A HISTORY OF THE COUNTY COURT, 1846–1971

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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.

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.

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 society[13] – 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.

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.

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.

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.

known initially as 'courts of conscience', a title gradually displaced by 'courts of requests'.[33] Perhaps inspired by the City of London's court of conscience, Bristol and Gloucester (jointly), Newcastle upon Tyne and Norwich obtained their courts at the end of the seventeenth century, but had few followers until the second half of the eighteenth century when towns became so eager that by 1830 some 250 courts had been established.[34]

In typically English fashion, the new courts sat alongside the old, adding to the confusion of the juridical landscape.[35] Usually however, they effectively annihilated their older rivals. In Kent in 1830 the county court had only 166 suits, and while the courts of record in Dover and Gravesend had just six and five respectively, their courts of requests could show 273 and 513. Some courts of requests were far more popular than those, Tower Hamlets having 28,624 suits, Halifax 22,864 and Liverpool 21,334.[36] In that year over 200,000 suits were brought in courts of requests, and about 300,000 in local courts of all kinds, dwarfing the 90,000 writs issued for the superior courts and justifying the claim that 'for most Englishmen, civil justice was the justice of courts of requests (and other local courts), not the justice of the common law and the superior courts'.[37]

The courts of requests gradually began to conform to a common pattern.[38] Their jurisdiction was geographically confined and limited in amount, usually to 40s but increasingly to £5; parties were allowed to give evidence, something which legal purists regarded with horror as a direct incitement to perjury; payment in instalments might be ordered, a facility the superior courts did not acquire until much later; there was no jury, and the judge, one of several commissioners appointed by the corporation, often lacked any legal qualifications. From 1747 most of the local Acts were entitled 'for the more easy and speedy recovery of small debts' and

[33] W. H. D. Winder, The Courts of Requests, *LQR* 52 (1936), 369–94; M. Slatter, The Norwich Court of Requests – a Tradition Continued, *JLH* 5 (1984), 97–107.

[34] *Fourth Report of the Common Law Commissioners, PP* 1831–2 (239) XXV, pt II.

[35] For the profusion of courts *c.* 1600 see L. Knafla, *Kent at Law* (London, 1994).

[36] *Fourth Report*, app. 1, reproduced in part in H. W. Arthurs, 'Without the Law': Courts of Local and Special Jurisdiction in Nineteenth Century England, *JLH* 5 (1984), 130–49 at 132.

[37] Arthurs, 'Without the Law', 132.

[38] Winder, Courts of Requests, 376.

the courts seem to have achieved that aim, providing 'a much speedier and cheaper debt collecting agency than any [the creditor] enjoys at the present day'.[39]

In the view of their leading contemporary champion, the Birmingham commissioner William Hutton, 'if the commissioners cannot decide against the law, they can decide without it'[40] and although some later Acts expressly required the court to adhere to the common law, their own lack of legal knowledge, the rarity of legal representation in the court and the want of an effective appeal meant that the commissioners had a pretty free hand.

It is not surprising that most lawyers affected either disdain or downright hostility to courts of this sort, with their potential for oppression and inconsistency. Even suitors, overwhelmingly traders, did not regard them as entirely satisfactory, for while they did possess coercive powers – in 1830 Greenwich issued 367 executions against goods and 379 against the body – their limitations were frustrating.[41] First there was a range of actions, roughly between £5 and £20, outside the jurisdiction of the courts of requests but still uneconomical to take to the superior courts. Second, there were still towns with no court of requests and no viable borough court either. Third, the problem with almost all local courts was that they were essentially fora for disputes between inhabitants of the borough, lacking effective jurisdiction over outsiders; for the increasing number of traders who operated on a regional or even a national scale, they were inadequate.

The concerns of retail traders however were not a central issue in the politics of the age. Humanitarians began to agitate for the reform of the 'bloody code' of the criminal law and the relief of insolvent debtors, and property owners became restless under Lord Eldon's costive regime in the court of Chancery, but until 1820 no prominent politician championed the cause of more effective local justice.[42]

[39] *Ibid.*, 391.

[40] Quoted in H. W. Arthurs,*'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto, 1985) at p. 29. This book supplements the article referred to above.

[41] *Fourth Report*.

[42] *HEL*, vol. XIII (1952), pp. 259–307.

THE ORIGINS OF THE NEW COUNTY COURTS

Lord Althorp was a rising man among the opposition Whigs who, having recently succeeded in putting through Parliament a bill to reform insolvency proceedings,[43] next turned his attention to the related problem of pursuing small debts through the courts. Like Mackintosh and Romilly before him, Althorp had already found that law reform was 'a topic of no party interest, and leading to no political results';[44] hence he could expect little support from his political associates. In fact some of the most vehement opposition would come from leading Whig lawyers, while his staunchest supporter in the Lords was Lord Redesdale, an arch-reactionary in politics.[45]

Althorp presented his first bill in March 1821. He proposed to revitalise the county courts by raising their jurisdiction to £15 and giving the sheriff an 'assessor' with legal training. Each assessor would make a quarterly circuit of towns nominated by the justices at quarter sessions, holding jury trials with attorneys addressing the court only on points of law.[46] The response was discouraging, the Attorney-General pronouncing it 'extremely objectionable' and shrewdly playing on the fears of the county members by predicting that it would result in a heavy charge on the county rate.[47] It was evident to Althorp that he would need influential backing if he was to make headway, so when he tried again in 1823 he had the bill sent to a select committee, having taken steps to procure convincing evidence of the deficiencies of the courts and the great volume of credit trading which they were failing to support.[48]

The committee pronounced that 'every witness ... agrees in stating, that no prudent tradesman ever thinks it for his interest to

[43] Sir D. Le Marchant, *A Memoir of John Charles, Viscount Althorp* (London, 1876), pp. 182–90.

[44] *Ibid*., p. 188.

[45] Redesdale had in fact presented a bill of his own in 1820: *HLSP* CXIV, nos. 18, 97; *Hansard* 1820 2nd s., vol. 1, cols. 742–6.

[46] *PP* 1821 (85, 233) I.

[47] *Hansard* 1821 2nd s., vol. 4, col. 1264.

[48] Althorp asked the radical William Hone to collect data for him: E. A. Watson, *Whig Renaissance: Lord Althorp and the Whig Party, 1782–1845* (New York and London, 1987), pp. 111–12. The many petitions in support of the Bills of 1824 and 1825 (*HCJ* 79 and 80, with at least fifty in the latter) may also have been engineered.

sue for any debt below [£15]'.[49] Nor was the injustice confined to creditors, because in the superior courts and at the assizes 'the expense of these proceedings ... puts it into the power of unprincipled men to harass the poor, and to compel them to pay money, which according to justice they ought not'.[50] While giving a broadly favourable verdict on courts of requests, the committee did not feel that they could safely be expanded beyond the bigger towns where 'it is very easy to find intelligent and respectable men, well qualified to perform the duties of commissioners'.[51] Nor could the limit of their jurisdiction safely be enlarged to £10 or more since (and the committee's logic is rather questionable here) many cases might then arise which called for greater legal knowledge than even intelligent laymen were likely to possess.

Two popular courts were rejected as possible models: the Clerk of the Middlesex county court volunteered that its process was too summary for cases above 40s,[52] while the county court of Lancaster, despite possessing advantages over other county courts, was nevertheless, through 'the necessity of adopting all the modes of proceeding in the superior courts ... an inconvenient and expensive system of trial for small debts'.[53]

The committee therefore proposed to revitalise the old county court. It was to have a legally qualified assessor as judge and, since 'they would have felt great objection to such an increase to the influence of the crown',[54] the committee altered Althorp's proposal, giving the appointment instead to the *Custos Rotulorum*. Jurisdiction was to be raised to £10 and, though there was to be a full twelve-man jury, procedure was to be greatly simplified. The court was to have the power to direct payment by instalments and, since 'it is quite obvious that if a power to appeal is given in courts such as those ... all hopes of establishing a cheap jurisdiction must be given up',[55] the assessor was given instead a power to order a new trial if the jury returned a verdict contrary to law or evidence.

Althorp was concerned lest the lack of effective remedies should

[49] *PP* 1823 (386) IV, p. 1. [50] *Ibid.*, p. 2. [51] *Ibid.*, p. 3.

[52] *Ibid.*, pp. 4–5. The court under Serjeant Heath and his son was later severely criticised in Parliament: *Hansard*, 1841–2 3rd s., vol. 65, cols. 1184–6.

[53] *PP* 1823 (386) IV, p. 5. Whereas in the rest of the country, county courts could hear cases above 40s only if the plaintiff obtained the writ *Justicies* from the King's Bench, in the Duchy it was available from the Chancery 'at a much smaller expense'.

[54] *Ibid.*, p. 7. [55] *Ibid.*, p. 9.

curtail the supply of credit to the urban poor, but many on the committee shared the common fear that better remedies might make traders too lax in giving credit; to prevent this they recommended that there should be a two-year limitation period for debts sought to be recovered in the county courts.[56] On the vexed question of emoluments the committee came down decisively in favour of a salaried assessor, though his staff might be paid by fees. Salaries, to come from suitors' fees, would vary from one county to another, being set by the justices at quarter sessions; any shortfall was to be made up from the county rate.[57]

Althorp quoted extensively from the report when reintroducing his bill in February 1824 and it made good progress despite predictable differences over patronage and salaries and City objections to the shorter limitation period.[58] Loudest in opposition were the lawyers; the Attorney-General averred it would be useless unless advocates were barred from appearing and the assessor was empowered to cross-examine witnesses himself, while others maintained that the bar would be corrupted by the lure of these judicial posts.[59] What proved to be the most intractable objection however had nothing to do with the merits of the bill.

The superior courts had certain 'patent officers', some of whom were perfect sinecurists like Lord Ellenborough (chief clerk of the court of King's Bench, worth £9,000 a year),[60] while others performed functions of a largely formal nature. All extracted fees from suitors and most had either purchased the office themselves or had it purchased for them. Though public opinion was growing less tolerant of sinecures it was generally accepted that an office-holder was entitled to compensation if his office were abolished or if reform of the institution seriously diminished its value. These patent officers, however, had a novel complaint: they claimed compensation for the diversion of business – estimated at one quarter – from the superior courts to a reinvigorated county

[56] Le Marchant, *Viscount Althorp*, pp. 189–90; *PP* 1823 (386) IV, p. 9.
[57] *PP* 1823 (386) IV, p. 10.
[58] *Hansard* 1824 2nd s., vol. 10, cols. 210–12, 303–4, 728–9, 1425–42; vol. 11, cols. 852–6.
[59] *Ibid*., vol. 10, col. 1441.
[60] The son of the former Lord Chief Justice, he launched an intemperate attack on the Bill: *Hansard* 1824 2nd s., vol. 10, col. 1315. As shown in J. Wade, *The Extraordinary Black Book* (London, edn of 1830) at p. 485, he was also joint *custos brevium* of the same court.

court.[61] Such a claim was almost unprecedented and posed a threat to future reforms of the public service if it were admitted. Nevertheless it furnished a convenient excuse to resist a measure which even Eldon acknowledged was probably necessary,[62] and in a House of Lords with an elevated conception of the sanctity of property rights it was fatal to the bill's chances.

The 1825 session proved equally frustrating even though Althorp reluctantly gave way on compensation. He erred in trying to placate concerns about patronage by substituting for his new assessors the existing commissioners of the Insolvency Court, augmented by four; this failed to win over opponents and worried supporters, who were doubtful whether the judges could take on the extra volume of work.[63] Realising that only the government could carry the measure, Althorp besought the Home Secretary, Sir Robert Peel, to take it over. Peel's record had already, in the despondent view of one Whig leader, established him in the public mind as 'the only reformer'[64] and he agreed to add local courts to the queue of reforms he had in hand, though he would not adopt Althorp's bill unaltered.

Peel was a reformer indeed, but was a cautious and pragmatic one, devoted to shoring up institutions by judicious modernisation, not to root-and-branch reconstruction. His introduction to the Small Debts Recovery Bill in June 1827 affords a good illustration of his outlook:

> We find ... in existence at present, a court of very ancient institution, familiar therefore to the people, founded upon good principles and of known and defined powers and constitution. It appears to me a wise course to retain and to improve this institution; to enlarge the sphere of its operation and to infuse into it new energy and vigour, rather than to supersede it by the establishment of a novel jurisdiction, resting on no foundation of antiquity, with no prescription to plead in its favour, and in the constitution of which, in every step, an experiment of doubtful issue must be made.[65]

[61] *Hansard* 1824 2nd s., vol. 10, cols. 1426–30. The Attorney-General put the compensation at £5–6,000 p.a., diminishing as the sinecurists died.
[62] *Ibid.*, vol. 11, col. 1316.
[63] Le Marchant, *Viscount Althorp*, pp. 193–5; *Hansard* 1825 2nd s., vol. 12, col. 152; vol. 13, cols. 599–601; *HCJ* 80 (1825–6) and *HLJ* 57 (1825). Evidence of the office-holders to the select committee is in *PP* 1825 (276) V.
[64] George Tierney, quoted in N. Gash, *Mr Secretary Peel* (London, 1961), p. 337.
[65] *Hansard* 1827 2nd s., vol. 17, cols. 1350–8.

Most of Althorp's bill was retained by Peel. The main difference was in the judges. The sheriff or his deputy would preside and though the sheriff might appoint an assessor *ad hoc*, he would not be permanent, so avoiding any claim to a pension. The jury was to be only of five; execution against goods was to be the principal sanction – there was no right to imprison a debtor – and to meet recent complaints about abuses by bailiffs of local courts, the sheriff was empowered to dismiss county court bailiffs for misconduct and to award damages against them for extortion.[66]

It was a typical measure of Liberal Toryism, conservative and inexpensive, and since Althorp generously hailed it as an improvement on his own it seemed to have a fair wind behind it.[67] But the claims of the patent officers continued to obstruct progress.[68] Anxious for an end to 'compensation in instalments',[69] Peel referred the whole question of the patent officers to the Common Law Commissioners and by the time this 'most rank and unweeded garden of lucrative offices without employment'[70] had been purged of its sinecures Peel had resigned for the second time and the old order was engulfed in a turmoil which threatened to blow it away.

The Whigs were in office at last, among them their great champion of law reform Henry Brougham, who had presented his credentials in a six-hour *tour de force* in the Commons in 1828.[71]

[66] *Ibid*., cols. 297–8, 1350–6; *PP* 1826–7 (535) II.

[67] *Hansard* 1827 2nd s., vol. 17, col. 1360. It was also welcomed by the Attorney-General, Sir James Scarlett.

[68] The Bill went through its committee stage but the report was shelved on 22 June: *HCJ* 82, 595.

[69] *Hansard* 1828 2nd s., vol. 19, col. 1475; Gash, *Mr Secretary Peel*, p. 477.

[70] Wade, *Extraordinary Black Book*, p. 485; *Hansard* 1829 2nd s., vol. 21, col. 1165. The Act abolishing the patent offices (11 Geo. IV & 1 Will. IV c. 58) is described in S. Walpole, *A History of England from 1815*, vol. III (London, 1880), pp. 48–50.

[71] Brougham has proved a daunting subject for biographers. Lord Campbell, *Lives of Lord Lyndhurst and Lord Brougham* (vol. VIII of *Lives of the Lord Chancellors*, London, 1869) is entertaining, well informed and relishably malicious, while his more balanced modern biographers, e.g. C. New (1961), R. Stewart (1985) and F. Hawes (1957) do not examine his contribution to law reform in detail. The omission is being repaired by T. H. Ford, first through several articles and then in *Henry Brougham and his World* (Chichester, 1995), which goes down to 1830. R. K. Huch, *Henry, Lord Brougham, the Later Years, 1830–1868* (Lewiston, 1993), despite the title, is mostly on the 1830s. Brougham's own *Life and Times* (3 vols., London, 1871) has useful correspondence but is not a reliable narrative.

Though local courts had figured in it only briefly,[72] Brougham aspired to bring about the reforms which had eluded Althorp and Peel through a bill presented to the Commons in 1830.[73] Before the year was out he found himself bringing it forward again, this time in the other House and from the Woolsack, prudence, as much as fitness, having suggested him for the great office of Lord Chancellor which removed him from the Commons.[74]

Brougham was one of the wonders of the age and seemed the embodiment of the 'march of intellect'. He brought to law reform a daring and confidence which knew no bounds, an arrogance which scouted opposition and obstacles and a fecundity in producing bills matched only by an airy irresponsibility when it came to the niceties of draftsmanship.[75] When such a man turned his mind to local courts the result was unlikely to resemble the productions of less adventurous spirits. Indeed, so ambitious was the scope of Brougham's proposals that even their author felt it prudent to confine them in the first instance to two diverse counties, Kent and Northumberland, by way of an experiment.

Introducing his measure in the Lords, Brougham began by demonstrating that a large proportion of the business of the superior courts of common law concerned claims for less than £100 – 'he took that sum as a natural limit for those actions which ought not to be removed'[76] – and that even when the trial of small actions took place at the assizes they were unacceptably expensive, 'out of all keeping, in fact, to the value of the thing litigated'.[77] This, of course, was conventional wisdom. The natural home for small claims was in local courts and Brougham extolled the courts of the Sheriff Depute in his native Scotland.[78] His solution to

[72] *Hansard* 1828 2nd s., vol. 18, cols. 190–1.
[73] *Hansard* 1830 2nd s., vol. 24, cols. 243–74.
[74] R. Stewart, *Henry Brougham, 1778–1868* (London, 1985), pp. 248–52.
[75] Sir John Eardley Wilmot, an admirer who became a county court judge, listed 112 bills he claimed were produced or inspired by Brougham: A. H. Manchester, *A Modern Legal History of England and Wales, 1750–1950* (London, 1979), p. 16.
[76] *Hansard* 1830 3rd s., vol. 1, col. 719. Returns to the Commons in 1827 showed 64,000 of 93,000 affidavits for debt filed in the common law courts to be for sums under £50; only 15,000 exceeded Brougham's 'natural limit'.
[77] *Ibid.*, col. 720. Brougham had been particularly influenced by his own experience at the spring assizes of 1826, when the average award in fifty-two verdicts at Lancaster was £14 15s.
[78] *Ibid.*, col. 716.

England's problems, however, lay in 'forming a Court, new in its kind, but modelled upon ancient principles' since 'it was evident, from all the attempts which had been made to recall the ancient County Courts into existence ... [and] from the opposition which had been made to such plans ... that they must abandon the ancient County Courts as incapable of being now (*sic*,?new) modelled to suit the wants of the country'.[79]

The new courts, courts of record, were to be styled 'Courts of Local or Ordinary Jurisdiction'. Each county would have one, its resident judge sitting in towns of his choosing, holding court in each at least once a month except for his vacation in August. His jurisdiction would be impressively wide; personal torts up to £50; debts, contracts, trespass to goods, trover and small legacies up to £100. Ultimately the jurisdiction would also be an exclusive one but at the outset the superior courts would have cognisance of cases within these limits if they involved titles to land or complex questions of law; the other inferior courts would eventually be abolished to leave the new courts masters of the field in their locality.[80]

Not content with this, Brougham conferred on his protégés the power to sit as arbitrators and in 'courts of reconcilement'. He had been deeply impressed by the success of such courts in Denmark and expounded their virtues:

> if the suitors who daily thronged the Courts of Common Law had, instead of consulting a counsel or an attorney, or any other person equally interested in the actual existence of an action, the advantage of a previous conference with a conciliatory judge, he would not say that nine cases out of ten, but certainly two out of three, would never be brought to trial.[81]

Courts of reconcilement became a sort of King Charles' head with Brougham, who tried unwearyingly for the rest of his active life to persuade the invincibly insular English of their merits. Under Brougham's scheme the local judges would therefore be required to act in a bewildering variety of capacities- as 'conciliatory judge', arbitrator, small claims judge, judge in ordinary and also as magistrate. Different rules as to juries, pleadings and costs would govern each role, and such was Brougham's impatience

[79] *Ibid*., col. 727.
[80] The Bill, concerted with M. A. Taylor, a veteran law reformer, and Thomas Denman, is in *HLSP* 1830–1 CCLXXXIII (17) and *PP* 1830 (568, 569) I.
[81] *Hansard* 1830 3rd s., vol. 1, col. 735.

with fine detail that acute critics could find plenty in the way of inconsistencies, contradictions and omissions;[82] even the experienced attorney entrusted with the task of drawing up the schedule of costs was said to have found it impossible to create a workable scheme.[83] Since the judges would need to be men of considerable ability the rewards would have to be attractive. They were to receive £1,500 plus up to £500 out of the fees, and would be assisted by registrars on £400 plus up to £300 from the fees.

By the sheer ambition of his proposals Brougham had raised the stakes in the debate about local courts. Previous proposals would have taken a quantity of small business away from Westminster Hall and, in the case of Althorp's bills, would have created a cadre of junior provincial judges; but their impact on the legal profession and the administration of justice would have been trivial compared with what was now put forward. Brougham had already made himself thoroughly unpopular with attorneys on the northern circuit[84] and the profession resented his imputation that they did not give disinterested advice.[85] Furthermore the vested interests of the bar and big London agency firms of solicitors were sure to oppose his plans as a threat to their prosperity.[86] And for diehard Tory peers here was radicalism indeed. They would take their cue from Eldon and from Lyndhurst, who gave the bill an ominously chilly reception.[87]

One attack came from the opposite quarter, from a viewpoint which denounced the bill vehemently as a feeble thing, a shoring up of 'matchless constitution' and a betrayal of true, logical reform. This was the line taken by Jeremy Bentham and robustly pressed in the *Westminster Review*:[88] sorely wounding to Brougham's vanity, it was highly amusing to his many enemies. Bentham,

[82] E.g. *LM* 5 (1831), 1–49; *LO* 1 (1830–1), *passim*.
[83] *LO* 1 (1830–1), 170–3.
[84] T. H. Ford, Henry Brougham on the Northern Circuit: Even His Own Solicitor: paper to the Tenth British Legal History Conference, Oxford, 1991.
[85] *Hansard* 1830 3rd s., vol. 1, col. 735.
[86] The first issues of the journal the *Legal Observer* have leaders, letters and reviews of pamphlets, almost all of them hostile.
[87] *Hansard* 1830 3rd s., vol. 1, cols. 739–40. According to E. Myers, *Lord Althorp* (London, 1890), p. 39n, Lyndhurst had abandoned his support for Althorp's bill when he found that Eldon had become opposed and with 'unscrupulous effrontery' spoke and voted against it.
[88] Mr Brougham and Local Judicatories, vol. 13 (1830), 420–57. This followed a denunciation of his law reform views in vol. 11 (1829), 447–71.

who had 'an extreme detestation of jobbery',[89] seems to have taken violent exception to the patronage which would accrue to the Lord Chancellor under this scheme, but his own ideas, characteristically stark and uncompromising, were not practical politics and his disciples, though eloquent, were few and not in a position to mount an effective opposition.

It was evident that the bill would not make headway in the Lords unless it could be presented as more than the wild project of an erratic radical politician. With even his energies fully taxed in trying at once to fulfil his boast that he would rapidly clear off the accumulated arrears in Chancery and to participate vigorously in the intense political activity surrounding the Reform Bill, Brougham was probably not sorry to buy time by sending the local courts issue away to the Common Law Commissioners for more dispassionate examination. These Commissioners had been appointed in 1827 and now their terms of reference were extended 'to inquire into the practice and proceedings of provincial courts ... for the recovery of small debts'.[90] They were all barristers[91] and the conservative tone of their first three reports encouraged lawyers to suppose that they would find little to commend in Brougham's extravagant scheme and would, at worst, recommend something along the lines Peel had brought forward.

In fact, however, the Commissioners formed a most unfavourable view of existing arrangements for justice in the provinces and began their report with a devastating indictment:[92]

It appears to us that the present inferior courts are more or less open to some or all of the following objections:

[89] A. Aspinall, *Lord Brougham and the Whig Party* (Manchester, 1927), pp. 230–1. For Bentham's reaction to Brougham's great speech see J. F. Dillon, Bentham's Influence on the Reforms of the Nineteenth Century, in *Select Essays in Anglo-American Legal History*, vol. I (London, 1907), pp. 492–515, at 502–3. Brougham's old vehicle, *The Edinburgh Review*, was more sympathetic: vol. 51 (1830), 478–95.

[90] *Fifth Report*, *PP* 1833 (247) XX. On the role of commissions in nineteenth century law reform see A. H. Manchester, Law Reform in England and Wales, 1840–1880, *Acta Juridica* (1977), 189–202.

[91] J. F. Pollock, H. J. Stephen, J. Evans, T. Starkie and W. Wightman. Pollock and Wightman later became judges, Starkie a county court judge. Those commissioners who were judges already did not participate in this report: J. M. Collinge (ed.), *Officials of Royal Commissions of Inquiry* (London, 1984), pp. 14–15.

[92] *Fifth Report*, p. 1.

That their jurisdiction is in general too limited in point of amount and local extent.
That frequently suits are removable into the higher courts without security.
The want of competent Judges and Juries.
The want of efficient inferior ministers to serve and execute process.
The use of complicated and expensive pleadings.
The distance of the place of trial from the residences of the parties and witnesses.
The want of sufficient means to compel the attendance of witnesses.
Delay.
The facility of evading execution.
The abuses occasioned by entrusting the execution of process to improper agents, for whose misconduct no superior is responsible.
The want of appeal.
The expense of the proceedings as compared with the amount of the demand.

Institutions were reviewed in turn and none escaped condemnation. County courts were 'inefficient for the administration of justice, and the subject of general complaint'. As for hundred courts, 'incompetent juries, an ill-regulated course of pleading, and the practice of allowing costs wholly disproportioned to the action ... render these courts inoperative for any useful purpose'.[93] One or two local courts were singled out for praise, notably the Palace Court of Whitehall,[94] but most of the borough courts were condemned for their arbitrary and sometimes exorbitant costs and the narrowness of their geographical jurisdiction.[95]

The select committee of 1823, composed mostly of laymen, had been quite favourable to the courts of requests, but the Commissioners were severe. As lawyers they were naturally predisposed to share Blackstone's suspicions of courts 'with methods of proceeding entirely in a derogation of the common law, and whose large discretionary powers make a petty tyranny in a set of standing commissioners'.[96] In fact there was little evidence before them of 'petty tyranny' and the 'suspicion ... that their decisions are often wanting in impartiality' was just

[93] *Ibid.*, pp. 6, 9.
[94] *Ibid.*, p. 10. The Palace Court, however, gave exclusive audience to six attorneys and four counsel and, following damning criticism, was abolished in 1849: T. Mathew, The Mayor's Court, the Sheriffs' Courts and the Palace Court, *Juridical Review* 31 (1919), 139–51.
[95] *Fifth Report*, pp. 10–11.
[96] Quoted by the Commissioners on p. 11.

that, a suspicion.[97] The main objection to courts of requests was that since 'so much is left to the discretion of those who decide the cause' (necessarily so if they were to be cheap enough to fulfil their function), the judges needed to be 'persons of considerable ability and learning'; yet in fact 'they consist in general, of commissioners whose pursuits in life can give no assurance of their possessing these qualities'.[98] Lay magistrates, it would seem, might safely be entrusted with an immense range of important functions but decisions about a 40s debt needed legal training.

When taxed with the inadequacies of local courts, defenders of the *status quo* were given to retort that their decay was the result of consumer preference for the superior justice developed at Westminster and that if there were deficiencies in its delivery the remedy lay in improving the superior courts, though they were usually rather vague about how this might be done.[99] The Commissioners, however, did not share the view that nothing else should be attempted until every avenue had been explored to make Westminster Hall cheap enough for bringing a small claim to be worthwhile. Admitting that 'the extent to which the jurisdiction of the inferior courts ought to be carried must depend much on the question how far the delay and expense attending suits in the superior courts are capable of reduction, which has not yet been sufficiently ascertained', they nevertheless felt that the latter 'are far too costly and dilatory for the decision of suits of small importance as to amount'[100] and for the very small they could never be otherwise.

Concluding that 'the inadequacy of the present Courts, in causes of action from 40s to at least £20, amounts almost to a denial of justice',[101] the Commissioners recommended a national network of small claims courts. No-one should need to travel more than twenty or twenty-five miles to one and each market town of 20,000 persons should have its court. They would handle

[97] *Ibid.*, p. 12. Arthurs, 'Without the Law', pp. 33–4, forcefully points out that the evidence before the Commissioners hardly justified their doubts on this score.

[98] *Fifth Report*, p. 12.

[99] See e.g. *LM* 10 (1833) at 179; *LO* 1 (1830–1), *passim*, and the speeches of the Attorney-General (*Hansard* 1830 3rd s., vol. 1, cols. 274–6) and Lyndhurst (*Hansard* 1833 3rd s., vol. 18, cols. 883–4).

[100] *Fifth Report*, p. 17.

[101] *Ibid.*

personal claims up to £20, small legacies and ejectments relating to tenements with an annual value not above £20. About twenty judges were envisaged, chosen from barristers of ten years' standing, salaried and resident in their district and assisted by a registrar for each court. Court forms would be simple; all process would be served by the court; there would be no special pleading; and except where he wished to raise certain technical defences the defendant would need to hand in only a notice that he intended to defend. Juries would be six strong and although lawyers would be allowed, they would receive no costs where less than £5 was claimed or recovered; above that amount attorneys should receive 'a fair remuneration' – which was rather begging the question.[102]

Though much less ambitious than Brougham's proposals in some ways – the much lower money limit of jurisdiction and the omission of reconcilement for instance – the Commissioners went beyond him in wanting the new courts to supersede the existing local courts immediately rather than run alongside them. Overall, however, there was a surprising degree of consistency between the two – surprising because Lyndhurst's subsequent charge that Brougham had packed the Commission with his supporters was nonsense.[103]

The Commission's report dismayed opponents of reform and, because it soon came to be regarded as authoritative, provided supporters with a strong and non-partisan endorsement. To Brougham's great indignation, it also enabled Conservatives to claim that bills to establish local courts were based on the Commission's ideas and not his. As with all the law reforms of Brougham's time, 'he himself claimed credit for nearly all of it, and his enemies – who were many – denied him any credit at all'.[104]

The report was not published until the spring of 1833 but Brougham reintroduced his Local Courts Bill, somewhat modified to meet the Commissioners' views and no longer confined initially

[102] *Ibid.*, pp. 18–30.

[103] *Hansard* 1833 3rd s., vol. 18, cols. 868–9, 889–90; *LO* 7 (1833–4), 35. Starkie, Evans and Wightman were appointed by Brougham but none of them was known for liberal or radical views.

[104] G. R. Y. Radcliffe and G. Cross, *The English Legal System* (6th edn, by G. J. Hand and D. J. Bentley, London, 1977), p. 263. For an example of a disparaging overview of Brougham's contribution see *Quarterly Review*, 105 (1859), 504–26.