Finch's grounding the law in a God given 'law of nature' than he approved of Blackstone's doctrines of tenures and estates.

9

The final question to address is whether Bentham succeeded in his objectives when he set out the guiding principles of property law in the form of a real property tree. In order to answer this question it is first necessary to turn from a consideration of the provenance of Bentham's real property tree to a more detailed study of the workmanship of the tree itself but this presents some difficulties because although Bentham gave some explanations of of the principles in the real property tree, he gave no complete discussion of all the principles, or a complete discussion of how they relate to each other, or indeed any detailed description of the tree itself, other than the announcement he had made to the Commissioners that has already been mentioned. However Bentham did give some descriptions of some of these principles, and some are familiar from Bentham's other writings, and so an analysis of the fragments of writings in the manuscripts may build up to a more complete picture of Bentham's views on the principles regulating property

law.

The most immediately pressing question to address is whether Bentham intended his schematic plan of property law principles to be a completed tree, on the model of Ramus' trees. He had after all expressed great admiration for such a design as an aid to analysis and synthesis in the past. But at first sight Bentham's real property tree certainly does not appear to be so, because although many of the features of a Ramean tree are present, one vital aspect is missing. The tree does not fulfil the function that Bentham considered to be of primary importance. It does not seem to use the bifurcate method of analysis to consider the real property principles. In that case was this a preliminary draft and did Bentham intend to set out a bifurcate tree in the future, or had he abandoned his belief in dichotomous division? Bentham gave an answer to some of these questions in the manuscripts.

On the same day, July 30th 1830, that he drafted the real property tree Bentham prepared some preliminary remarks on the tree.[89] Bentham wrote that the order proposed was to set out the leading principles 'as per Constitutional Code'. Then the principles should be set out in 'order of subordination' with pairs of mutually antagonising principles 'where they have place'. So far this would definitely indicate that Bentham had intended to prepare a Ramean tree, but having set out his plan he mentioned nothing further about the construction of the tree and instead immediately began to consider its

practical application to property law. He wrote that that each principle should refer to the corresponding rule, 'Agenda for the purpose of giving effect to the rules corresponding to the several principles Example simplification maximising'. Bentham next listed briefly a 'Practical Problem', this was to decide by law to whom each distinguishable subject matter of property belonged.

> To determine by law to whom it shall belong at the relatively present point in time and when it ceases to belong to that person by what efficient means it shall be transferred from him to some and what other person.[90]

From these preliminary remarks it would seem clear that Bentham had planned an ambitious project, one that would not only determine and set out the leading principles of property law, but which would then go on to show how each principle referred to a specific rule of law. These would appear to be the steps necessary to codify property law.

In this discussion Bentham did not go into any great detail on the theory of property law but concentrated on practical rules for the transfer of property, whether this was by succession or by alienation. His plan was in accord with the remarks he had made earlier about the need to clearly relate axioms of mental pathology to principles of law and then in turn to relate these to rules of law. He had made a practical start on this project, but Bentham's ambitious project was never completed, or rather there is

no evidence of such a project ever existing in a completed, finished state. But enough remains to indicate the form that parts of it would have taken, illustrating both the content of the principles listed on the tree, the relations between the principles, and also the rules of law established by these principles.

10

In his discussion of the tree Bentham began by listing the principles in the order in which they were numbered on the original tree, first the greatest happiness principle, then the disappointment-minimising principle, and the notoriety-maximising principle, and so on,[91] moving horizontally from left to right across the columns drawn on the page, from trunk to twigs as it were, rather than reading the tree vertically. He looked at each principle immediately subservient to the greatest happiness principle and then discussed the principles that were in turn subservient to it. But unfortunately not all the principles were described in this way.

It is not possible to make detailed comments on all twenty seven principles, but instead certain principles will be treated in more detail, mostly the ones that Bentham had most to say about. To begin with a relatively uncontentious and straightforward principle, Bentham described as the notoriety-maximising principle as signifying notoriety for the means of transfer of

property.[92] Therefore this principle regulated the rules of law for the transfer or alienation of property from one proprietor to the next. The next principle in subordination was described as the simplicity-maximising, or complication-minimising principle. From this principle reference would be made to the 'several subject matters of property efficient causes of title thereto and cessation of title'. So again this principle affected the rules for the transfer of property. These principles demanded that the rules of law affecting transfer were well known and understood, that they were uniform in construction, therefore free from unnecessary complications.

On the tree itself Bentham wrote an addition in his own hand that the complication-minimising principle is also subordinate to the uniformity-maximising principle. Bentham had mentioned elsewhere the need to achieve uniformity in such fundamental matters as tenure, and this was a matter that had concerned the Commissioners as well. They had asked a specific question about the continuing existence of different kinds of tenure in their first set of questions for the First Report.[93] Many respondents to the Commissioner's inquiries agreed with Bentham's opinion that the existing anomalous differences in tenure, such as gavelkind and borough english, should all be abolished, and that one uniform form of tenure should remain.

Bentham's description of the tree went on to explain that the principle immediately under the greatest

happiness principle was the 'value maximising'. He explained the significance of this in terms of the rules respecting inheritance,

> By putting it into the power of the father to dispose of the whole of his property in a certain shape to the eldest of his male children to the exclusion of all the others and so on for any number of future contingent generations.[94]

This is a clear reference to the established principle of primogeniture which operated on the death of a proprietor to pass the property to the eldest male heir to the exclusion of any other male, and all female, descendants. As we have seen in chapter one, primogeniture as a customary rule of law operated automatically on an intestacy, so it was always within the power of a testator to mitigate its effects by means of a will, or an intervivos trust. Although it only operated on intestacy the rule had symbolic importance because it was followed voluntarily by the aristocracy. Most frequently substantial landowners draw up settlements, to take effect in life or on death, to pass the bulk of the property to the eldest male heir, while usually making some provision for younger sons and daughters, so keeping an estate intact.

By enshrining this ancient custom, described by some contemporaries as barbaric, on the real property tree as an important principle of real property was Bentham explicitly giving his approval to it? There is no doubt

that lawyers who were Bentham's contemporaries firmly believed that the ability of English landowners to prevent the enforced fragmentation of their land was an important factor in promoting the efficient use of that land, and they made favourable comparisons with other countries where by custom land was divided between heirs.[95] The law of primogeniture was regarded by many as a source of England's political strength, but did Bentham believe it to be beneficial? Did Bentham also believe land was best utilised if the great landed estates were preserved? If he did then his writing here is in conflict with his earlier work where he criticised James Humphreys for his support of primogeniture. The answer is that Bentham's views were complex and always in accordance with the principle of utility. We have seen that when he reviewed Humphreys' book in 1826 he had argued against primogeniture on the grounds of logic. The rule for succession to property should be either equal partibility for both males and females, or the eldest, whether male or female, ought to succeed.[96] So Bentham did not support primogeniture as a means of maintaining inequality based on gender.

Bentham considered that the greatest happiness principle would be served by the continued existence of a right to private property. This explains his unequivocal support for the enclosure of common land, because he believed that land would be far better utilised if it was

enclosed rather than if it was left in common ownership.[97] Also he had declared his opposition to the enforced appropriation and redistribution of property in the Civil Code, in an appendix entitled 'On the Levelling System',[98] arguing that the security providing principle would oppose such attacks on private property. If there is a conflict between the principles of security and equality then equality should give way. This is because security is the foundation of subsistence, abundance and happiness, and everything depends on it. In contrast equality brings only a limited portion of happiness with it. It can only be achieved imperfectly and is quickly lost by changed circumstances. 'The establishment of equality is a chimera: the only thing which can be done is to diminish inequality'.[99]

But this support for private property did not mean that Bentham gave automatic support for primogeniture. A wider examination of Bentham's views on the laws and customs of succession makes it clear that he did not agree with his contemporaries about the importance of preserving primogeniture as a customary rule of law.

11

Bentham always insisted on the broader view of the of the laws relating to real property, including succession, inevitably leaning towards a consideration of the political and social dimension of property law even when

supposedly discussing practical reform measures. Of course it will be said that so did any other lawyer of the time who advocated retaining primogeniture, because this harsh custom could only be justified for its political role. It had no beneficial effect on the situation of individual members of families, or on property law in general. We have seen that when James Humphreys argued for the necessity of retaining primogeniture,[100] he justified his preference on political grounds; primogeniture was necessary in order to preserve the aristocracy, which was vital for the constitution of the country.

In contrast Bentham's political aims were not the preservation of the status quo, and he had long raged against the undue influence of the aristocracy in opposing land law reform. Instead Bentham insisted that when considering the law of property it should be remembered that this subject related to two separate, but distinct fields of law.[101] 'One was what commonly goes by the the word Justice-civil justice having for its object or end in view the prevention of disappointment in relation to property...', while the other field was political economy, to which belonged in law the ends in view of subsistence, abundance, security and equality. Having listed these two fields of law which were connected to the law of property Bentham then added a third field in pencil, 'Constitutional Law', but having listed it, he did not develop this point. The law of succession as part of the

law of property was therefore to be considered as an aspect of civil justice and political economy.

The right of parents to provide for their children by allowing the alienation of property at death by succession is clearly an essential element of the concept of private ownership of property. Bentham followed Locke and accepted the arguments for such a right to private property as the starting point for his own discussion of ownership because this was in accordance with the principle of utility, and in particular with the security providing principle, which is subservient to the greatest happiness principle.[102] Because security meant security for expectations this included the right of succession to property. But this did not mean that Bentham considered that such security of expectation should overwhelm or prevent any possibility of a more equal distribution of property. As we shall see Bentham's guiding principles of real property did incorporate plans for distributive justice.

Earlier in the Civil Code Bentham has set out his proposals for the law of succession in the form of a code.[103] He had mentioned the need for this part of the law of property to be codified on several occasions, in connection with comments that he made to Tyrrell and James Humphreys. Bentham started his discussion by placing the law of succession firmly in the political realm by saying that the legislature should have three ends in view when considering this subject.[104] Firstly they should consider the need to provide for the rising generation, next to

prevent the pain of disappointment, and lastly to promote the equalisation of fortunes. Rejecting the law of primogeniture Bentham set out a Code which in Article 1 stated that there should be no distinction between the sexes. This was far more radical in aim than James Humphreys or most other lawyers of the time, and was discussed in chapter one. He gave as his reason for this measure the need for equality, so in this instance equality took precedence over security of expectations.

Among other controversial proposals Bentham agreed with Humphreys that in default of any heirs the property should go to the state. But Bentham's proposal that all property should vest in the state on an intestacy formed part of his plan for the gradual equalisation of property. He argued that up to a certain point the principles of security and equality were in constant opposition, but they could with time and patience be made compatible.

> When property is vacated by the death of the proprietors, the law may intervene in the distribution to be made, either by limiting in certain respects the power of disposing of it by will, with the design of preventing too great an accumulation of property in the hands of a single person, or by making the right of succession subservient to the purposes of equality.[105]

This is further evidence that in this part of property law Bentham was prepared to give priority to equality. In this

case there could in fact be very little possibility of infringing the non-disappointment or security providing principles and so equality could take precedence. He opposed enforced appropriation of property because this would be against the security providing principle, but the gradual accretion of wealth to the state away from the great families was in accordance with the distribution maximising and property equalising principles. He proposed two kinds of rules, one would limit the amount a testator could leave descendants by will, and the other operated on an intestacy to pass property to the state. It is also necessary to look at Bentham's plans for testate succession.

Bentham was in favour of freedom of testation, 'The power of making a will, is an instrument placed in the hands of individuals for the prevention of private calamity'.[106] On the real property tree freedom of testation would also be the rule of law that corresponded to the division-maximising principle. But this immediately came into conflict with the value-maximising principle which worked to maintain an estate, not disperse it, and to allow a division maximising principle, and freedom of testation would also conflict with the non-disappointment principle because it might confound long held expectations of inheriting property. So to deal with this conflict between competing principles Bentham wrote that in every case where the division maximising principle infringed on the non-disappointment principle, the latter must then

give way and conform with the greatest happiness principle. If one did not allow any infringement of the non-disappointment principle this would prejudice the interests of those not yet in possession in favour of those in possession, and so perpetually maintain the status quo. This state of affairs would then inevitably infringe the value-maximising principle because land would be inalienable which was detrimental to both political economy and civil justice.

This was one reason for giving proprietors the power of devising property by will to the prejudice of all persons in general, in particular to those to whom it would be given by virtue of the division maximising principle.[107] Maintaining the status quo would infringe the property equalising principle, and as we have seen Bentham believed happiness would be maximised if wealth were to be more evenly distributed.

Bentham looked in detail at some of the practical rules of law that must follow from these principles and the resolution of conflict between them in the Civil Code. Although he insisted on freedom of testation Bentham was not happy to leave to chance matters of such great importance as the inheritance of property by possibly helpless individuals. After all there is always the possibility that a proprietor may use his right to freedom of testation to leave property away from the close heirs who may be young children totally dependent on him.

Alternatively those who are treated by the law as strangers to the proprietor may in fact be those who are closest to him, such as a common law wife, or illegitimate children. Should the rights of legal heirs take precedence over the wish of a testator to provide for such strangers or not? Bentham recognised that there was a great need to reconcile these different interests. He wrote that 'Here the reasons of utility divide themselves: there is a medium to be taken'.[108] For illegitimate families the reconciliation that Bentham offered was that a testator should have the right to dispose of half his property after death if he had no near relations, so he was free to dispose of half his estate to strangers. This would safeguard the right to provide for the unmarried 'wife' and children. and the residue would accrue to the state, so facilitating the equalisation of property.

But a problem of a different kind might present itself. A father, instead of acting as the protector of his dependent family, might become a tyrant and disinherit legitimate heirs. In order to protect such dependents Bentham proposed 'the institution of what is called in France a <u>legitime</u>,'[109] which is a rule of law that protects next of kin by insisting that a certain proportion of a testator's estate must be left to his legitimate heirs. But even this 'legitime' might be devised away from heirs if a court's approval was first obtained.[110] Bentham's proposals protected the legitimate family of a testator by the <u>legitime</u>, and allowed for a

testator to use up to half their estate to provide for an illegitimate family, but not surprisingly there was no enforced provision for the illegitimate family.

Bentham's proposals for reform of the laws of succession anticipated the Administration of Estates Act 1925 by providing a statutory regime for succession on intestacy. His plans for reform here illustrate the attempts he made to reconcile the value-maximising principle with others on the real property tree such as property-equalisation, or excessive-accumulation-obviating, which would promote property the dispersal of estates. Bentham planned to balance competing interests and principles and used the greatest happiness principle to do so.

12

The non-disappointment principle was second in order of priority on the tree to the greatest happiness principle, and Bentham was insistent that this principle was the particularly appropriate principle with respect to the law of property.[111] On the tree he listed the notoriety-maximising, registration-maximising, fraudulent-insolvency-obviating and occupation-continuing principles as subordinate to this major principle, all of which clearly correspond to the rules of law which would make questions of title, and transfer whether by alienation or

succession public knowledge because of registration at a land registry. In addition security would be given to titles, so preventing disappointment from any number of causes, such as 'Titles secured against non forth comingness temporary or permanent by 1. design 2. accident'.[112] Disappointment was prevented because registered titles are secured against extinction by the working of the equitable doctrine of notice (by which the bona fide purchaser of the legal estate for value without notice of an encumbrance could take a legal estate free of the encumbrance) and because titles are secured against extinction by subsequent acts of third parties and secured against false titles that can be created by forgery, fabrication or alteration. Bentham was an enthusiastic promoter of a property register, a subject that has been examined in detail in chapter four, and so will not be looked at again as a practical application of the non-disappointment principle.

But Bentham's non-disappointment principle has a wider importance in his utilitarian scheme of law than operating to prevent disappointment caused by insecure title or fraud. In recent years it has been argued that the non-disappointment principle should be considered to be Bentham's principle of distributive justice. F. Rosen has shown that Bentham evolved the principle late in his life, and that it appeared by that name for the first time in Bentham's Review of James Humphreys' book in 1826. It is also mentioned in the 1830 texts of Official Aptitude

Maximised in the 1830's, the Equity Dispatch Court Proposals of the same date[113] and Pannomial Fragments.[114] Because Bentham was at the same time considering his reformulation of the greatest happiness principle and also applying the principle of utility to practical reform measures, F. Rosen has argued that the non-disappointment principle should be regarded as Bentham's principle of justice, under the overall authority of the greatest happiness principle.[115] The non-disappointment principle allowed Bentham to propose measures that would result in greater equality in property ownership, a necessary pre-condition for an advance towards equal happiness and ultimately democracy, without at the same time disturbing the principle of security. 'In his later writings Bentham does not emphasise the maintenance of the existing distributions of property. The 'disappointment-prevention' principle allows for reform to take place towards equality so long as full compensation is paid for violations of 'fixed' expectations'.[116]

P. J. Kelly has supported these findings, but in addition has argued that the disappointment principle was intended by Bentham to be a modification of the security-providing principle and that, while not called by this name, the former principle was not a late development but was in fact developed by Bentham much earlier in his career.[117] The security-providing principle operates as Bentham's formal principle of justice because it sets out

the boundaries of personal inviolability between individuals and at the same time constrains the actions of the utilitarian legislator, so providing the conditions for social interaction. 'The 'security-providing' principle translates the dictates of utility into a system of rights and obligations'. As a formal principle of justice the security providing principle should therefore be contrasted with the disappointment-preventing principle because the latter 'is concerned with realising and maintaining the requirements of the formal principle within a particular society'.[118] In this way P. J. Kelly argues that while F. Rosen has largely stressed the importance of the disappointment-prevention principle for the development of constitutional reform it has a wider significance and by the construction of the principle Bentham had developed a theory of distributive justice. This can be found not in one particular work but dispersed among several different works, mostly unpublished and in manuscript. Bentham's theory of distributive justice is one which allows for the maintenance of a right to private property and operates to protect expectations, so rebutting claims that Bentham's utilitarian theory can ignore individual entitlements, and yet at the same time allow a legislator to pursue a 'policy of the substantial equalisation of property holding'.[119]

In another attempt to reconcile the value-maximising principle with the non-disappointment principle on the tree Bentham made an interesting proposal for setting up

what looks like an arbitration procedure, presumably to be used in cases of disputed title. He wrote that the corresponding rule of law, as far as it could be used without infringing the non-disappointment principle, was that the subject matter in question 'should be given to a public functionary in trust for the community, to him with reference to that one of any number of competitors with reference to whose interest in the value of it would be greatest'.[120] From similar proposals that Bentham made in the context of adjudication Postema has concluded that Bentham intended his judge to engage in 'utilitarian balancing',[121] and that therefore Bentham was proposing an act utilitarian system of adjudication, judges must appeal to the principle of utility in each case to be decided. Against this P. J. Kelly argues that the adjudicator will initially decide disputed title on the basis of expectations derived from established sources, such as occupation and cessation. If the conflict is irreconcilable then relying on the non-disappointment principle the legislator can can divide the title, or give to one party alone, compensating the other.[122] The legislator therefore employs previously settled, preferably statutory, utilitarian rules of law.

Bentham had mentioned a principle which he named the aristocratic-influence-restraining in several places on the real property tree, and this can be looked at as a last practical examination of the relationship between

the non-disappointment principle on the other principles on the real property tree. The aristocratic-influence-restraining principle, together with the sense-of-relative-indigence-restraining principle, is placed as subordinate to the disappointment-minimising principle, while in turn two other principles were subordinate to it. These were the property-equalising and division-maximising principles already mentioned above. Bentham was clearly much concerned to restrain the overwhelming influence that the aristocracy held over land, and leading from that, their political strength, and wrote of the undesirability of the 'Aristocratic desire of eternizing opulence'. The problem was that it was painful for the head of 'what is called an ancient family' to contemplate the decay of that family.[123] But what does decay mean in this context, he asked. It means not the extinction of the family, but that it exists in a condition 'of inferior opulence'. This is the situation the aristocrat wants to avoid, and 'craves assurance' that it can be avoided 'provided always that the descent has been all along in the male line without any interruption by the female'. Men of this class, continued Bentham, 'are inexorably anxious to make an everlasting sacrifice of the welfare of the whole community in the present and all future ages'.[124]

Bentham refused to accept that this aristocratic desire to maintain their wealth was an expression of paternal affection. 'Paternal affection? is this the denomination that aims to be applicable to it?...No

surely: and for this plain reason',[125] that if this was really the reason the so called affection would extend to all the aristocrat's children, 'younger children in every generation as well as eldest child- female as well as male' and primogeniture only provided for the eldest male. So the aristocratic-influence- restraining principle, together with the sense-of-relative-indigence-restraining principles, worked to prevent aristocratic pretensions interfering with the happiness of the whole community. It is not clear what rule of law followed from this guiding principle, but it is likely to be the rules of law governing succession, in particular the abolition of primogeniture.

13

Bentham had mentioned that the two fields of political economy and civil justice were affected by the law of property. It was the opposition of the differing needs of these two fields that led to a need to reconcile two different principles on the real property tree, the value maximising and the 'property and thence prosperity equalising principle'.[126] Bentham wrote that it was necessary to find a middle course by which such a mode of disposition 'shall be productive of the greatest quantity of happiness in the aggregate of the population'.[127] He continued that this middle course is bound to be different

in the different stages of society in the course of civilisation, and suggested that a 'necessary instrument of reconciliation was the colonisation principle, 'as long as upon the surface of the globe vacant spots susceptible of human habitation remain unoccupied'.[128]

Bentham had mentioned the colonisation principle on the real property tree and at first this seems somewhat out of place and puzzling in this context. To see how this principle relates to the others we note that subordinate to the value-maximising principle in the second column are the antagonising property-equalising, (or excessive-accumulation-obviating) principle and the division-maximising principle. Bentham says that these two are also subordinate to the aristocratical-influence-restraining and to the sense-of-relative-indigence-restraining principles, and that they in turn antagonise with the over-population-restraining principle. The instrument of reconciliation between these opposed principles is the colonisation principle. So it is the colonisation principle that effects the reconciliation between the property-equalising and the over-population restraining principles.

In order to understand why Bentham had included colonisation in his discussion of the principles relating to real property it is necessary to consider the contemporary debate on the merits or otherwise of having colonies that occupied many Benthamites. Bentham had shared an antipathy towards colonies as a costly drain on

the economy of the mother country and in addition warned that their possession led to the danger of outbreak of war between competing colonial powers.[129] The loss of the American colonies in 1776 led many opponents of colonisation to consider colonies to be 'part of an expensive ancien regime requiring reform',[130] and Bentham agreed. When he put forward his Panopticon plans to the government part of his argument to the Finance Committee was based on a close examination of the figures for the cost of sending prisoners to the Australian penal colony.[131] Bentham argued that his Panopticon would be cheaper.

But in about 1830 the character of discussions about colonisation changed as a result of the Colonial Reform movement which formulated plans 'which they claimed would alleviate social malaise and economic stagnation at home and ensure rapid development in the colonies'.[132] Bentham was much influenced by the ideas of Edward Gibbon Wakefield, the son of a surveyor and a friend of both James Mill and Francis Place, and so presumably already known to Bentham. In 1826 Wakefield was sentenced to three years imprisonment in Newgate for abducting an heiress, and while so incarcerated he began a study into the problem for England of retaining colonies. In 1829 he sent Bentham a copy of an anonymous pamphlet entitled 'Sketch of a Proposal for colonising Australasia'[133] which must have interested Bentham greatly because by 1831 he

had included the colonisation principle in his survey of principles applicable to land law, and at the same time had drafted a charter for a company whose purpose was to colonise part of south Australia with emigrants from over-populated England.[134]

Wakefield's theory was one of 'systematic colonisation', instead of leaving emigration to chance. He explained that one of the problems with the American colonies had been that emigrants had almost immediately been able to buy land very cheaply. Once they had become small proprietors they did not offer their labour for hire, and this lack of labour deterred the capital investment necessary to develop either efficient larger scale farming or almost any manufacturing enterprise. In order to prevent this happening Wakefield wanted emigration controlled. All land would have a value given to it which would preclude purchase because of cost until the emigrant had laboured for a number of years, and saved the purchase price. The mother country would be benefited by having a market for manufactured goods, and also by relief from the pressure of over-population which might otherwise lead to social revolution. Bernard Semmel remarks that 'As early as the 1830's, then, Wakefield advocated a program of empire very similar to that which Hobson and the Marxists were to accuse capitalism of following three quarters of a century later'[135] and adds that, in addition, Wakefield had more or less anticipated their analysis of the economic necessity for such a plan

for systematic colonisation.

Bentham's contribution was to draft a charter for a colonisation society that would be an incorporated company on the model of the East India Company, with shareholders in England providing the capital for migrants to Australia to settle and establish a colony. In the Bentham manuscripts we also find a short paper written by Wakefield on the Colonisation Society dated 23rd August 1831 which indicates an active plan to set up such a company at this date. Bentham's draft charter gives a characteristically detailed account of the purposes and organisation of the society, one that he decides to call 'New Colonia',[136] or 'Utopia'. The purposes of the society are set out in a draft entitled 'Colonisation Proposal Special Ends in View' the first being 'to transfer individuals, in an unlimited multitude from a state of indigence to a state of affluence', and the second to give relief to the remaining population of the mother country from continually increasing indigence. During the early part of the century, following the end of the Napoleonic Wars, unemployed homelessness was perceived as a serious problem, and the Vagrancy Acts currently in force were passed. Fears of the consequences of social unrest continued to cause anxiety, and Bentham would have been aware of these sensitive issues.

The third purpose (but incorrectly labelled fourth by Bentham) was to give the taxpayers of the mother country

immediate relief from the support of the poor through payment of taxes, and the fourth was to give these same taxpayers a security against future increases of either tax or population that would last until Australia was as densely populated as Europe. The fifth was 'Giving to the Settlers not merely continuance of being, but well-being, bodily and through education, mental'.[137]

Other purposes Bentham mentioned were to increase the wealth of the mother country by providing markets for produce, and this state of affairs would also continue until the population of the colony equals that of the mother country. A final purpose was rather tersely stated to be to afford profit to the shareholders of the company. Bentham does not have much to say on this point although profit to the citizens at large of both the mother country and colony were of great concern to him.

In order to effect the planned colony Bentham proposed the formation of a joint stock company with a charter granted from the Crown and capital of five hundred thousand pounds.[138] This capital would be used as follows, one hundred and twenty five thousand pounds to pay rent to the Government who would then pay the cost of transporting the emigrants to Australia, and pay for their subsistence until they found employment. A further one hundred and twenty five thousand pounds would be paid out as loans to employers on condition they employed the men in the settlement, and two hundred and fifty thousand pounds to construct roads and bridges to give access

across all the land of the settlement. Bentham had already named the most suitable location for the colony, a place 'discovered by Capt. Flinders',[139] and now stated that the 'vicinity maximising' or 'dispersion preventing' principle meant careful attention should be paid to the relation between each spot occupied by a settler, and the aggregate of such spots occupied by all the colonists. They should be as close together as possible because distance from the place of government is detrimental to commercial interests, and detrimental to the security of individuals from the hostility of 'uncivilised aborigines' and from disorderly fellow settlers.[140]

Other problems result if the settlers are dispersed over too wide an area. They need to be close to the place where they can obtain provisions, purchase or borrow instruments needed for production, sell produce, or hear news or information that may be of importance to them. They may want medical or other help, or need to enter into or enforce loans, and so may need to be close to a court.[141]

Bentham envisaged two different kinds of emigrant, those with and those without capital. Those without money would be advanced five hundred pounds, while those with capital would need no such assistance, and in fact might need a different sort of inducement to settle. They would require assurances for the liberty of the Press, not only against interference by the Governor of the Colony, but

against the Editor who might be in a state of dependence on the Governor. Somewhat realistically, Bentham wrote,

> Effectual provision against this abuse would be matter of no small difficulty and to be considered effectual would probably be found to require arrangements running to considerable detail.[142]

But colonists without capital also needed inducements to settle and for Bentham this included paying attention to the minutiae of travel arrangements:

> During the voyage (average length of it about four months) board good in quality, and ample in quantity with lodging for the several couples, in a manner as decent and comfortable in respect of bedding during the night and means of exercise and recreation during the day time as the nature of the situation will admit.[143]

Once the colonists have landed Bentham said that for the first year in return for labour the company's managers should provide rations as if they were soldiers, and he queried what the rations would consist of, ('in the way of drink, can there be any need or use of anything but the second value'?),[144] and what clothing allowance should be made, in addition to a daily rate of pay. Bentham also considered what furniture will be needed by the colonists and how much they should be allowed to transport. In the attention paid to details such as these Bentham seems to have enjoyed using his imagination to construct the ideal colony of New Colonia, but he remained aware of some of

the difficulties that were implied in such a plan.

> Of Govt. the end in view (all comprehensive) ought to be and is supposed to be the greatest happiness of all the inhabitants. Of management the end in view on the part of the company will be of course the greatest profit...But (says/writes the philosopher) between such objects ought there to be any competition? And in the suggestion of a (conflict?) in any particular, is it endurable that matters should be so ordered, in that to the happiness/ the interests of a handful of comparatively rich individuals on one part of the globe, the happiness of (illegible) and ever increasing multitude on the opposite side of the globe should be sacrificed?[145]

Bentham said that the answer is that but for the few in question the many with whatsoever happiness they will have or are susceptible of would not be in existence. So they should sacrifice whatever portion of their happiness is necessary to secure the existence of the remainder, provided there is a remainder, because more than this should not be required any more than would a tradesman at the gate require more than payment for the article from which he makes his profit. But Bentham concludes that the more closely this is looked at the less likely is it that the sacrifice will have to be submitted to by the colonists, or exacted by the company, although he does not explain why this should be his conclusion.[146]

How successful a device was Bentham's real property tree? Did his carefully drafted schematic representation of the principles applicable to property law serve his purpose which was to provide the Commissioners with plan of the guiding principles of property law. Bentham did provide the Commissioners with the tree so at this level at least it must be conceded that Bentham had succeeded in his aim. In addition in many cases he had also provided rules of law following from the guiding principles and these illustrate how the principles were to operate in their guiding role. Whether or not the Commissioners took any note of Bentham's tree is another matter, although we have seen that Tyrrell asked Bentham to provide his assistance and guidance in the organisation of information and in promoting a principled reform.[147]

Providing the Commissioners with a real property tree and urging them to draft reformed rules of property law according to some principle was all part of Bentham's open agenda, his declared objective of encouraging the Commissioners in their efforts. He had discussed the benefits of using his bifurcate methodology and succeeded in placing all the principles applicable to real property on one single sheet of paper so that the Commissioners could have this before them when drafting new legislation. The completed real property tree also exists as strong

evidence of Bentham's hidden agenda in his dealings with the Real Property Commission, and here Bentham succeeded in placing before the nineteenth century Commissioners and before us, a detailed exposition of the main social, political, legal and bureaucratic issues that exist in any system of property law. He has also shown how a utilitarian scheme governed by utilitarian guiding principles will reconcile inherent tensions between the the different opposing principles, most importantly he has offered a plan for the reconciliation of the security providing principle with a programme of property equalisation.

Notes

1. Bowring, i. 299.

2. Bowring, i. 301.

3. Bowring, i. 300.

4. Bowring, i. 326.

5. Bowring, i. 302.

6. Blackstone, ii 262.

7. See Megarry and Wade, p. 62.

8. Bowring, i. 328.

9. Of Laws in General, ed. H. L. A. Hart, University of London Athlone Press, London, 1970, (CW) hereafter referred to as OLG.

10. OLG, pp. 251-288.

11. See OLG, pp. xxxvii-xxxviii.

12. OLG, p. xxxviii.

13. UC lxxvi. 23.

14. UC lxxvi. 145.

15. Discussed in Deontology Together with a Table of the Springs of Action and an Article on Utilitarianism, CW, ed. Amnon Goldworth, Clarendon Press, Oxford, 1983, p. 309; see also Louis Werner, 'A Note about Bentham on Equality and about the Greatest Happiness Principle', Journal of the History of Philosophy, xi (1973), 237-251; Amnon Goldsworth, 'The Meaning of Bentham's Greatest Happiness Principle', Journal of the History of Philosophy, vii (1969), 315-321; Kelly, 1990, p. 75.

16. Deontology Together with a Table of the Springs of Action and an Article on Utilitarianism, p. 209.

17. UC lxxvi. 145.

18. UC lxxvi. 147.

19. P. J. Kelly, 'Utilitarianism and Distributive Justice: The Civil Law and the Foundations of Bentham's Economic Thought', Utilitas, i (1989), 71.

20. UC lxxvi. 149.

21. Shorter Oxford Dictionary, Axiom:3; pathology:2.

22. See Kelly, 1989, p. 14.

23. Bowring, iii. 224.

24. UC lxxvi. 149.

25. UC lxxvi. 149.

26. Bowring, i. 302.

27. UC lxxvi. 149.

28. Bowring, v. 417.

29. Bowring, v. 419; see chapter three.

30. Bowring, v. 417.

31. Bowring, v. 419

32. UC lxxvi. 65.

33. UC lxxvi. 13.

34. For example see UC lxxvi. 255.

35. UC lxxvi. 13.

36. UC xxvii.

37. Chrestomathia, ed. M. J. Smith and W. H. Burston, Clarendon Press, Oxford, 1983, (CW), p. xi.

38. Chrestomathia, pp. 139-276.

39. See Dinwiddy, p. 45-48; Ogden, p. xxxii; Harrison, p. 47-75.

40. See Lobban, 167-8.

41. F. Pollock, Digest of the Law of Partnership, Stevens and Sons, London, 1877; J. F. Stephen, Digest of the Law of Evidence, Macmillan, London, 1876; M. Chalmers, The Sale of Goods, W. Clowes and Sons, London, 1890.

42. A. W. B. Simpson, Legal Theory and Legal History: Essays on the Common Law, Hambledon, London, 1987, p. 307.

43. See also David Sugarman, 'A Hatred of Disorder': Legal Science, Liberalism and Imperialism', in Dangerous Supplements: Resistance and Renewal in Jurisprudence, ed. Peter Fitzpatrick, Pluto Press, London, 1991, p. 38.

44. Lobban, p. 160-1; see also Ogden, p. xxxiv.

45. Chrestomathia, p. 165; Lobban, p. 168.

46. BL Add. MS 33549 fo. 316.

47. Harrison, 49-51.

48. Chrestomathia, p. 272-273.

49. See Harrison, p. 56-59.

50. OLG, 245.

51. OLG, 246.

52. OLG, 251.

53. OLG, 251.

54. Chrestomathia, p. 142.

55. See D'Alembert's 'Encyclopaedical Table' in Chrestomathia, p. 158.

56. Chrestomathia, p. 160.

57. Chrestomathia, p. 164.

58. Chrestomathia, p. 223.

59. Chrestomathia, Table iv, p. 158.

60. Chrestomathia, p. 213.

61. Chrestomathia, p. 254.

62. Chrestomathia, p. 256.

63. Chrestomathia, p. 216.

64. Chrestomathia, p. 232.

65. Lobban, p. 164 n. 53.

66. Walter J. Ong, Ramus, Method, and the Decay of Dialogue, Harvard University Press, Cambridge, Mass., 1983, p. 78-82.

67. Chrestomathia, Table iv.

68. William and Martha Kneale, The Development of Logic, Clarendon Press, Oxford, 1962, pp. 232, 301.

69. Chrestomathia, p. 242.

70. Walter J. Ong, S. J., Ramus, Method and the Decay of Dialogue, Harvard University Press, Cambridge, Mass., 1983, p. 200; Wilbur Samuel Howell, Eighteenth Century British Logic, Princeton University Press, Princeton, 1971, p. 16-17; p. 124-134; see also Lisa Jardine, Francis Bacon: Discovery and the Art of Discourse, Cambridge University Press, Cambridge, 1974, pp. 17-58.

71. Lobban, pp. 159-169.

72. Chrestomathia, p. 251.

73. Chrestomathia, p. 220-242; See Lobban, p. 165.

74. Lobban, p. 164.

75. See Peter Goodrich, 'Ars Bablativa: Ramism, Rhetoric, and the Genealogy of English Jurisprudence, in Legal Hermeneutics: History, Theory and Practice, ed. Gregory Leyh, University of California Press, Berkeley, 1992, pp. 43-82.

76. Goodrich, p. 44.

77. W. S. Holdsworth, 'Some Aspects of Blackstone and his Commentaries', The Cambridge Law Journal, iv (1932), 272.

78. Quoted by Wilfred Prest, 'The Dialectical Origins of Finch's Law', Cambridge Law Journal, xxxvi (1977), 326-352.

79. Thomas Wood, An Institute of the Laws of England, Richard Sare, London, 1720.

80. Prest, 326; Simpson, 1987, p. 290.

81. See Prest, 333 for a copy of this tree.

82. Henry Finch, A Summary of the Common Law of England, extracted and summarised by E. W., London, 1673.

83. See Prest, 239; see also Ong, pp. 258-269.

84. Henry Finch, Law or a Discourse Thereof, in foure Books, London, 1627.

85. Ibid., p. 6.

86. See Simpson, 1987, p. 293.

87. Finch, 1627, p. 1.

88. Ibid., pp. 3-4.

89. UC lxxvi. 3.

90. UC lxxvi. 3.

91. UC lxxvi. 13.

92. UC lxxvi. 3.

93. First Report, Appendix 1, p. 87.

94. UC lxxvi. 3.

95. See chapter one.

96. UC lxxviii. 155.

97. See: Bowring, v. 391; Bowring, i. 342; chapter one.

98. Bowring, i. 358-364.

99. Bowring, i. 311.

100. Humphreys, 1826, p. 206.

101. UC lxxv. 45.

102. Bowring, i. 302; see Kelly, 1990, p. 106.

103. Bowring, i. 334.

104. Bowring, i. 334.

105. Bowring, i. 312.

106. Bowring, i. 337.

107. UC lxxvi. 46.

108. Bowring, i. 337.

109. Bowring, i. 337.

110. Bowring, i. 337.

111. UC lxxvi. 147.

112. UC lxxvi. 244.

113. Bowring, iii. 319.

114. Bowring, iii. 212.

115. Rosen, pp. 101-6.

116. Rosen, p. 219.

117. Kelly, 1990, p. 176.

118. Ibid., pp. 139-140.

119. Ibid., p. 9; but see also Gerald Postema's discussion on the non-disappointment principle operating as a principle of adjudication in Bentham's proposals for the Equity Dispatch Court, Gerald Postema, Bentham and the Common Law Tradition, Clarendon Press, Oxford, 1986, pp. 414-421.

120. UC lxxvi. 45.

121. Postema, p. 214.

122. Kelly, 1990, pp. 204-5.

123. UC lxxvi. 271.

124. UC lxxvi. 271.

125. Ibid.

126. UC lxxvi. 3.

127. Ibid.

128. Ibid.

129. 'Emancipate your colonies! Addressed to the National Convention in France, Anno 1793', Bowring, v. 407; 'The Philosophic Radicals and Colonialism,' Bernard Semmel, Journal of Economic History, xxi (1961), 513.

130. Donald Winch, Classical Political Economy and Colonies, G. Bell and Sons, London, 1965, p. 2.

131. R. V. Jackson, Jeremy Bentham on the Cost of the Convict Colony in New South Wales, Working Paper 70, Australian National University Working Papers in Economic History, 1986.

132. Winch, p. 2.

133. Semmel, 518.

134. UC viii. 149.

135. Ibid. p. 518.

136. UC viii. 179.

137. UC viii. 150.

138. UC viii. 153.

139. Ibid.

140. UC viii. 155-156.

141. UC viii. 156.

142. UC viii. 159.

143. UC viii. 161.

144. Ibid.

145. UC viii. 177.

146. Ibid.

147. BL Add. MS 33,546, fo. 317.

CONCLUSION

Bentham died in 1832, a year before the Real Property Commission had delivered its last Report to parliament. He did not live to see the end of the Commission's work, or to witness the legislation introduced as a result of the Commissioner's recommendations. In the years shortly after the close of the Commission several acts were passed implementing the Commission's plans, including the Prescription Act in 1832, and the Inheritance Act, the Fines and Recoveries Act, the Real Property Limitation Act and the Dower Act of 1833. Later the Wills Act was passed in 1837 and in 1845 the Real Property Act.

Bentham did not live to challenge the Commissioners to keep their promise to him and publish all the work that he had done for them. It is clear that he expected a far greater role for himself in the records of their proceedings, even thinking that the Commissioners would dedicate a whole report to his work alone.[1] But this did not happen and the Commissioners did not even go so far as to publish all the work he sent them. It is not known why the Commission did not honour their agreement with Bentham, especially since they had not hesitated to enter into it in the first place,[2] or why Bentham's friends and editors did not take up the issue subsequently. Many mysteries remain unresolved in the story of Bentham's relations with the Real Property Commission, but unless

the Commission's working papers are discovered it is unlikely that much more will be disclosed.

1

What was Bentham's standing was with other property lawyers? Did Bentham address any of his legal reform proposals to them? This dissertation has sought to tell the story of Bentham's relationship with the Real Property Commission which can now be seen more clearly. But it is not always easy to discover how someone in the past was viewed by his contemporaries. The records that survive may distort rather than clarify, and here Bentham presents particular problems because in many ways his subsequent reputation has obscured what he actually did or did not do. The records have been forgotten and neglected. Myths of Bentham the philosopher, Bentham the legal reformer, Bentham the architect of authoritarian prison houses, including the 'auto-myth' of Bentham the eccentric 'hermit' of Queen Square, have all made it difficult for later generations to understand how he was perceived during his own lifetime.

We have seen that Bentham had been invited to contribute to the investigations into property law reform of one of the most important Royal Commissions of the time because of his reputation as a proponent of systematic reform and codification of the common law. He had personal contacts with some of the leading lawyers of the age,

including Romilly, Brougham, Austin, Charles Butler, the Commissioner John Tyrrell and James Humphreys, and he played a prominent part in 'the great debate'[3] on law reform in the early nineteenth century. Bentham made a significant contribution to the debate about the reform of English property law played out against the background of the Real Property Commission.

2

Bentham believed, with considerable justification, that property law was about to be fundamentally restructured in some way or another, and he thought that there was a real possibility that he could influence events and that his reforms would be adopted. The Real Property Commission had been ordered by government to propose some reform measures and he had been asked to contribute. Even though the Commissioners had hastened to reassure their readers in their First Report that the English law of real property needed very little adjustment because it was already close to perfection, Bentham knew that reform of one sort or another would not be put off much longer.

Believing that change was imminent, Bentham worked in a variety of ways to achieve his purpose of influencing the outcome of the Commission's deliberations, and his written communications with the Commissioners were just

one part of a concerted campaign. For example Bentham prepared petitions to present to parliament calling for codification,[4] and arranged for Daniel O'Connell to bring a notice of motion to lay draft plans for codification before parliament.[5] He also prepared a petition and drafted a bill for a new Court of Equity, the Equity Dispatch Court.[6] All these projects, and others, were in progress when Bentham died, and more investigations need to be undertaken before the full extent of his activities is known.

Bentham must have believed that at last he would see some of his ideas coming to fruition in his own country. As a result, in many of his communications with the Commissioners his tone was moderate and calm, with a marked lack of usual invective against lawyers and aristocracy and opponents of reform generally. As we have seen he spent much time in preparing answers to the many questions sent to him by the Commissioners because he believed it important even though he complained of being under pressure from other commitments.

Bentham hoped to use what influence he possessed with the Commission to promote not just reform, but the utilitarian reform, of property law and worked to this end as part of his secret agenda. Because he believed that some of these projects had an immediate prospect of success, he produced not only theoretical discussions but detailed costed plans for a land registry, or for a new equity court, and commenced a fundamental restructuring of

English land law as a preliminary to a utilitarian code of property law.

Bentham's plans for the Land Registry are significant for the detail which he put into providing the Commissioners with a model of a well planned institution of government. As we have seen the plans included ideas about the building and about the people who would work there. Bentham considered that the greatest happiness principle was best served by a democratic form of government, and so his Land Registry should be seen in the context of his ideas for 'good government'. The possibility of conflict between interest and duty for the functionaries in the registry should be eliminated so that they would work in the best interest of the majority. By substituting salaries for fees, examinations to determine suitability for the job, competition for jobs, attendance requirements and other 'securities for appropriate aptitude' Bentham put before the Commissioners a working, democratic institution of government, democratic because he viewed institutions as political societies in miniature.[7]

In connection with the Constitutional Code F. Rosen has shown that an important part of Bentham's late work was to argue that equality of power, which could be achieved by universal suffrage and representative government, would also act to enhance security because it would limit the possibility of abuse of power by

government functionaries. These concerns can be clearly seen in Bentham's plans for a Land Registry.[8]

The other detailed plans that Bentham put before the Commissioners were not so complete as his plan for the Land Registry, and it is not possible to know how much of this material reached them, although I have argued that, as some of it was prepared to a high standard of readiness, it probably was sent to them. This was true of Bentham's 'principles applicable to Real Property', the real property tree. Bentham had told the Commissioners that he was preparing this work for them[9] and one fair copy of the tree remains in the manuscripts. I have argued in chapter six that Bentham's carefully crafted diagram was a completed working out of these principles.

The idea for such a tree was influenced by the work of early philosophers, so Bentham was working within a certain tradition which sought to create a methodology to organise and understand a body of knowledge. Bentham drew on both this tradition and on his own earlier work to provide the Commissioners with an analytical methodology that would aid them in drafting utilitarian codes of law. One puzzle has been to understand why Bentham did not use his bifurcate method and failed to set out pairs of antagonising principles on the tree. But it has been argued that Bentham planned the tree as a first step in more ambitious project, one that would first detail the leading principles of property law, and then go on to show how each had application to a rule of law. This would be

the steps necessary to fundamentally restructure and codify English property law.

In chapter five it has been argued that, as another aspect of his fundamental restructuring of English property law, Bentham turned his attention to the doctrines of tenure and estate. He demonstrated convincingly that these ancient English doctrines were defective and did not accommodate 'new' forms of wealth such as company shares, or annuities which were increasingly important. Bentham used Blackstone's work on property to exemplify these defects in the common law, and replaced the doctrines of tenure and estates with a system of rights and obligations.

But I have argued that Bentham had another purpose when drafting his table of incorporeal hereditaments that went beyond the immediate requirements of English law. He intended this work to be a part of a 'universal jurisprudence', explaining such terms as 'right' and 'obligation' and so explaining the laws of all nations to each other. Bentham had long talked and written about plans for a universal jurisprudence. Late in his life in his property writings he demonstrated how it could be achieved and how it could act as a general, higher code of law from which particular codes could be drawn up for whatever need.

Since Bentham's late work, particularly on property law, was so closely connected and all part of one all-comprehensive reform plan, there are several other areas that need to be investigated before the full extent of Bentham's plans can be known. The Civil Code writings included a property code and this needs to be investigated further. P. J. Kelly's recent important book[10] has uncovered Bentham's theory of distributive justice in these writings, and more needs to be done on the property code part of the writings because these papers were not selected or prepared for publication by Bentham himself, but put together later by editors with possibly odd consequences. The relationship of Bentham's property code to his theory of obligations needs to be considered.

An important work that has not been investigated in any detail is Bentham's plans for reform of procedure, the court system and in particular his proposal for a new court of equity. This was his Equity Dispatch Court proposal which, according to the editor's note, was the last project Bentham undertook before his death in 1832, and remained unfinished.[11] Although he hoped that such a system of courts would eventually be adopted all over the country, Bentham thought it too great an expense to introduce such a change all at once for the whole legal system. His Equity Dispatch Court proposal was therefore

an inexpensive experiment to see how such a system would work in practice.[12]

The Equity Dispatch Court proposal is important because it exhibits many of the main concerns and interests that Bentham had at this stage in his working life, drafting statutes, procedural reform, the administrative reform of institutions, and establishing a system of control over public functionaries. This was to be a temporary court, although as the editors pointed out he did not actually fix the length of time that it was expected to last. It was not to be permanent because Bentham considered it imperative that the dual systems of law and equity be abandoned in favour of one unified system. He believed it was an absurdity to have two separate courts and systems of law. But because of the many complaints about the delays and problems in the existing Equity Court of Chancery, as an interim relief measure, a new equity court should be set up and existing equity business transferred to it. Bentham thought the problem so pressing that if the government did not put a swift end to such scenes of 'misery and vice',[13] the government itself might fall.

Bentham's proposal for the Equity Court is interesting because it sets out not only the details of the organisation of the court itself, and the summary procedure to be used, but because it also provides a practical example of how Bentham thought legislation

should be drafted. The Bill began with a preamble, followed by numbered articles. In a preface Bentham recorded that he would follow the format set out in Official Aptitude Maximised, Expense Minimised, and include in each article several different kinds of matter, namely the enactive, the instructional, the exemplative, ratiocinative and commentative or illustrative. Existing statutes gave reasons only in a preamble, but Bentham argued that ratiocinative material should be found throughout the body of the Act. In fact Bentham said the only reason that he set out a preamble at all in his Bill was because this was what was traditionally expected.[14] All Bentham's strictures on drafting reforms can be discovered in this bill, from the organisation of the material to length of sentences, and to numbered articles.

As a consequence of the substitution of summary procedure for regular procedure, Bentham's new court demanded that the parties, or agents, attend in person to commence an action, and that the parties attend in person to give oral evidence in the presence of each other and of a judge. This would mean the whole case might take minutes instead of years. Additionally, in order to make sure that personal attendance was not a huge burden on suitors every individual who attended should not have to spend the night away from home.[15] This necessitated the establishment of 'local judicatories', which Bentham likened to the system of courts that had existed in Anglo Saxon England, which would be geographically limited in the cases they could

hear.

The new court would be 'single seated', in other words there would be one judge, and that judge would be an elected official, elected by secret ballot, whose appointment would then be confirmed by the King.[16] This official would receive a salary instead of fees as remuneration in order to eliminate sinister interests and ensure the best conjunction between interest and duty. The judge would be assisted by a registrar, again in receipt of a salary and not fees. His duty would be to keep records of all suits and the original documentation. Bentham also provided for an 'eleemosynary advocate' to be attached to the court. This was a functionary whose duty was to give gratuitous assistance to any parties to an action who, due to 'relative indigence' are unable to pay for professional assistance. These eleemosynary advocates were not to be paid at all, instead they were barristers who gave their time and services free because they acted in the expectancy of one day obtaining a post as a salaried official in one of the courts.[17] Bentham likened this to the practice of doctors who give free medical service in hospitals while hoping for a salaried appointment in the hospital. The plans for some of the other functionaries in the court include messengers and a 'prehensor', that is an official whose duty was to apprehend persons or things required by the judge for the hearing,[18] also consignees, or in-trust-holders.[19] These

latter functionaries were trustees appointed by the court to hold property of various sorts for beneficiaries, affect transfers of property ordered by a judge, and even lock up people in a 'lock-up-house' in order to carry out a court order. Bentham's plans for this court were detailed and contained a practical application of many of his plans.

4

In conclusion, one question remains to be answered, which is whether Bentham's reform proposals for property law had any effect, direct or otherwise, on subsequent legislation or changes in practice. This question is difficult to answer. If he had drafted legislation then there would then be little doubt about Bentham's direct influence on subsequent events. But he did not do so, and therefore it is more difficult to draw conclusions.

In the past Bentham was credited with having had a profound effect on law reform. Henry Brougham said that the age of law reform and Jeremy Bentham were the same,[20] and that he had exposed the defects in English jurisprudence. In the twentieth century A. V. Dicey[21] accorded Bentham a pre-eminent position in law reform, naming the years between 1825 to 1870 as the period of Benthamism or individualism. But this view was never accepted uncontested, and David Sugarman has argued that Bentham's ideas were selectively appropriated by later

lawyers to suit their own purposes which were largely to create a discipline of law that could be taught in universities without challenging the legal profession. Bentham's ideas were stripped of radicalising potential and placed firmly in a past where his techniques had been needed to expose defects in the now reformed law.[22]

Another, contrary, approach to the problem of establishing the influence of ideas has been taken by S. E. Finer in his historical examination of the growth of nineteenth century government.[23] Finer describes the threefold process whereby Bentham's ideas can be connected to actual reforms of law and its administration. At one ends of the process we find Jeremy Bentham scribbling away in Queen's Square Place, Westminster, and at the other end civil servants and judges busy executing his plans. The connections are made by, firstly, a process of irradiation, by which small groups of Benthamites attracted to their salons, committees and associations a much wider circle of people who became in turn infected with enthusiasm and so second degree Benthamites. Secondly a process of suscitation, which means to stir up or animate. This was the process of arranging pubic inquiries or article in the press to influence public opinion favourably. Thirdly by a process of permeation, by which Benthamites obtained official appointment and then used their position to further irradiate suscitate and permeate.

Finer's view rests on a conspiracy theory but does

give an answer to the question about how Bentham's influence could have been effected. Bentham did have close contacts with the leading lawyers of his day, some of whom did draft legislation, for example John Tyrrell, Bentham's friend, is credited with having drafted the 1837 Wills Act, although it would be true to say that Bentham does not appear to have exerted sufficient influence on these lawyers to have created them in his own likeness as utilitarians.

A satisfactory detailed analysis of what influence Bentham had on the legislation introduced in the years following the close of the Commission has not been the focus of this dissertation and must be the subject of another study. But it is not without significance that Bentham was invited to contribute to the Real Property Commission in 1829 when they had reached the stage of making a detailed examination of the case for registration of title to land. There was near consensus among conveyancers and Commissioners that a registry would alleviate many of the problems encountered in the transfer of land, and Bentham shared many of their concerns. He was also seen as a person capable of producing the systematic reform so many of them wanted, and which was in the end not to be achieved.

Because Bentham addressed his late writing on property law to the Real Property Commission, the question of his influence has been considered in the context of their success or failure to introduce legislation to

implement their proposals. But Bentham always had a wider audience and a wider purpose, and the success or failure of this wider purpose must be assessed in other ways. The headings on many property manuscripts indicate the place that was to be accorded to property law in his Pannomion. Property law was to be part of the Civil Code, as the manuscript headings make clear. Although incomplete because death interrupted his efforts, Bentham undertook significant steps towards providing the Pannomion with an all-comprehensive, utilitarian, codified, rationally structured law of property.

Notes

1. BL Add. MS 34,661, fo. 3.

2. UC lxxvi. 14.

3. Lobban, 1991.

4. Justice and Codification Petitions, Bowring, v. 437.

5. Parliamentary Debates, new series, xxv. 1830, 1114.

6. Equity Dispatch Court Bill, Bowring, iii. 319.

7. Hume, p. 246.

8. Rosen, p. 223.

9. Bowring, v. 417.

10. Kelly, 1990.

11. Equity Dispatch Court Bill, Bowring, iii. 319.

12. Bowring, iii. 322.

13. Bowring, iii. 321.

14. Bowring, iii. 323.

15. Bowring, iii. 329.

16. Bowring, iii. 330.

17. Bowring, iii. 342.

18. Bowring, iii. 376.

19. Bowring, iii. 382.

20. Parliamentary Debates, xviii. n. s., 1827, 127-258.

21. A. V. Dicey, Lectures on the Relation Between Law and Public Opinion in England, Macmillan, London, 1905, p. 125.

22. David Sugarman, '"A Hatred of Disorder": Legal Science, Liberalism and Imperialism', Dangerous Supplements: Resistance and Renewal in Jurisprudence, ed. Peter Fitzpatrick, Pluto Press, London, 1991, p. 43.

23. S. E. Finer, 'The Transmission of Benthamite Ideas 1820-50', Studies in Nineteenth Century Government Growth, ed. Gillian Sutherland, Routledge & Keegan Paul, London, 1972; see also Cornish and Clark, p. 65.

APPENDIX ONE

THE MANUSCRIPT CHRONOLOGY

Repetitious and Rambling?

Between 1829 and 1832, the year of his death, Bentham was working on several different projects about property law reform. He left numerous manuscripts that had not been published, and most seem to have been written specially for the Real Property Commission. Many bear the title Real Property Commissioners. The manuscripts discussed in this thesis are to be found in the collection at University College in one particular box, UC lxxvi.

This box contains several different folders, two of which contain the unpublished work, while the other folders contain draft for the published work, bills on property law reform printed by the House of Commons or examples of manifold writing. The note on the front of one of the folders states that the contents are 'repetitious and rambling', but we should not agree with this comment. Why should it have been assumed that Bentham would have spent so much of the time that he regarded as precious in pointless scribbling?

1

The manuscripts in the two folders that are of particular interest are to be found in the order in which

they were placed by Thomas Whittaker in 1892. The two folders are bulky and the ordering of the manuscripts is quite chaotic and makes little sense. Whittaker worked on the manuscripts as he found them, still in their original wooden boxes where they had been kept by Bentham.[1] Perhaps Bentham's editor John Bowring did some arranging or re-arranging of the manuscripts after Bentham's death. As Whittaker had intended to catalogue and arrange the manuscripts in subject and approximate date order we can only guess that neither he nor John Bowring really understood that the jumble of papers covered several quite different pieces of work that Bentham had undertaken for the Real Property Commission. The manuscripts are not in either date or subject order.

In 1935, when A. Taylor Milne prepared the catalogue of all Bentham's manuscripts kept at University College, he did not re-arrange the bundles made by Whittaker, and possibly before him by Bowring or even Bentham himself, but it is difficult to believe that Bentham himself would have been responsible for so thoroughly mixing up different subjects and dates despite his reputation for leaving his work in disarray. Although Taylor Milne did not re-order the manuscripts he did number them and also divided large bundles of papers into smaller folders where he thought appropriate. Dividing up and numbering manuscripts that were already in a disordered state has had the unfortunate effect of making even more impenetrable the jumble of papers in UC lxxvi.

Despite the initial chaotic appearance and order of the manuscripts they do in fact fall into distinct categories. Bentham was working on several different projects at different dates, mostly not at the same time but consecutively. Some of these reflect Bentham's public face as a reformer, and others clearly indicate the extent of Bentham's secret agenda, his plan, as 'counsel for the people', to introduce utilitarian reform to property law. It is useful to list these different categories of manuscripts in date order, although this is not necessarily the order of the most importance.

During 1829 Bentham wrote draft letters to the Real Property Commissioners, to the Secretary to the Commission, Mr Swann, and to one of the Commissioners by name, Hodgson. None of the final fair copies seem to be extant in other collections but it is possible to conjecture that some must have been completed and delivered because sometimes they refer to replies received by Bentham to earlier letters, or are headed 'JB's copy', or mention that a fair copy of the draft letter has been made and delivered.

Also during 1829 Bentham prepared detailed 'Answers' to 'Questions' from the Commissioners on tenures and inheritance and other matters dealt with in the First

Report. In addition he prepared 'Suggestions' for the Commissioners, setting out what he advised them to consider as the task they were undertaking, and what their aims should be. Finally after the publication of the First Report in 1829 Bentham wrote another set of 'Suggestions' based on the matters discussed by the Commissioners in the First Report.

During the course of 1830 Bentham continued the work begun in 1829, the 'Suggestions' based on the First Report, and made Comments on the Report. He also began new work on plans for introducing a system of registration of title to land and registration of other events, such as birth, death, or marriage. Once again this work took the form of answers to questions from the Commissioners, and also to Bentham's own 'Suggestions' on registration, and to comments he made on the Commissioners report on registration contained in the Second Report published in 1830. Some of Bentham's draft work was published by the Commissioners in the appendix to the Third Report in 1832, and by Bowring in 1843 as an 'Outline of a Plan of a General Register of Real Property'.[2] Some of this work was discussed in connection with Bentham's contacts with the Real Property Commission in chapter two. Most of this work reflects Bentham's public face as a reformer.

During 1830 Bentham worked with John Tyrrell to produce extensive lists of a particular category of property, incorporeal property. There are long lists of movable and immovable incorporeal property. Although the these manuscripts bear as one of their three headings 'Real Property Commission' the lists do not seem to have been prepared in response to a direct request from the Real Property Commissioners, or as preparatory work for 'Suggestions' to the Commissioners. Therefore they are part of Bentham's hidden agenda, his plan to apply utilitarian principles to property law.

At the same date Bentham drafted and completed work on what he considered to be the principles applicable to Real Property, in the form of a philosopher's tree, or Real Property Tree as he called it. The trunk was formed by the greatest happiness principle, and the branches were those principles subservient to the greatest happiness principle that were most relevant to property law, such as the non disappointment principle. Again this work was not directly in response to requests for Answers from the Real Property Commission, but formed part of Bentham's secret purpose for utilitarian law reform.

Finally during 1831 Bentham continued working on registration and also made detailed comments on the two Registration Bills printed by the House of Commons in

1831. In yet another project that he undertook Bentham commented extensively on a Fines and Recoveries Bill which he called 'Tyrrell's Fines and Recoveries Bill', so it was presumably drafted by the Commissioner John Tyrrell. Bentham continued his work on Tyrrell's Fines and Recoveries Bill in 1832, the year of his death.

Notes

1. A. Taylor Milne, Catalogue of the Manuscripts of Jeremy Bentham, Athlone Press, London, 1962, p. vi.

2. Bowring, v. 417.

APPENDIX TWO

THE CORRESPONDENCE AND MANUSCRIPT CHRONOLOGY ON REGISTRATION

1

Correspondence on Registration.

Bentham's published work on registration, 'An Outline of a Plan' is to be found in the Bowring edition of the collected Works dated July 1831,[1] but in March of the previous year, 1830, Bentham had written a letter to the Commissioners, and said that he was enclosing his 'suggestions in the form of answers to the questions you did me the honour to transmit to me...'[2] It is not at all clear what work this referred to, what were the questions and what were the answers, although the heading at the top of the letter refers to 'Suggestions Registration'.

Bentham apologised for sending the work in an 'unmatured form', but other commitments meant he was forced to use his exercise time to dictate answers to the questions as he walked backwards and forwards in his room. Whereas he would usually have hesitated to send work in this state, he had no apprehension in the present circumstances because of the Commissioner's 'superintending authority and legitimate censorship'.[3] This is a reference to Bentham's agreement with the Commissioners that they would publish whatever he sent them, subject to an agreed power of veto. Perhaps this

letter was not sent. Although it is in a copyist's hand it was clearly a draft and there was no indication that a fair copy was ever delivered to the Commissioners. Even if the letter was not sent, what was the completed work he was referring to?

Bentham's apologies to the Commissioners in this letter bear a remarkable similarity to the excuses he would be making to John Tyrrell three months later, in June 1830.[4] This time the apology was for delay instead of 'unmatured', presumably meaning unedited, work. Bentham wrote that he could not possibly complete his work in time for Tyrrell to include it in the Second Report as Tyrrell requested, as discussed in chapter two. Tyrrell had delayed the printing of the Report in the hope of including Bentham's contribution, and had asked Bentham if he would allow the Commissioners to include his 'former letters' in the appendix to a future Report. Bentham had refused this request, 'should I live to complete them (the Suggestions), then will be the time for the publication of my letters to the Commissioners at large'.[5] The reference to 'former letters' to the Commissioners is strong evidence that Bentham did send some of the draft letters in the manuscripts, and that the work published in the Third Report was not the only piece of writing that the Commissioners received from Bentham.

Bentham told Tyrrell that he had answered all the questions on registration sent by the Commissioners, and was half way through the other questions on 'the subject

at large'. The reference to the questions on 'the subject at large' must mean the questions for the matters included in the First Report. He said that he needed another three weeks to complete these questions, and then it would take time to go through the questions and write them up in the form of 'Suggestions'. It may be that this finished work became the work sent to the Commissioners the following year and published as 'An Outline of a Plan...' in an Appendix to the Third Report in 1832, but Bentham was writing on registration generally written during 1830 and 1831, and he could have meant something else.

There is a fair copy, in George Bentham's hand, of the answers to the questions on tenures and the other matters contained in the First Report, dated July 1830.[6] So it is apparent that Bentham did complete his answers on tenures in the time he estimated in his letter to Tyrrell, but whether he sent them to the Commissioners or not cannot be established. George Bentham played a role in Bentham's work on registration that has not been previously noted. George, who was Bentham's nephew, the son of his brother Samuel, appears to have been much involved in the work that that Bentham undertook for the Real Property Commission. Bentham made it clear in correspondence with the Commissioners and John Tyrrell just how dependent he was on his nephew's help. In the letter to the Commissioners of March 1830[7] and in the letter to Tyrrell of June 1830[8] he mentioned his need for his nephew's

secretarial help.

Then later in January 1831[9] George made a summary of the clauses of a Registration Bill for Bentham and then they worked together making comments on several clauses. His initials, GB, appear beside some comments,[10] while others are initialled JB. This could amount to more than secretarial help from George. There is evidence that George wanted to study law. Perhaps he gave Bentham secretarial help in return for help with his studies. In November 1826 George had written to Peel saying that he had seen the three bills on consolidation that Peel had sent to Bentham during the summer. Bentham was 'unwilling to divert any time from his other occupations' to look at them, and had told his nephew that if he were to send Peel some comments on the bills, then Peel for Bentham's sake would excuse George's 'interference'.[11] He continued that 'Time enough had not elapsed since I commenced the study of English law' for him to feel 'sufficiently confident' about commenting on the substantive law, but he had made a study of wording and so would direct his remarks in this direction. He then made comments on the virtue of brevity, and made a comparison of English statutes with the French Code. Peel replied to George and appeared to have been in contact with him.[12] George also wrote a pamphlet on a 'Registration Bill', presumably one preferred by the Commissioners, which he then distributed to several people including Charles Butler.[13] There are several letters of acknowledgement from recipients extant.

Then in 1832 Bentham died while still working on property law and related matters. John Bowring was named in Bentham's will as Bentham's literary executor, and George Bentham was sufficiently upset and angry about this to enter into litigation with Bowring about the executorship. George was unsuccessful. Since it was George and not Bowring who was closely involved with Bentham's work on property law, perhaps these events explain the neglect of Bentham's work on property law in the Works. Bowring would not necessarily have had any knowledge of the extent of Bentham's connections with the Real Property Commission, and George, who did know, had lost his fight for any control over the editing of this part of Bentham's work.

2

The Manuscript Chronology.

Bentham probably received the questions from the Commissioners on registration early in 1829, because the First Report was presented to parliament in May 1829, and the Second followed not too long afterwards in June 1830. The questions were not quite so numerous as the first set, which consisted of 202 questions, possibly because there was already a degree of consensus among lawyers on the benefit of drafting plans to set in motion plans for a registry of title deeds. Such a degree of consensus did not exist for other areas of property law. The first set

of questions had covered eight different subjects, although all were interrelated by the adverse effect they could have on alienation of property. These were tenures, descent, dower, curtesy, alienation by deed, settlement, fines and recoveries, and limitation of actions and prescription. But the second set of questions for the Second Report dealt exclusively with registration.

There were one hundred and sixty four questions. But not all dealt with registration of title to land. The first twenty six were searching questions designed to elicit answers about the legal, administrative and financial problems encountered on the transfer of land. For example there were questions about the accidental or fraudulent suppression of title deeds, the necessity of making lengthy searches of various sorts to establish the validity of a title, and the problems caused by the practice of creating fictitious leases which existed solely in order to strengthen a legal title.

Then there were detailed questions that sought to establish whether or not a register of deeds would solve these problems. For example, question 48[14] asked 'would not a register diminish the expenses of alienation'? Then there follow questions on the legislative and administrative details of setting up a registry, including an examination of what deeds respondents to the questions would think appropriate for registration. For example should the deeds to copyhold title be registered, or leases for more than twenty one years at a rack rent, or

wills?

The final twenty seven questions dealt not with the registration of title to land, but whether the concept of registration should be extended to include civil registers of births, deaths and marriages. If such matters should be registered, then what form should registration take? Bentham spent a disproportionate amount of time composing answers to these last questions, perhaps indicating the issues that interested him the most.

The questions were answered on various dates in March 1830[15] and the dates on the sheets of papers show that Bentham turned to the later questions first. But the answers were all dealt with in the continuous sequence given by the Commissioners. After having completed the later questions he then returned to the first questions[16] and it is quite possible to read Bentham's answers against the Commissioners questions. However, in the folder in which they were placed, the sheets of answers have not been numbered by Thomas Whittaker, or whoever undertook this task, in either date order, (the order in which Bentham answered them) or according to the Commissioners numbered sequence. They are numbered according to absolutely no comprehensible order. As a result it is not immediately apparent on looking at the sheets that Bentham did in fact answer all the questions on registration.

Then at the end of March 1830 a copyist made lists of headings from the sheets of answers made earlier in the

month,[17] but to compound the confusion these have been placed at the beginning of the folder. Did the copyist go on to make a fair copy of Bentham's answers and was this sent to the Commissioners? Again there seems no method of establishing this other than to conjecture that Bentham would probably not have undertaken this work unless he had the intention of sending it to the Commissioners. It is difficult to see what other use it would have because the questions are of necessity far too specific to serve for any other purpose at all.

Notes

1. Bowring, v. 417.
2. UC lxxvi. 40.
3. UC lxxvi. 40.
4. BL Add. MS 34,661, fo. 3.
5. BL Add. MS 34,661, fo. 4.
6. UC lxxvi. 150-157.
7. UC lxxvi. 40.
8. BL Add. MS 34,661, fo. 4.
9. UC lxxvi. 73.
10. UC lxxvi. 74.
11. BL Add. MS 33,546, fo. 81.
12. BL Add. MS 33,546, fo. 124.
13. BL Add. MS 33,546, fo. 485.
14. Second Report, Appendix 3, p. 139.
15. UC lxxvi. 91.
16. UC lxxvi 120.
17. UC lxxvi. 61-64.

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Jeremy Bentham and the Real Property Commission of 1828*

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In February 1828 a Royal Commission was appointed to examine the law of Real Property of England and Wales. The Commission sat for four years and examined a vast amount of material, recommended certain changes in the law, and drafted several bills for consideration by parliament. Four massive reports were eventually presented to parliament in May 1829, June 1830, May 1832, and lastly in April 1833. As a result parliament enacted a limited number of piecemeal (although important) reforms, but did not attempt a major revision of the law.

Jeremy Bentham was invited to contribute to the work of the Commission. He wrote some 'Suggestions' for the introduction of a system of registration of title to land. These were included by the Commissioners in the *Third Report* of 1832, and were eventually published by John Bowring in his edition of Bentham's *Works* as an 'Outline of a Plan of a General Register of Real Property'.[1] Bentham also contributed to the lively debate among lawyers in the years before the Commission was appointed. This debate sought answers to the question of how best to reform land law. James Humphreys's controversial book on land law reform proposing a code of property law was published in 1826.[2] Bentham reviewed the book for the *Westminster Review* and he was enthusiastic in his support for Humphreys's proposals to sweep away or modify much of the existing law and above all for the suggested code.

The Real Property Commission was set up to consider the reform of a body of law that had evolved without any major review since the imposition of feudalism by the Norman Conquest. The task faced by the Commissioners was immense. A. W. B. Simpson wrote that there had been no comparable undertaking either before or, for that matter,

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[1] *The Works of Jeremy Bentham*, ed. John Bowring, 11 vols., Edinburgh, 1838–43, v. 417.

[2] James Humphreys, *Observations on the Actual State of the English Laws of Real Property with the Outline of a Code*, London, 1826.

since.[3] In the eighteenth century land law was a complex structure composed of common law and statute, with interventions by equity, and much employment of legal fictions. Opinion varied on what reforms were necessary, and how best to put them into effect. By the early nineteenth century three kinds of attitude can be found in the work of legal writers. One inclined to the belief that the law was quite healthy, and that English land law was perfectly adapted to the needs of the English nation, needing no more than minor legislative or judicial adjustments. Another believed that while the substantive law needed no alteration, the mechanisms for creating or transferring interests in property were in dire need of vigorous reform. The third showed enthusiasm for a far more fundamental revision of the substantive law itself, a radical reform that redefined the nature of a right in property, or even replaced the substantive law with a French-inspired code of law.

Bentham supported codification, but he differed from other lawyers who advocated codes, like Humphreys, because Bentham's plans for a code of property law were firmly based on utilitarian principles. Yet the Real Property Commissioners, whose inclination was mainly to address modal and not substantive issues of law, sometimes actively sought Bentham's help.

Just how significant was Bentham's contribution to the early nineteenth-century debate on land law reform? Was the philosopher and self-styled 'hermit' of Queen's Square seriously interested in a close consideration of the dense, complex structures of land law? Avner Offer suggests that Bentham 'shrank from the magnitude of the task' of land law reform, and that, abandoning the effort, he turned instead to constitutional matters, leaving it to James Humphreys to produce the Benthamic project of codification of property law.[4] Despite old age and other commitments that demanded his attention, Bentham in fact prepared a great deal of material on land law reform for the Real Property Commission. He had discussed property issues elsewhere, most importantly in his writings on civil law,[5] but the work on property that Bentham undertook in 1828 and which is examined here, was prepared expressly for the Real Property Commission. It is here that Bentham sought to apply the principle of utility to part of substantive law.

[3] A. W. B. Simpson, *A History of the Land Law*, Oxford, 1986, p. 274.

[4] Avner Offer, *Property and Politics*, Cambridge, 1981, p. 27.

[5] See P. J. Kelly, *Utilitarianism and Distributive Justice*, Oxford, 1991. pp. 8–13, which explains that Bentham returned to the Civil Law at different times. The majority of these manuscripts have not been published. Others have been included in 'The Principles of the Civil Code' and 'Pannomial Fragments' which were constructed by the editors for the Bowring edition of the *Works of Jeremy Bentham.*

I

The most familiar view of the development of English land law is that this is a history of legislative neglect added to the gradual accretion of common law. It is frequently said that reform of land law, as well as many other branches of English law, was long overdue after what has been called the 'legislative holiday' of the eighteenth century,[6] but that such reform presented special difficulties. Property law was fully understood only by the few specialist conveyancing lawyers and the very complexity of the structure acted against reform because many people, lawyers and politicians, feared quite sincerely that interference with any one area of land law would lead to unforeseen dire consequences in another.

Even today it is considered difficult to understand English land law without looking at English history. The great legislative reforms of 1925 have been described in terms of evolution rather than revolution.[7] Many of the measures of 1925[8] were anticipated in recommendations made by the Real Property Commission between 1829 and 1833, and some were enacted piecemeal in the years that followed the Commissioners' last Report. But it was not until 1925 that major reform was effected by parliament, and so the reform of land law was delayed almost one hundred years.

Against this picture must be placed the recent work of David Lieberman[9] who points out that on the contrary, instead of failing to legislate during the eighteenth century, parliament had legislated at a greatly increased rate. For example between 1760 and 1820 parliament had enacted 254 statutes per session. Lieberman attributes the increase in legislative activity to the consolidation of parliamentary government in the years that followed 1688: 'Accompanying the establishment of a regular, annual parliamentary session was the dramatic increase of the King-in-parliament's exercise of its constitutional powers to

[6] See Offer, p. 27.

[7] Sir Robert Megarry and H. W. R. Wade, *Law of Real Property*, London, 1984, p. 1, write, 'Despite all this reform, the first thing the student must understand is that the basis of the subject remains the "old" law, and that the elements of this must be mastered before the new statutes can be understood. The approach to this subject . . . is still bound to be historical'.

[8] The Law of Property Act 1925 confirmed the Tenures Abolition Act of 1660 and abolished all feudal tenures save free and common socage. Section 1 of the Act allows only two estates to exist in law. These are the fee simple absolute in possession and the leasehold estate. Therefore all other estates, such as the life interest or the entailed estate, can only exist in equity. These measures did undoubtedly simplify land law, but at the same time the feudal doctrines of tenures and estates were preserved and continue to exist. Other reforming legislation introduced in 1925 included the Administration of Estates Act, the Settled Land Act, the Trustee Act, and of course the Land Registration Act.

[9] David Lieberman, *The Province of Legislation Determined*, Cambridge, 1989.

make law.'[10] Not only was there such a dramatic increase in the number of acts of parliament, but Lieberman writes that these acts were badly drafted and verbose. If the law of Real Property escaped the worst abuse at the hands of the legislators it was because it received less attention from parliament than other areas of law, for example, criminal law. Thus, as Lieberman argues,[11] it was the common law that transformed property law during the period. Judicial rather than parliamentary law-making solved the practical problems of land holding, such as the creation of the trust from the medieval use, and the collusive common recovery used to bar entails and so to alienate land.

Despite having fewer badly drafted Acts to contend with a common source of concern and complaint among the lawyers involved in the reform of property law in the 1820s was the sheer number of 'ponderous tomes' of both common law and statute in which it was necessary to search for the law. To quote James Humphreys: 'The result is, that our laws of Real Property are to be sought in the copious library of 674 volumes, exclusive of indexes to statutes.'[12] Humphreys wrote that an advantage to both practitioners and the public, nearly equal to all the reforms that he proposes in his book, would be to sweep away the 'ponderous pile of volumes in different ages, various languages, semi-barbarous and polished,—Norman—French, low Latin, and modern English,—in which the laws of Real Property are at present to be sought'.[13] He adds that, 'till the present indigestible heap of laws and legal authorities is consigned to oblivion, in vain will the public seek an uniform system of landed property'.[14]

In the work for a General Register of land that Bentham submitted to the Commissioners,[15] he complained of the 'train of surplussage, of which, under Matchless Constitution, the greatest part of an Act of Parliament is so regularly composed'. For example the use of the phrase 'whereas it is expedient' in an Act is not in accordance with anything that could be called reason, but is perfectly in accord with precedent. In a draft of 'Suggestions' on Real Property written in December 1829, Bentham wrote: 'From simplicity cognoscibility—from cognoscibility happiness. So from complexity uncognoscibility, from uncognoscibility unhappiness.'[16] Bentham had a lifelong concern with making the language of law accessible to everyone.[17] When he

[10] Ibid., p. 13.
[11] Ibid., p. 72.
[12] Humphreys, p. 209.
[13] Ibid., p. 225.
[14] Ibid., p. 226.
[15] Bowring, v. 418.
[16] UC lxxvi. 147.
[17] Douglas Long, 'Bentham on Property', *Theories of Property: Aristotle to the Present*, ed. A. Parel and T. Flanagan, Waterloo, Ontario, 1979, p. 221.

reviewed Humphreys's book[18] in 1826 he used the model legal instruments provided by Humphreys to show how legal drafting could be clarified. An advantage of such reform was that it could be put into immediate effect by conveyancers without waiting for the 'difficultly-moved machinery' of parliament.[19]

Nevertheless a code of law was much to be preferred. Anything less was at best 'partial legislation' and much to be 'reprobated'.[20] 'No partial legislation' was the 'principle laid down by JB in his Codification Proposal'.[21] Referring to property law Bentham wrote 'for want of a code the whole a mass of fictitious law'.[22]

In 1829 Bentham prepared material for an article that remained unfinished at his death, entitled 'Reformists Reviewed'. He wrote that there were three different kinds of reformers. 'As in Parliamentary so in Law Reform 1 Radical Reformists 2 Moderate d[itt]o 3 Anti reformists.'[23] Bentham called himself a radical reformist, in fact 'the first beyond all controversy'.[24] Later he expanded on the categories, listing five. These were '1 Reformists 2 Semi Reformists 3 Anti Reformists'. Then to Anti Reformists he added another two subcategories, the 'pseudo Reformist' and the 'dubious Reformist (Brougham)'.[25] Lord Eldon was the non reformist and 'Peel the pseudo reformist'.[26] Bentham accused Brougham of inconsistency in his approach to law reform because in his great speech in parliament he had argued against 'partial legislation', and yet 'after his speech a Commission with limited powers appointed with his assent'.[27] This Commission was not the Real Property but the Common Law Commission.

When Humphreys's controversial book was published in 1826 it had produced a furore among lawyers most of whom deplored the idea of substituting a French-inspired Code of Law for the Common Law, even though they might very well have approved of specific reforms suggested by Humphreys.[28] The book is often credited with being the immediate cause for the setting up of the Royal Commission on Real Property, together with Brougham's six-hour speech in Parliament in

[18] Bowring, v. 389.
[19] Ibid., p. 390.
[20] UC xi. 29.
[21] Ibid.
[22] Ibid., 27.
[23] Ibid., 21.
[24] Ibid.
[25] Ibid., 29. Referring to Brougham's great law reform speech in parliament, Bentham wrote that Brougham's 'eyes were directed by a vision of the Rolls', while for Bentham himself 'to no Rolls looks he no court butter for his bread'.
[26] Ibid., 23.
[27] Ibid., 29.
[28] Robert Dixon, *Observations on the Proposed New Code Relating to Property Law*, London, 1829; Edward Sugden, *A Letter to James Humphreys on his Proposal to Repeal the Laws of Real Property and Substitute a New Code*, London, 1826.

1828 urging law reform.[29] But as we have seen the need for reform of land law had already been recognized and debated in legal and parliamentary circles, particularly the need to reform the confusing, cumbersome and slow conveyancing procedures that did not meet the increased demands for quick and efficient alienation of property.

It was the intervention of equity in the common law that caused grave problems in conveyancing. For some time there had been open dissatisfaction amongst lawyers with the operation of the Court of Chancery which administered equity. This Court was renowned for delay and expense, which was partly the result of its very success in earlier times. The Lord Chancellor was the only judge and although he delegated to others he was able to review their decisions. The Master of the Rolls could deal with some matters, but only when the Chancellor himself was not sitting. The Chancellor was not a full-time judge and did not have a department of salaried clerks to assist him until 1885. As a result before this date the Chancery clerks were dependent on the often exorbitant fees they charged to litigants. The system was thought by some to have ground to a halt with the Chancellorship of Lord Eldon from 1801 to 1827. In his attempt to create a system of equity, to make sure that equity operated in as certain a manner as common law, Eldon's slow progress caused even longer delays.[30]

Such excesses had not escaped Bentham's critical attention. Bentham was acquainted with Michaelangelo Taylor, an MP who in 1811 procured a select committee to look into the delays in the court of Chancery. In May 1811 Bentham wrote to Sir Francis Burdett asking for Burdett's support for Romilly in a future debate in the Commons on Chancery:

> The pace of the present Chancellor in the making of decrees is more than ten times as slow as the average pace. . . . In one term, (I think it was the last) during which the master of the Rolls made *one hundred and fifty* decrees, the Chancellor made—*not one.*[31]

The House of Commons Committee recommended the appointment of a third judge and in 1813 a vice-chancellor was appointed, and the powers of the Master of the Rolls increased until in 1833 he was given concurrent jurisdiction with the Lord Chancellor.[32]

In 1824 a Royal Commission was set up to examine the Practices of the Court of Chancery and to recommend the appropriate reform. The

[29] Simpson, p. 274; Offer, p. 27.

[30] His often quoted remark that nothing would cause him greater pain on leaving his office than to feel he had justified the reproach that 'the equity of this court varies like the Chancellor's foot' is used to criticize his unhurried proceedings as procrastination.

[31] *The Correspondence of Jeremy Bentham*, vol. viii, ed. Stephen Conway, Oxford, 1988 (*The Collected Works of Jeremy Bentham*), p. 146.

[32] J. H. Baker, *An Introduction to English Legal History*, London, 1990, p. 130.

Commission was headed by Lord Eldon and when it reported in 1826 the Commissioners commented that they had not conceived it to be within the limits of the Commission to discuss complete revision of the English system of common law and equity. But because many suits in equity either owed their origin or were greatly protracted by questions arising from the complexities of conveyancing, the Commissioners suggested that it might be 'proper to commit to competent persons the task of examining this part of our law'.[33] This report was influential among lawyers because it sanctioned the need to survey and reform property law and it was probably in response to this report that James Humphreys wrote his book. Certainly the reviewers of Humphreys's book in the *Edinburgh Review* and the *Quarterly Review* of 1826 made great mention of the Commission's Report as calling for reform.

Although he was pleased that the need for reform was publicly acknowledged, Bentham was disappointed by the bodies set up to discuss the proposed reforms. He thought that by limiting the scope of each commission the anti reformists tried to ensure in advance that little would be accomplished by any commission. Bentham wanted an 'all comprehensive' reform that was grounded on fundamental principles: 'For the law of property system of reform but *one*: giving to each party the greatest facilities for ascertaining and understanding their respective rights.'[34] In particular he pointed out that

> nothing can be done to any good purpose in Common Law without the like operation in Equity. This inseparability well understood by Eldon when in Peel's mouth he forced the separation of the Common Law and Real Property Commissions from the Equity Commission . . . inseparability between the several parts of the law the same as the inseparability of flesh and blood as per Portia in the Merchant of Venice.[35]

So Bentham believed that separating common law and equity in this way could only prevent real reform in any area, and that this was done quite deliberately: 'To stave off reform a fork with two prongs 1 Commissions 2 Bills.'[36] Despite the disappointment he expressed about the manner in which the commissions set about their tasks, Bentham was more optimistic about the Real Property Commission because of his own involvement.

By the time that the Real Property Commissioners came to examine property law there was a range of conflicting opinions on reform, including either judicial reform of the Common Law, or legislative reform of the Common Law. If the latter option was followed, then how

[33] *House of Commons Sessional Papers*, 1826, xv. 34.
[34] UC xi. 30.
[35] Ibid., 29.
[36] Ibid., 23.

could acts of parliament be improved in quality, and reduced in quantity?

II

The Real Property Commission was at last appointed in 1828. Their first report was presented to the House of Commons on 20 May 1829. This began by naming the Commissioners and setting out their commission, which was 'To make a diligent and full Inquiry into the Law of England, respecting Real Property, and the various interests therein, and the methods and forms of alienating, conveying and transferring the same, and of assuring the titles thereto' with a view to reporting to parliament within two years recommending improvements and how these could be effected.[37] In fact the Commissioners took only one year to report that they felt they had as yet made little progress in the wide field of investigation presented to them, and that they needed a longer time because 'the whole field of Real Property is so connected, that alterations to be recommended in one Branch cannot be definitively arranged without an understanding as to the manner in which others are to be regulated'. Thus they hoped that any legislation introduced as a result of their recommendations could all be brought in at the same time as parts of a systematic reform of the whole field of property law.[38] So they confined their first *Report* to examining the law relating to Inheritance, Dower, Curtesy, Fines and Recoveries, Prescription and Statutes of Limitation of Actions. The second *Report* of 1830 was entirely concerned with registration of title to land, and their third *Report* of 1832 considered the law relating to contingent remainders and future estates, covenants and a period of limitation for the rights of the church. The fourth *Report*, which did not appear until after Bentham's death, was completed in 1833 and examined the law relating to Wills.

The Commissioners have often been criticized for their unwillingness to accept the need for reform. They are presented as self-congratulatory lawyers by Avner Offer, who wrote of the Royal Commission's 'complacency'.[39] Certainly the opening remarks of the *First Report* seem to support this view: 'the Law of England, except in a few comparatively unimportant particulars, appears to come almost as near to perfection as can be expected in any human institution'.[40] But, as A. W. B. Simpson points out,[41] the *Report* did distinguish between the substantive law establishing the nature of a right in property, and

[37] *House of Commons Sessional Papers*, 1829, x. 1 (hereafter cited as *First Report*).
[38] *First Report*, p. 5.
[39] Offer, p. 28.
[40] *First Report*, p. 6.
[41] Simpson, p. 275.

mechanisms for effecting the creation and transfer of such rights, and the Commissioners were in fact very critical of modes of creation and transfer of interests and estates in Real Property, finding them 'exceedingly defective' regarding 'many important alterations'.[42] This state of affairs was caused by preserving 'antiquated maxims when the state of society and modifications of property are changed'. They wrote that they were conscious of 'how much easier it is plausibly to expose the imperfections of the Law as it now stands than to show how it may be safely amended'.[43]

The Commissioners went on to explain the manner in which they intended to proceed, which was with caution and due regard for existing institutions. Then they went on to quote from Humphreys's book, calling him an eminent legal writer. The language they used was Humphreys's when they wrote that the public would be too sanguine in hoping for a system comprehensible to all because the law was of necessity too complex for this and such an expectation could not be met.[44] Nevertheless they aimed to improve the operation of the existing law.

The Commissioners deliberately set out to encourage the general debate on reform, and to collect as much informed opinion as possible. They did this by first circulating a general letter stating the nature of their Commission, inviting suggestions on any of the subjects to be discussed. They also prepared a series of written questions on some issue intended to be covered in each Report, which they then sent to people they believed would respond with useful information, requesting either written answers or attendance before the Commissioners for oral examination. The Suggestions received by the Commissioners, and the Answers to the Questions sent out were placed in an Appendix at the end of the successive Reports. Bentham's 'Suggestions on Registration' (registration being the subject of the entire second *Report* of June 1830) were appended to the third *Report* of 1832. This was the work eventually published by Bowring as 'An Outline of a General Register of Real Property'. Bentham prepared pages of Answers to the Questions sent to him, but they were not included in any of the Reports. It is not at all clear why not, but of course it may be that Bentham never sent in his Answers to the Commissioners. As the original working papers of the Commission have not been found and perhaps were destroyed long ago, it is not possible to do more than conjecture from drafts and correspondence that either this project remained incomplete at Bentham's death in 1832, or that he intended the work that he had done to be published separately, even forming a

[42] *First Report*, p. 7.
[43] Ibid., p. 9.
[44] Ibid., p. 10.

whole report on its own. The Correspondence with one of the Commissioners, John Tyrrell, seems to support this last idea, but is ultimately inconclusive.[45]

With the exception of the first Question in the *First Report*, the Questions sent to chosen respondents were all very specific and limited in extent.[46] The first Question concerned tenures and asked if the respondent considered it desirable to abolish the rule or fiction of law known as the doctrine of tenures, which vested the absolute property of all lands in the Crown. The respondents' Answers give an illustration of the attitudes to reform prevailing. Predictably these varied from expressing an opinion that no reform was necessary to suggesting a code.[47] One respondent, the barrister John Pemberton, complained, 'I must remark upon these Questions generally that they seem only to lead to such alterations as will not tend much to relieve the country from the great expense and loss attendant on the present system.'[48] This could be a justifiable complaint that the Questions did not allow much general discussion. Bentham certainly complained of the lack of general discussion on the aims of the reforms to be introduced by the Commissioners,[49] but he was content to answer the Question on tenure briefly. He thought that tenures should be abolished and gave as his reason two principles, the 'falsehood excluding' and the 'complication-minimising' principles. The 'falsehood excluding' principle attacked the continued use of legal fictions. To retain the doctrine of tenures is to retain the feudal fiction for holding land that says all land is granted by and held from the Monarch in return for services. For Bentham, of course, ownership of property depended on the law: 'Property and law are born together and must die together. Before the laws, there was no property: take away the laws, all property ceases.'[50] In addition, the continued use of the doctrine of tenures led to 'confusion and thence misconception and disappointment', and so the 'complication-minimising principle' urged its abolition.[51] For Bentham the lack of general discussion meant a failure to consider the principles to be applied in undertaking any reform. In response to the *First Report* he wrote in 1829 that before all things it is necessary to have in our eyes the end in

[45] BL Add. MS 34,661, fo. 3, discussed below.

[46] For example Question 13, *First Report*, p. 87 asked,

> Do you think it advisable that persons beneficially entitled in fee to gavelkind lands should be enabled to disengavel them by declaration to that effect by deed? Have the goodness to state any objections to this measure that may occur to you.

[47] See Bellenden Ker in *First Report*, p. 295, on codification. He mentions both Bentham and Humphreys, and advocates using the American model of property legislation as opposed to the French model.

[48] *First Report*, p. 127.

[49] UC lxxvi. 145.

[50] 'Principles of the Civil Code', Bowring, i. 309.

[51] UC lxxvi. 150.

view,[52] and again the same month, 'Excuse me gentlemen but as yet it seems to me that for want of [a] leading principle you have been building without a plan—wandering in a labyrinth without a clew—shooting in the air without a mark to aim at.'[53] Naturally enough, he proposed the greatest happiness principle to remedy the defect. The fact that the Commissioners restricted their respondents to such a degree in the answers required from them explains why in his published work on registration prepared for the Commissioners Bentham was compelled to restrict himself to such a narrowly bureaucratic discussion of the working of the Registry. He was quite correctly basing his work on the Questions set by the Commissioners, and other respondents who sent in Suggestions on the subject of Registration followed a similar pattern in their responses.

III

Turning from the content of the Reports to an examination of the lawyers who acted as Commissioners, it is clear that all were successful practitioners. The Commission appointed by Peel in 1828 to undertake such a major review of the English law of Real Property was headed by John Campbell, later made Baron Campbell, author of the *Lives of the Lord Chancellors* and the *Lives of the Chief Justices*, who became Lord Chancellor in 1859. Campbell was appointed to head the Commission after Edward Sugden had refused to serve. Edward Sugden, Baron St. Leonards, who became Lord Chancellor in 1852, was a noted and successful conveyancer who had publicly taken issue with James Humphreys on the subject of the reform of land law after the publication of the latter's book in 1826:

> I must declare myself decidedly opposed to all Codes . . . like an earthquake the Code would remove all the settled law of property in the country . . . my firm belief is that a greater calamity could not befall the country. . . . I conscientiously believe that the general rules of law are as near perfect as human intelligence can make them.[54]

Sugden was particularly opposed to a Registry of Deeds of title, and mentioned in the same open letter to Humphreys[55] that he had once said that he would use his best exertions to prevent such a measure becoming law. There is some irony in the vehemence with which Sugden opposed reform, because he was acquainted with Bentham and had written to him in November 1812 in most flattering terms: 'I do

[52] Ibid., 143.
[53] Ibid., 145.
[54] *A Letter to James Humphreys by Edward Sugden*, London, 1826, p. 5.
[55] Ibid., p. 22.

myself the pleasure of sending you a copy of a Pamphlet on a subject which you have long since so entirely and happily exhausted as to leave nothing for any future writer to attempt.'[56]

Campbell, however, was not a conveyancer but an eminent common lawyer. It was Campbell who drafted the introduction to the *First Report* of the Commission in 1829, so the often quoted remarks on the state of perfection of English law are his. But then so are the remarks in praise of Humphreys. Since Campbell was Peel's choice as head of the Commission,[57] can we conclude that Peel had carefully chosen[58] a lawyer whom he thought would be unlikely to want to introduce any drastic changes in the law, such as a Code? Peel's letter to Campbell making the appointment almost seems to confirm this, because instead of setting out the wide brief given to the Commission to survey the whole field of Real Property, he wrote 'His Majesty has been graciously pleased to direct the necessary steps to be taken for the appointment of a Commission, to enquire into the state of the laws regarding the *Transfer* of Real Property.'[59] This was a very partial view of the Commission's brief.

Certainly Campbell was no radical: as a whig member of parliament in 1832, he did not at first support the Reform Bill. In fact, in a letter to his brother George he wrote:

> I must say you are much too radical for me. Anything that amounts to the formation of a new Constitution I shall oppose, as I hold the formation of a new Constitution to be an impossibility, and there has as yet been no instance of it in the world. A Constitution may be modified and improved, but it must spring from time and accident, and not from design.[60]

But once Campbell was appointed to the Commission he took up the task with energy and enthusiasm. He regarded the appointment as a considerable distinction, and certainly did not see himself as constrained to look only at ways of improving the transfer of Real Property, as Peel had seemed to have intended.

[56] *Correspondence* (*CW*), viii. 287. The Pamphlet was on interest rates. Referring to Bentham's 'Defence of Usury', Sugden called Bentham the 'father of the subject'.

[57] Peel to Campbell, 17 May 1828, Stratheden and Campbell Papers, Roxburgh, Scotland. I am grateful to the Hon. Misses Moyra and Fiona Campbell for allowing me access to the papers in this collection.

[58] Peel's influence over the composition of the Commission is denied in a letter to Arbothnot, 19 May 1828, BL Add. MS 40,396, fo. 197, in which Peel declared himself unable to influence the composition for he was 'compelled to be guided by the advice of more competent judges'. But perhaps he was being disingenuous, because in a letter to Robert Gordon, 11 August 1828, BL Add. MS 40,396, fo. 219, Peel showed that he certainly took great pains to select the members of the Commission to consider the lunatic bill.

[59] Letter cited, Peel to Campbell, [my emphasis]. See also the *Life of John, Lord Campbell, Lord High Chancellor of England*, ed. Hon. Mrs. Hardcastle, 2 vols., London, 1881, i. 454–6.

[60] Ibid., 503.

Campbell acted on his determination to bring before the House Bills based on the work of the Commission, and drafted by them. It seems to have been through his efforts that in the years following the Commission's *Reports* several important measures were passed. These include in 1832 the Prescription Act, and in 1833 the Fines and Recoveries Act, the Dower Act, the Inheritance Act, and the Real Property Limitation Act, followed in 1837 by the Wills Act. Campbell took up the cause of registration of title to land with particular interest, and presented bills to Parliament on the subject in 1830 and 1851. The consideration of registration of title was a major part of the work of the Commission, but Campbell was less successful here, despite his clear commitment to the reform. A working system of registration of title to land was not to be finally accomplished until 1925, although a limited area of compulsory registration was achieved earlier. The very successful hostile opposition to this particular reform came from the landowners and from provincial solicitors[61] but does not come within this discussion. However it is interesting to note that Bentham had expressed his own decided opinions at the time. 'Opposed to the greatest happiness in this part of the law . . . two classes of sinister interests, 1) the aristocratic, 2) the professional.'[62] The professional interest was that of the conveyancer.

Campbell's letters to his brother and his memoirs provide another brief glimpse of the fate of bills for registration of land. In 1832 Campbell was appointed Solicitor General. On the day before his appointment he wrote to his brother that he had had an interview with Earl Grey, who had made only one condition for the appointment. This was that Campbell would not bring in his 'Register Bill'. Grey declared himself personally hostile to Registration, and feared it would make the Government unpopular.[63] In his memoirs Campbell repeats the story, adding that Grey thought Registration of land was 'odious to a large and powerful class'.[64] Campbell accepted the condition, but he was certainly not going to be deterred from pursuing the cause. He arranged for Brougham to bring in the Bill, and he seconded it. But the Bill failed to get a second reading. Bentham's assessment of the opposition to reform of land law appears to have been accurate.

The other seven members of the Commission appointed to serve with Campbell were William Henry Tinney, John Hodgson, Samuel Duckworth, Peter Bellinger Brodie, Francis Sanders, Lewis Duval and John Tyrrell. All were conveyancers and also members of Lincolns' Inn,

[61] See W. R. Cornish, *Law and Society in England 1750–1950*, London, 1989, p. 173; Simpson, pp. 282–3; Offer, p. 28.

[62] UC lxxvi. 28.

[63] *Life of Campbell*, ii. 19.

[64] Ibid.

which is not surprising in itself, and indeed Bentham himself was a bencher of Lincolns' Inn. But some other connections between them make one query the commonly held view that the Real Property Commissioners were mostly interested in preserving the status quo. Brodie and Duval had been pupils of Charles Butler, as had James Humphreys. Charles Butler was a Roman Catholic, and because of this he was prevented from practising at the bar. Instead he became one of the leading conveyancers of the day, and exerted great influence over his contemporaries. His political beliefs coincided with those of Charles James Fox and his sympathies were with the French Revolution, though not in its religious aspects. Bentham and Butler had long been acquaintances, their friendship having begun at least as early as 1789 when Bentham wrote to Butler suggesting that they share in the expense of subscribing to a foreign newspaper.[65] Bentham and Butler collaborated in drafting the Penitentiary Bill of 1796. Correspondence between Bentham and his brother Samuel refers to Bentham's visits to Butler to work together on the Bill, and on one occasion his exasperation with Butler who was presumably not working fast enough for the impatient Bentham. 'This cursed Roman Catholic fellow with all his promises has not sent me my Bill yet', he wrote to Samuel in December 1796.[66] He was far more generous in 1797 when he wrote that credit for the Bill should be given to Butler, as he had 'worked at it with the zeal of friendship, and took more than common pains with it'.[67]

Sugden, who so strenuously opposed reform, had been a pupil of Duval, and later John Tyrrell, Bentham's friend and colleague, was a pupil of Sugden. An entry in a book of *Memoirs of Former Members* of a Lincolns' Inn Conveyancing club called the Institute says of Tyrrell, 'His school . . . was that of Mr. Charles Butler, which had to a great degree discarded the mass of verbiage, still too great, that defaced our conveyance of land'.[68] The *Memoirs* record that the Institute was formed in 1815 and continued to meet until 1861. Vaizey, the editor of the *Memoirs*, wrote that the first Minute Book of the Club records that 'On the 1st March 1815, and at the Freemasons' Tavern, Messrs Brodie, as Chairman, Hodgson . . . Tyrrell', and two others resolved to establish a club that would be limited to twelve members. This seems to have been a dining and discussion club. Four of the first members of the Institute were also members of the Real Property Commission by 1829.

[65] *The Correspondence of Jeremy Bentham*, vol. iv, ed. A. T. Milne, London, 1981 (*CW*), p. 67.

[66] *The Correspondence of Jeremy Bentham*, vol. v, ed. A. T. Milne, London, 1981 (*CW*), p. 334. Bentham again complained bitterly to his brother about Butler in December 1796, ibid., 338, also mentioning that he was suffering from toothache, so perhaps his physical pain accounts for his irritability.

[67] *Correspondence* (*CW*), vi. 4.

[68] *The Institute: Memoirs of Former Members*, ed. J. S. Vaizey, London, 1895.

Records show that in 1828 they had passed a resolution that members individually and collectively should give all possible assistance to the Commission, and that members who were not Commissioners should meet from time to time for that purpose.

Other members of the Club wrote to the Commission or were called before the Commission to give oral evidence. One of the most interesting of the original members was Charles Henry Bellenden Ker. He is mentioned in the *Memoirs* as having been a friend of Romilly in his youth, and as a friend of Brougham associated with him in schemes for parliamentary and other reform and the promotion of education. He wrote for the *Edinburgh Review* and the *Times* and was a committee member of the Society for the Diffusion of Useful Knowledge. All of these activites would have brought him into contact with Bentham. The *Memoirs* record that Ker had been proposed, along with James Humphreys, for membership of the Real Property Commission but that Peel had objected because Ker had 'already expressed an opinion on the subject of the Inquiry'.[69] Peel is supposed to have opposed the membership of James Humphreys too.[70] Humphreys certainly seems to have expected an invitation to join the Commission, because he delayed accepting an offer to lecture on real property at the new University of London until the Commission was announced in Parliament.[71] Was Peel opposing the membership of lawyers too obviously known to be moving in Bentham's circles? Bellenden Ker continued his public life by acting as a Commissioner in 1831 on a Commission to look into public records, recommending the setting up of a Public Record Office. He prepared a lengthy report in 1837 for Poulett-Thompson on the law of Partnership, when the latter was president of the Board of Trade. Part of this became law in 1890 as the Partnership Act, one of the very few acts codifying English law on the Statute Book. Both Bellenden Ker and Butler gave evidence before the Commission and both discussed the merits and disadvantages of introducing codes of law.

Some of these connections between reforming lawyers and Bentham are tenuous, but it is clear that the lawyers who were Commissioners, or who contributed to the findings of the Commission by giving evidence, were not all as uniformly opposed to reform as they have sometimes been thought to be. In fact their opinions accurately reflect the range of prevailing beliefs about the best way to reform land law, including codification. It is also clear that Bentham played a particular role as a law reformer, something that becomes even more apparent

[69] Ibid., p. 223.
[70] Offer, p. 28.
[71] College Correspondence, University College London Library, fo. 818.

when Bentham's friendship with Humphreys and John Tyrrell is considered.

IV

Bentham had a close working relationship and friendship with James Humphreys which began in 1826 and continued until Humphreys's death in 1830. He was also a friend of John Tyrrell who was a successful conveyancing lawyer who had been called to the bar in 1815. Tyrrell was at the height of his career when Bentham made his acquaintance in 1829, at about the same time as Tyrrell's appointment to the Real Property Commission. He was among the lawyers who gave oral evidence to the Real Property Commission in 1828.

James Humphreys also attended the Commissioners for five days in 1828, and two in February and March 1829. Because Humphreys attended the Commissioners in person to give his evidence, and presumably because of the controversy aroused by his book, the Commissioners did not keep to their pre-arranged Questions during their oral examination, and Humphreys's answers are by far the most far-reaching of the answers received. Instead the Commissioners spent most of the time asking Humphreys detailed questions about the code he had proposed. He held up the example of not just the Napoleonic Code, but also codification of the New York Customs and Excise Laws, suggesting that while a complete code of laws would probably not be endured in this country, an isolated subject, such as the law relating to descents, could be codified.[72] The advantage of a code, he said, was that it could give simplicity and consistency to the whole body of the laws, 'purge them of extraneous matter, and embrace them in one system and one book'.[73] It is interesting that Humphreys mentioned the New York Statutes to the Commissioners because at about the same time in 1828 three New York lawyers had undertaken the task of revising New York property law.[74] Extracts from the Reviser's original Reports make many references to the work of English property law reformers of the time, in particular Humphreys and Brougham.

[72] *First Report*, p. 249.

[73] Ibid.

[74] Revisers' Notes, *3 New York Revised Statutes*, 1836, Appendix, p. 401. The connections between Humphreys and the New York reformers are examined in B. Rudden, 'A Code Too Soon: The 1826 Property Code of James Humphreys: English Rejection, American Reception, English Acceptance', *Essays in Memory of Professor F. H. Lawson*, ed. Peter Wallington and Robert Merkin, London, 1986, pp. 101–16, and Charles E. Stevenson, 'Influence of Bentham and Humphreys on the New York Property Legislation of 1823', *American Journal of Legal History*, i (1957), 155–69. Stevenson maintains that Bentham through Humphreys influenced the codification of New York Property legislation.

In addition to his work as a Commissioner, Tyrrell prepared a substantial survey of the whole area of Real Property Law with proposals for reform. This was attached to the *First Report* and also separately printed by Tyrrell in 1829 under the title *Suggestions sent to the Commissioners appointed to inquire into the Laws of Real Property.* In these *Suggestions* Tyrrell acknowledged the debt owed to James Humphreys by himself and indeed by the general public, and wrote 'he has rendered this subject interesting, as well as intelligible'.[75] But Tyrrell went on to disagree with Humphreys about the method of effecting reform, predictably rejecting Humphreys's proposed code on the grounds that it would interfere with existing settled rights and cause great differences of opinion. Bentham's opinions were closer to those of James Humphreys than John Tyrrell.

Tyrrell prepared most of the fourth *Report* of the Real Property Commission that appeared in 1833 on the subject of wills. He is also credited with drafting a bill on wills that became the Wills Act 1837. Bentham commented extensively on Tyrrell's work, in particular on Tyrrell's Fines and Recoveries Bill in November 1831.[76] He also wrote to Tyrrell on succession,[77] and as a whole the draft papers that Bentham prepared for the Real Property Commission indicate that Bentham and Tyrrell were in close communication during these years.

The correspondence between Bentham and Tyrrell reveals the extent of Bentham's interest and involvement with the deliberations of the Real Property Commission. This correspondence began in 1829, after the printing and circulation of Tyrrell's book, and also after Tyrrell had been appointed to the Commission. Bentham had been sent proposed Codes of Law for Louisiana by Edward Livingston, the United States Senator. In February 1830 he wrote back to Livingston regretting that 'the circumstances in which I am placed do not admit of my complying with the wish expressed in [Livingston's] obliging letter with which they are introduced'.[78] This was a request to assist with drafting a penal code. Bentham wrote that he was sending some of his work and also a 'copy of John Tyrrell's work on Real Property Law'. This must have been the book of *Suggestions* that Tyrrell had prepared for the Real Property Commission. Bentham introduced Tyrrell as one of the eight Commissioners who had been appointed by the Home Secretary, Peel, to the Commission and wrote:

> The subjoined copy of [Tyrrell's] letter to me on the occasion will speak for itself. I must beg you to keep it from publication. . . . His disposition to coalesce

[75] John Tyrrell, *Suggestions Sent to the Commissioners Appointed to Inquire into the Laws of Real Property*, London, 1829, p. 2.

[76] UC lxxvi. 281.

[77] Ibid., 287.

[78] Livingston Papers, Box 72, fo. 13, Princeton University Library.

with a person so obnoxious as I am to his superiors—in particular to Mr. Peel, the patron of his office—proves at any rate the so much more than expected honesty of his intentions, the sincerity of his desire to see a real reform effected. You will see the prejudices he had to overcome—a short glance at my Petition will suffice for this.[79]

John Tyrrell had written to Bentham on 12 November 1829, 'I feel a strong ambition to attempt under your guidance, a digest of the present confused and scattered rules [of real property] and shall be most happy if I can follow at a humble distance your exertions to do good.'[80] A cordial and affectionate friendship based around questions of property law seems to have developed between Tyrrell and Bentham, with many invitations to Tyrrell to join Bentham at Queen's Square Place for dinner. Tyrrell, who was addressed in such terms of affection as 'My dear new found and highly valued friend'[81] or more usually 'my ever dear Tyrrell', was asked to comment on Bentham's work and send him books and information. In June 1830 Tyrrell wrote to Bentham that he was sorry he had not obtained any petitions for Bentham's Dispatch Court Bill, but that he was pleased that Bentham's name was 'at last received with some part of the respect which is due to it, in the house of commons'.[82] This was a reference to the debate in Parliament on 8 July 1830, when Daniel O'Connell withdrew his notice of a motion to have drafts or plans of a code of laws and procedure laid before the House. O'Connell regretted that the Member for Westminster 'was prevented from presenting a petition on this important Question, from a man whose name was his highest eulogy—he meant Mr. Jeremy Bentham—to whom the world was so deeply indebted for his work on the subject'.[83]

For his part Tyrrell urged Bentham to send in his 'Suggestions on Registration' to the Commissioners, a request with which Bentham found it impossible to comply: 'To prepare anything for you within the compass you mention, namely that of the present week is altogether impossible.' He wrote,

Neither is it at all necessary or even desirable. Either what I may have to say will be worth absolutely nothing, or it will of itself furnish sufficient matter for a separate Report. Send in therefore the Report which you have in readiness. No Bill in pursuance of it can be brought in this session: and before the next session my communication will be in readiness for you.[84]

Bentham was under pressure to complete other work and relied a great deal on the assistance of his nephew George Bentham:

[79] Ibid.
[80] BL Add. MS 33,546, fo. 317.
[81] BL Add. MS 34,661, fo. 2.
[82] BL Add. MS 33,546, fo. 422.
[83] *Parliamentary Debates*, xxv. 1114.
[84] BL Add. MS 34,661, fo. 3.

After dinner, while I am vibrating in my ditch, my nephew seated in the chair you occupied, he reads your questions, and I preach answers to him which he drafts down, making in relation to them such observations as occur to him. In this way what I do in relation to 'Real Property' is done thus far as it were *in no time* as the phrase is: otherwise it could not be done at all.[85]

It is a measure of Tyrrell's regard for Bentham that he placed so much importance on his friendship at a time when Tyrrell himself was under great pressure from professional, Real Property Commission and parliamentary commitments. The editor of the *Memoirs* wrote that Tyrrell's work on the Real Property Commission had weakened his health and lessened his practice. It is also interesting that Tyrrell, who was not in favour of codification, sought out the friendship of Bentham, the radical reformer.

V

In his letter to Livingston Bentham mentioned that Tyrrell had drafted for him an 'Analytical Sketch' of the whole field of Real Property.[86] Bentham clearly relied on Tyrrell's outline to produce his own overview of real property which took the form of a chart. Bentham was obviously working on this material as part of his contribution to the Real Property Commission, but he had a larger purpose too. Property law was intended to be part of his proposed Civil Code, and, therefore, a part of Bentham's planned Pannomion. He attacked legal fictions and examined and elucidated (as he himself said) the nature of a right in property. In his civil law writings Bentham wrote that rights give rise to obligations, and that the two are inseparable:

Rights and obligations, although distinct and opposite in their nature are simultaneous in their origin, and inseparable in their existence . . . the law cannot grant a benefit to any, without, at the same time, imposing a burden on someone else.[87]

The draft work for the Real Property Commission sets out a scheme for a new basis for property rights. In the place of historical, feudal concepts of tenures and estates is a scheme based on rights and obligations. This is a far more fundamental revision of property law than that envisaged by the Commissioners.

On 13 July 1830 Bentham wrote to Tyrrell that he had drafted 'in as yet a rough state' a sort of table of '*Leading Principles*, drawn up by my nephew and me, by the application of which my proposed Code would be drawn into existence. They were deduced . . . from the Questions proposed by your *Commission*'.[88] George Bentham would read out the

[85] Ibid., fo. 4.
[86] Livingston Papers, Box 72, fo. 13.
[87] Bowring, i. 301.
[88] BL Add. MS 34,661, fo. 5.

question and Bentham would dictate an answer grounded on the greatest happiness principle. 'In this way' wrote Bentham,

> he has drawn up a sort of diagram in the form of a tree having for its root the Greatest Happiness Principle from which issue branches, of which the principles the denomination of which are narrowest in their extent, on the extreme twigs, present number of them 26.

Bentham had mentioned this Real Property Tree in *An Outline of a Plan of a General Register of Real Property*, the work on registration completed for the Commissioners:

> In the character of Principle, I might have to submit to your consideration no fewer than seven or twenty words, or sets of words, which in the form of a tree, composed of a trunk with branches and sub-branches, called by logicians in former days the *Arbor Porphyrum* lie at this moment before my view.[89]

The manuscript Bentham had before him was a sheet of paper divided into four vertical columns. In the far left stands the greatest happiness principle, and this is the trunk or root of the tree. The other columns to the right of this form the main and then subordinate branches and include the disappointment-minimizing principle and registration effecting principles. So as part of his work for the Real Property Commission Bentham applied his principle of utility to part of substantive law.

Although Bentham died before the Real Property Commission had presented its final *Report* his involvement with the Commission was considerable. He represented the most radical of the reforming lawyers who gave evidence to the Commission. The Real Property Commission did succeed in engaging in a much wider examination and discussion of substantive law than the other Commissions of the time. Perhaps Bentham contributed to this achievement through his contacts with reforming lawyers and Commissioners such as Tyrrell, and by his direct addresses to the Commission, in his Answers to their Questions.

The fact that ultimately the Commissioners recommended a cautious and not a radical reform is a reflection of the Commissioners' own preference for 'partial reform'. They were largely 'moderate' or 'semi-reformists', for whom a proposal for a code of property law inevitably raised the fearful spectre of republican France. It is also a reflection of the strength of opposition to the reform of property law in nineteenth-century England, an opposition that Bentham had accurately described.

Bentham often sounded despondent about the prospect of achieving law reform, or sometimes even bitter about the lack of real commitment on the part of those who were supposed to be working for reform. But

[89] Bowring, v. 419.

he was far more optimistic and enthusiastic about the work of the Real Property Commission. He hoped that his contributions would have some significant influence on the Real Property Commissioners' deliberations. In 1829 he wrote that very little more could be expected from the Common Law Court Commission than had resulted from the Chancery Commission, but 'From the Real Property Commission some hope from their correspondence with JB.'[90]

[90] UC xi. 27.