

INTRODUCTION

To inflict one more book upon a world already awash with information demands some justification beyond the need to propitiate that modern Moloch the Research Assessment Exercise. Nor is it enough to offer the familiar incantation that this is ‘an unjustly neglected subject’, for readers will have learned from grim experience that all too often such subjects have been very properly neglected by more discriminating scholars as being insignificant, abstruse or plain dull. So what justifies a book on the history of the county courts?

Aside from obtaining a grant of probate or letters of administration, a citizen’s most likely involvement with the civil courts is through divorce or separation, or being subjected to (or much more rarely, initiating) claims for debt. These proceedings are nowadays overwhelmingly most likely to be conducted through the county court, so what was, for most of its 150 years, often described as ‘the poor man’s court’ remains the court of law most frequently encountered by the people in civil disputes. Throughout its history many defendants, if not most, never actually attended the court, or at least got no further than the court office, but their perceptions of the legal system in its civil garb will certainly have been influenced, and perhaps shaped or reshaped, by that experience.

Those perceptions in turn help to shape society’s conception of the law as it is and as it ought to be. Individual experiences feed into the collective consciousness of communities, helping to mould their views of law’s legitimacy and its perceived effectiveness in action. This in turn subtly affects how, and how well, the law operates within a community – how well it lives up to its pretensions in fact. For that reason, if no other, we should know something of these courts, for if the superior courts gave out the

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law, the county courts put it into practice, not always as its makers envisaged.

That would, I think, justify a book on county courts, and there is certainly no existing work to supersede or displace, though a few scholars have produced interesting and valuable studies on which I have drawn freely, gratefully and, I hope, accurately.¹ But there are as many possible 'histories' of an institution as there are historians and the fashioning of the story needs justification as well as the subject.

In view of what is said above, the most enlightening approach would perhaps be to examine the experience of the litigants and those others (such as debtors' families and friends) directly touched by court proceedings. This however presents formidable difficulties. Litigants, especially those 'one shotters' made famous by Marc Galanter, are notoriously elusive. In most courts of common law their own narrative, if given at all (as it is only in a minority of cases), will have been oral and will have perished in the absence of the shorthand writer. In the inferior courts laymen's accounts are unlikely to have survived even in the distorted shape of a judge's summation, and, even if they have, will have been subjected to the court's own ritualised reshaping. And the difficulties are compounded in the case of county courts by the destruction of court records² and by the fact, much commented upon by contemporaries, that with nearly 500 courts, local variations in practice were so great that generalisation is to be undertaken only with great caution.

Nevertheless, I do not believe that the difficulties are insuperable and I do believe that local studies using sources such as local newspapers, trade journals and official statistics would reveal some very interesting things. One of my aims in writing this book has been to encourage such studies by providing an accessible outline of the national picture which will, I hope, suggest topics for study and give non-lawyers the confidence to undertake it.

My other objective has been to fill in (perhaps with polyfilla) one of the many gaps in our knowledge of the operations of civil

¹ In particular Gerry Rubin, whose two contributions on county courts in D. Sugarman and G. R. Rubin (eds), *Law, Economy and Society, 1750-1914* (Abingdon, 1984) (see bibliography) suggested that this was a subject which warranted more investigation.

² G. R. Rubin, Debtors, Creditors and County Courts, *JLH* 17 (1996), 74-82.

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law in the last two centuries. An extraordinary amount of filling remains to be done. Some parts of the history of the legal professions, for example, have been admirably illuminated³ but large tracts remain in darkness. Former *terra incognita* such as insolvency and property law have been mapped⁴ but there are many more voyages of discovery to be made. We still lack a full account of the making of the Judicature Acts, for example and our knowledge of the courts remains woefully inadequate, with the important, but limited exceptions of the House of Lords and the Privy Council.⁵ Where, for instance, is the history of the King's Bench and the Chancery over the last two centuries?

When these and other subjects have found their historian the story of the county courts may look very different from that presented here, but all histories are provisional and this one may assist the writing of others. The aims of the book, then, are modest and traditional and they became more so in the writing. It was originally intended that its narrative should extend to the 150th anniversary, but the past twenty-five years have involved very extensive changes: to the jurisdiction – notably in family matters; to the courts' internal structure – the small claims court in particular; and to the whole court system – with the creation of circuit judges, the court service, etc.; and the pace of change shows no sign of abating. As a result, any adequate treatment of the modern era would have required more space than was available and would have unbalanced the narrative.

Fortunately, a stopping point was easily chosen. The Courts Act 1971 was a real watershed in the civil justice system, both symbolically with the abolition of the assizes and practically, for while it stopped short of bringing about that unification of high and county courts that had so long been urged, it did bring both within the embrace of an overarching judicial and administrative structure; indeed the creation of the small claims procedure in

³ See e.g. the works by D. Sugarman, R. Cocks, D. Duman and R. Abel cited in the bibliography.

⁴ J. S. Anderson, *Lawyers and the Making of English Land Law* (Oxford, 1992) and V. M. Lester, *Victorian Insolvency* (Oxford, 1995).

⁵ R. Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800–1976* (London, 1979) and D. B. Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council 1813–1986* (Manchester, 1987).

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1973 went some way towards creating the three-tier structure which had been mooted in the 1870s.

However, even thus reduced, my original plan was too ambitious. I have had to jettison much of the material on the enforcement of judgments, and the sections dealing with staff have been severely pruned. I regret particularly that those central figures the registrars have not received their due and I hope that the overall effect is not to place too much emphasis on the narrative of changes proposed and sometimes achieved as against the description of the everyday workings of what, after all, was a court whose principal function throughout was the collection of debts.

As this suggests, the shape and contents of this book are the outcome of deliberate choices on my part. They are also, no doubt, influenced by my prejudices and background. I claim no special qualifications for writing it. My professional appearances in the county courts of East Kent in the 1970s were few, brief and usually inglorious and my grasp of the Green Book is little less tenuous now than it was then. Furthermore, since I am not a member of that 'gentleman's club . . . of white, male Britons, all formerly students of, and currently staff at, the Oxbridge-London nexus of legal education',⁶ I am presumably excluded from the 'phallocracy' they are said to have imposed on English legal history. Even in this neutered state, however, I expect I still pipe in the 'voice of the white, middle-class patriarch'.⁷ Critical readers will doubtless make appropriate allowances for distortions of class, race and sex as well as those brought about by an ignorance and carelessness which are all my own.

⁶ W. P. McNeile, *Living on Borderlines*, *Law and Criticism* 6 (1995), 167-91 at 182.

⁷ *Ibid.*, at 180.

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THE MAKING OF THE NEW COUNTY COURTS

THE DEFICIENCIES OF THE COURTS

England in 1820 was on the verge of becoming ‘the first industrial nation’.¹ Population was growing fast, from about 10 million in 1801 to 14 million by 1821 and more people were living in towns.² Most towns were still small but some were growing at a tremendous rate and a few were already very large: Manchester had 90,000 people, Liverpool 83,000 and Leeds 53,000.

Apart from ports like Liverpool most towns were still what towns had always been, centres for the supply and exchange of produce for the surrounding countryside; but there were new ones whose primary function was making goods – the factory and the mill were becoming familiar features of the northern townscape.³ London was still a city apart: a home of industry, commerce, government and culture – the biggest and most diverse city in the western world.⁴ It still dwarfed all rivals at home, yet such was the rate of growth in provincial towns that London’s share of the urban population of England fell from nearly three-fifths to barely one-third.

England had long been a commercial country but internal trade, facilitated by improvements in communications,⁵ became ever more intensive. Townsmen always had to be supplied with food and as more and more became wage-earners they had to buy

¹ The title of Peter Mathias’ book (London, 1969).

² Mathias, *The First Industrial Nation* (2nd edn, London 1983), fig. 6, p. 227; P. Corfield, *The Impact of English Towns* (Oxford, 1982), p. 9.

³ Corfield, *Impact of English Towns*, ch. 2.

⁴ *Ibid.*, p. 10. Peking and Tokyo were bigger.

⁵ Mathias, *First Industrial Nation*, pp. 97–107. The improvements, however, should not be exaggerated.

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almost everything they wanted, while in the countryside the march of enclosures was steadily eroding the possibility of even partial self-sufficiency for labourers; there was no peasantry worth the name in England by now.⁶

More crowded cities increased the potential for accidents. In the streets vehicles collided with pedestrians and with each other. Now and then houses collapsed or caught fire. In the factories, docks and mines the hands were killed or injured by machinery, for the workshop of the world was a dangerous place. Where accidents could be attributed to a breach of the duty of man to man, whether under the common law or some particular statute, there was the possibility of a law suit.⁷

Such actions, however, never formed more than a small proportion of the work of the courts of law. For centuries past their principal source of business (apart from their role in enforcing the criminal law) had been the breach of contractual obligations and in particular the obligation to pay money.⁸ Here too, industrialisation promised to expand the courts' workload. A consumer society was developing with an ever-widening range of goods offered more pressingly to an enlarging class of potential purchasers; for however harshly the transition to industrialisation pressed on the lower orders, it was steadily swelling the ranks of the better off.⁹

Consumer credit was expanding. Credit purchases had long been a matter of course for the upper classes; now they were becoming a temptation for the middle classes as well, though many restrained themselves owing to a well-grounded apprehension of the draconian remedies available to their creditors should

⁶ *Ibid.*, pp. 55-9. One estimate for 1821 puts 24.8 per cent of the labour force in agriculture, forestry and fishing; 38.4 per cent in manufacturing and industry; 12.1 per cent in trade and transport; 12.7 per cent in domestic and personal service; 8.5 per cent in public, professional and other categories: P. Deane and W. A. Cole, *British Economic Growth, 1688-1959* (2nd edn, Cambridge, 1962), table 30.

⁷ W. R. Cornish and G. de N. Clark, *Law and Society in England, 1750-1950* (London, 1989), pp. 483-512, summarise the leading developments in tort law.

⁸ C. W. Brooks, Interpersonal Conflict and Social Tension: Civil Litigation in England, 1640-1830, in A. L. Beier (ed.), *The First Modern Society* (Cambridge, 1989), pp. 357-99 at 390.

⁹ N. McKendrick, The Consumer Revolution of 18th Century England, in N. McKendrick, J. Brewer and J. H. Plumb, *The Birth of a Consumer Society* (London, 1982), pp. 9-33.

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they default.¹⁰ Imprisonment for debt was routine, even on mesne process, with bankruptcy a refuge open only to traders, and humanitarian efforts to procure the release of hopeless debtors encountered resistance from many who felt it a wholesome discipline against improvidence.¹¹

The poor often had little choice but to buy on credit, which sometimes took particularly pernicious forms in the tommy-shop and truck dealing.¹² Dependent upon inadequate earnings, forced to rent housing, and – a sinister new development – at the mercy of sudden slumps in trade which became the hallmark of a capitalist society¹³ – many were regularly in debt. Others, who need not have been, fell victim to the blandishments of travelling pedlars and salesmen inveigling their wives into the purchase of fripperies to brighten drab and anxious lives.¹⁴

Credit underpinned the whole economy and the obverse of credit was debt and the coercive force of the law. Courts of law are seldom popular with those who have to use them. Debtors are apt to see them as merely an extension of the arm of the creditor and to resent the extra burden of legal costs, while creditors feel they have been deprived of their due unless the recovery of the debt is expeditious and complete. Where the debt is comparatively small it is difficult to devise an economical system which combines proper safeguards for the debtor and rapid recovery for the creditor, and Regency England had not managed to do so.

Among the features of the courts which most irritated suitors in the provinces was the striking concentration of judicial facilities in London, for though common law trials at nisi prius might take place at the assizes, every action had to start and finish in London.¹⁵ The assizes in any case were far from satisfactory. The judges only went on their circuits twice a year – for a total of about

¹⁰ *Ibid.*, pp. 203–30 (J. Brewer, *Commercialization and Politics*); J. C. Beckett, *The Aristocracy in England, 1660–1914* (Oxford, 1986), pp. 295–315.

¹¹ The realities of bankruptcy and its fictional treatments are examined in B. Weiss, *The Hell of the English* (Lewisburg, 1986), and there is a thorough recent treatment by V. M. Lester, *Victorian Insolvency* (Oxford, 1995).

¹² These practices were not wholly eradicated by the Truck Acts of 1831 and 1887.

¹³ Mathias, *First Industrial Nation*, pp. 206–17. Sharp fluctuations due to the state of the harvest, wars and political crises were, of course, already endemic.

¹⁴ D. Alexander, *Retailing in England during the Industrial Revolution* (London, 1970), pp. 63–86.

¹⁵ *HEL* vol. I (5th edn, 1931), p. 188.

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seventy days – and the location of the assize towns exhibited, though less outrageously, the idiosyncracies of the unreformed House of Commons. Admittedly there were no Grampounds and Old Sarums among the assize towns, but many sleepy market towns welcomed the red judge while major industrial centres never saw him: Sheffield did not receive an assize until 1955.¹⁶ Criminal business always took precedence, so witnesses in civil suits had to be kept in hotels at the parties' expense, often many miles from their homes and businesses.¹⁷ However valuable as a training ground for barristers, the assizes were an inefficient way of bringing justice to the people.

The same inconvenience to witnesses was even greater at trials in Westminster Hall and was one substantial element in the expense of going to law. There were several others. The courts had developed an adversarial pattern of operation and a highly elaborate and technical body of procedural rules and practice which made it foolhardy to attempt even the simplest action without professional assistance, generally involving both attorney and barrister. Lawyers revelled in this 'natural environment for technical objections and procedural stratagems: those choking, fee-sucking devices were the bane of 18th century litigation'.¹⁸ Not surprisingly, although the common law courts had engaged in competitive strategies designed to win clients from their rivals,¹⁹ they had not been able to make small actions economical and it was not easy to see how they could do so without far more drastic changes than even reformist lawyers were willing to contemplate.

Almost as frustrating as the cost of going to law were the law's delays. Some were the product of the traditional organisation of the legal year; no courts sat during the long summer vacation, and the four terms, outside which only interlocutory business was done, lasted only three weeks each.²⁰ Within this framework the

¹⁶ *First Report of the Common Law Commissioners*, PP 1829 (46) V, pp. 17, 42 ff. and table 9; Sir B. Nield, *Farewell to the Assizes* (London, 1972).

¹⁷ Brougham's speech, *Hansard* 1830 3rd s., vol. 1, cols. 711–58.

¹⁸ Cornish and Clark, *Law and Society*, p. 25.

¹⁹ C. W. Francis, Practice, Strategy and Institution: Debt Collection in the English Common Law Courts, 1740–1840, *North-Western University Law Review* 80 (1986), 808–954 at 847–52. Despite the competition, 'the overall cost of litigation in the central courts doubled between 1680 and 1750': Brooks, *Interpersonal Conflict*, pp. 381–2.

²⁰ *First Report*, pp. 12–16.

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courts could not handle any substantial growth in business without more judges, but the judges were reluctant to add to their number lest the quality and consistency of judge-made law be impaired; moreover judges were remunerated in part from suitors' fees.²¹

Despite all these disincentives, however, recourse to the courts increased along with the expansion of commerce, and by the 1820s the King's Bench, which had drawn well ahead of its rivals in the popularity stakes, was struggling to cope with its workload.²² Expense, delay and complexity made the courts at Westminster unsuitable for the hearing of claims for small amounts of money, for which they had never been the intended forum. There was, after all, a national network of local courts – for the county, the hundred and the borough – to provide that service, and in the sixteenth century attempts, seemingly ineffectual, had been made to exclude small debts from the royal courts.²³

Unfortunately for suitors these local courts were for the most part very unattractive. For one thing a perverse interpretation of the Statute of Gloucester limited the jurisdiction of the county and hundred courts to claims not exceeding 40s, which became progressively more inconvenient as the value of money fell.²⁴ Even within these limits, however, their sometimes inconvenient location, archaic procedures and vulnerability to corruption and partiality, plus the fact that by writ of pone a suit could be removed into the superior courts, ensured that both the county and the hundred court were unpopular and largely moribund institutions.²⁵ A few of the hundred courts which were private franchises were still active and a handful were really busy, notably the Salford Hundred Court, serving a great town of recent growth and which therefore lacked the institutions of a borough.²⁶

Borough courts were more varied in the extent of their jurisdiction and some retained their local importance longer than was

²¹ They became fully salaried by 6 Geo. IV c. 84.

²² *First Report*, p. 17 and table 4.

²³ *HEL*, vol. I, p. 74.

²⁴ *Ibid.*, vol. I, p. 72; J. H. Baker, *An Introduction to English Legal History* (3rd edn, London, 1990), p. 27.

²⁵ *HEL*, vol. I, pp. 72–5; *Fifth Report of the Common Law Commissioners*, PP 1833 (247) XXII, pp. 6–10.

²⁶ *HEL*, vol. I, p. 134.

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formerly assumed.²⁷ Even so, by 1820 few were really active. In Kent, for instance, returns to the House of Commons noted courts 'not held very often' (Canterbury), 'not held for many years' (Folkestone), 'discontinued' (Queenborough) and 'not held since 1747' (Sandwich). Even the Maidstone Court of Pleas, established by charter in the reign of George II with unlimited monetary jurisdiction, was 'not used, being as expensive as the courts of Westminster Hall'.²⁸

Legal writers were generally complacent about the decline of local courts, extolling the superior quality of justice in Westminster Hall and maintaining that only through confining litigation of any substance to this narrow channel could the coherence and certainty of the common law be sustained and the need for lawsuits be restricted.²⁹ The high-water mark in the centralisation of justice was reached as late as 1830, when the Great Sessions for Wales, exercising a parallel jurisdiction to the superior courts, were abolished.³⁰

Laymen had always been less easily persuaded of the transcendent merits of a system which required suitors to travel to London or await the assize, paying a high price for the best justice because the alternatives, where they existed at all, were so bad as to be unacceptable. Demands for change had been insistently made during the Interregnum and found their most imposing and plausible expression in the elaborate proposals of the Hale Commission.³¹ In the eighteenth century potential litigants voted with their feet and stayed away from the courts – almost all courts – in great numbers.³²

Dissatisfaction with the existing courts led to the creation of new institutions to operate alongside them, small claims courts

²⁷ C. W. Brooks and M. Lobban (eds.), *Communities and Courts in Britain, 1150-1900* (London, 1997), pp. xxi-xxii.

²⁸ *HCJ* 78 (1823), 1026.

²⁹ A view popularised by Sir W. Blackstone (*Commentaries on the Laws of England*, vol. III, (1979 edn, Chicago) p. 82), which became received wisdom at the bar, repeated *ad nauseam* in e.g. the *Legal Observer* and the *Law Magazine*.

³⁰ 11 Geo. IV & 1 Will. IV c. 70, based on recommendations by the Common Law Commissioners (*First Report*, pp. 35-52).

³¹ D. Veall, *The Popular Movement for Law Reform, 1640-1660* (Oxford, 1970), pp. 167-78.

³² Brooks, *Interpersonal Conflict*, pp. 360-7, 381-4; W. Prest, *Law Reform in Eighteenth Century England*, in P. Birks (ed.), *The Life of the Law* (London, 1993), pp. 113-24.