THE REFORM OF THE TESTAMENTARY
JURISDICTION OF THE ECCLESIASTICAL
COURTS, 1830-1857

A thesis submitted for the degree of Doctor of Philosophy

by

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Abstract

This thesis traces the efforts of successive Governments of both persuasions to reform the ancient jurisdiction of the spiritual courts over the validity of wills of personal property. Those non-partisan efforts spanned three decades and resulted in the 1857 Court of Probate Act.

A Royal Commission, reporting in 1832, recommended in effect that the jurisdiction be centralised in London by transferring it from the Province of York and from the diocesan and inferior courts to the Prerogative Court of Canterbury at Doctors' Commons, where the specialist civilian lawyers practised their separate and monopolistic body of law. Because the Real Property Commission preferred a secular solution, the 1832 Report was endorsed by a Commons Select Committee in 1833 and modified by a Lords Select Committee in 1836 to allow a limited non-contentious local jurisdiction.

Several early attempts to bring in reforming measures based upon the centralising 1832 Report failed because of local opposition, a lack of resolve on the part of Ministers and the pressure of other business. Two Government Bills were introduced during Peel's Second Ministry. The 1843 Bill failed because it pursued a centralising policy. The 1844 Bill failed because it departed from that policy and offered to keep the diocesan courts. The Whig Opposition introduced its own centralising Bill in 1845 but it too failed.

After the inactivity of Russell's administration, efforts at reform were resumed in the 1850s by rapidly changing Governments, but were hampered by local opposition, pressure of other business, and the Crimean War. By then the 1854 Report of the Chancery Commission had recommended that the entire jurisdiction should be removed to a secular court, and the debate raged about which practitioners should benefit.

Finally, after pressures in the Commons to secure appropriate compensation and district probate offices with extended powers, the 1857 Act ushered in the present system.
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Introduction

The kind of insatiable curiosity which possessed Kipling's *Little Elephant* prompted the present tentative excursion into a strangely neglected area of legal history, *videlicet*, the final decades of the testamentary jurisdiction of the ecclesiastical courts. That same curiosity had some years ago produced an unoriginal undergraduate dissertation upon the structure of the medieval will, but the decision to follow that with a sudden leap into the nineteenth century requires an explanation. The change of direction happens to have been provoked by a chance conversation about diocesan registries with Richard Helmholz, a conversation which took place at the Thirteenth British Legal History Conference in Cambridge in 1997. His masterly work on the pre-Reformation and Early Modern jurisdictions of the ecclesiastical courts is well known to legal historians, whilst James A. Brundage, the late Father Sheehan and a number of others have also laboured with distinction in the same vineyard. The conversation in Cambridge, the exalted standing of the group of scholars involved in that research and the authoritative nature of their published findings convinced a fledgling legal historian that to move forward in time to the nineteenth century, and to examine the position of the ecclesiastical courts in what were the declining years of their testamentary jurisdiction, might uncover a more rewarding and less crowded area in which to pursue a piece of research.

What is common knowledge about that later period is the anomaly that the spiritual courts were still exercising a non-contentious and contentious jurisdiction over the validity of wills of personal property, even though there was by then a widespread acceptance that the jurisdiction was 'merely temporal', as Samuel Gale told the Real Property Commission in 1832. A preliminary trawl through what work had been done on the nineteenth century produced a scant return. That was both remarkable and gratifying. Remarkable, given the undeniable fact that the granting of probates of valid wills and the settlement of disputes about the validity of wills were processes which affected all citizens in all walks of life, as they still do; and gratifying, because there was the prospect of being able to work in fallow ground. In fact, the only directly relevant published work was A.H. Manchester's pioneer article in the *American Journal of Legal History*, although it had appeared as long ago as 1966 and was restricted to printed sources. More recently, in 1992, Waddams' otherwise
balanced account of the career of Stephen Lushington, the distinguished civilian, had
devoted relatively little space to the reform of the testamentary jurisdiction; and his
later work has concerned itself instead with two other jurisdictions which the
ecclesiastical courts still enjoyed in the nineteenth century, matrimonial causes and
defamation. The trawl also revealed unpublished theses which might have been
supposed to be relevant, Welch on Bishop Blomfield (London, 1952) and Garrard
on Archbishop Howley (Oxford, 1992), but neither made any mention of
testamentary jurisdiction in the Diocese of London and the Province of Canterbury,
respectively. Nor had Frances Knight thrown light on the probate arrangements at
Lincoln in her recent work on Bishop Kaye's management of that sprawling diocese.

It might be argued, of course, that the attempts to transfer the jurisdiction away from
the ecclesiastical courts is a topic which does not warrant examination, and that it
has been quite properly neglected by legal historians. It is true that when the Lord
Chancellor was introducing his crucial Bill in 1857 he admitted that it dealt with a
'dry and technical' subject which some regarded as being of 'second-rate importance'.
However, if the present choice of topic needs to be justified, the plentiful evidence
eventually culled from Parliamentary debates, from official reports, from the legal
press and from the private correspondence of some of the leading participants
demonstrates how seriously Cranworth and his contemporaries took the
arrangements for testamentary justice. The same evidence also demonstrates that the
argument came to be less about the content of the jurisdiction and more about where
it was to be provided, and how the business was to be apportioned out between
practitioners in London and in the Provinces. Those were important politico-legal
issues which found a place in their day alongside other aspects of 'centralization' and
'anti-centralization', whether for sincere reasons or out of self-interest. What is
certain is that by the beginning of the 1857 session Cranworth felt that the whole
question of testamentary jurisdiction had turned into a 'first-rate difficulty'. That
being so, this thesis will attempt to reconstruct the protracted events which led to the
resolving of that 'difficulty' in 1857.

However, it has to be said that some formidable research problems were
encountered along the way, not only because the choice had fallen upon a topic
which had been so little considered in its own right that it lacked direction signs, but
also because the chosen topic touched upon a number of other areas of study which
were discrete and specialised and sometimes non-legal. For example, it was
necessary to become reasonably familiar with how Parliament conducted its business, how pressures were exerted upon MPs, how official inquiries were instigated, how the legal press reacted to events, how the phenomenon of pamphlet literature played its part and how the Church of England defended itself in a time of change.

First, Parliament was the ultimate forum for debating both the principles and the details of reform, and what happened there from administration to administration and from session to session has largely determined the structure of the thesis. Those arcane procedures needed to be understood and closely watched because they could be manipulated, and often were, either to promote or to impede the progress of a reforming measure. It was also necessary on occasions to exercise judgement about the likely accuracy of conflicting reports of the same debate, as variously found in *Hansard*, the *Mirror of Parliament* and the *Law Times*.

Secondly, the influence of outside pressures upon Parliament proved to be both significant and elusive. From the vantage point of a political historian, Peter Jupp had some interesting points to make about the role of public petitions during Wellington's administration, but much more evidence is needed about how hostile petitions and lobbying were organised by the country registrars and their allies in the 1840s and 1850s. That information may be available in the surviving records of several of the diocesan registries, especially those at York, Chester, Exeter and Norwich. Regrettfully, only Lincoln has been sampled for purposes of this thesis.

Thirdly, there had to be some familiarity with the mechanisms of official inquiries, whether by Royal Commissions or by Parliamentary Select Committees. It was not always possible to place the several inquiries into testamentary jurisdiction within the wider context of inquiries, but it can safely be said that those which were examined in detail were undoubtedly important and properly influential relative to the facts they found, to the recommendations they made and, like the experience of Trollope's Dr Proudie, to the mere standing of their members.

Fourthly, the legal press flourished throughout the latter part of the period under consideration, as both Anderson and Polden have testified, and that source provided much that was valuable in the form of facts, commentaries and reforming proposals, all of which were aimed at lawyers and the informed public. However, much more needs to be known rather than deduced about the editorial policy of a particular legal weekly or periodical at any given time, about its links with one political party or the other, about the identity and motives of its contributors and about the
composition of its readership. These details are important because, when it came to testamentary jurisdiction at least, the legal press took an informed, continuing and probably influential interest in each attempt to reform the jurisdiction.

Fifthly, there was another unfamiliar, and also ephemeral, source to track down which seems to have received little attention from legal historians, namely pamphlet literature linked to the reform of the jurisdiction. Some pamphlets set out reasoned arguments; some were scurrilous; some merely disseminated the text of speeches in the Commons; and many were anonymous. But what they usually had in common was the defence or propagation of the self-interest of the author or of those groupings represented by the author. John Nicholl took the medium seriously enough to form a collection of pamphlets hostile to the 1843 Bill.

Sixthly, the period covered by the thesis was a time when Parliament was often having to give priority to discrete issues not connected with testamentary jurisdiction or even with the ecclesiastical courts. The continuing reappraisal of the relationship between Church and State, the reform of the Church’s financial structures and the resentment over church rates came closest, but the thesis has not attempted to do more than note the existence of those problems, and has mentioned industrial unrest, Irish affairs and the Crimean War only where they consumed the time of Ministers and of Parliament.

Finally, the absence of a body of published research dealing with the chosen topic has imposed a greater dependence upon original material than might have been originally envisaged or thought desirable. That in turn has caused difficulties and delays. At one extreme, at Prime Ministerial level, only Wellington’s Papers at Southampton University and Peel’s Papers in the British Library were decently catalogued and readily accessible. At the other extreme, the Bodleian Library’s microfilm version of Sir James Graham’s revealing correspondence was accompanied by no more than a bundle-list, whilst the even more relevant Merthyr Mawr Papers, recording the contributions made by Sir John and Dr John Nicholl and still in private hands, presented similar but greater difficulties. Access to the Merthyr Mawr Papers was achieved by the temporary loan of some bundles of letters and memoranda to the Glamorgan Record Office. Those bundles had been selected from a terse list, characteristic of its time, held by the National Register of Archives. It is perfectly possible that a wider or different selection of material would have provided more detail about the involvement of both men, but it is unlikely that the essential
features of their involvement would need be re-assessed. Nonetheless, life would be made easier for the next generation of legal historians if the Merthyr Mawr Papers and the originals of the Graham Papers could be fully catalogued.
The preparation of this thesis has involved periods of research in a number, alas too few, of libraries and record offices. Therefore, the thanks of a former gamekeeper is due to the staff of the British Library, the Buckinghamshire Record Office, the Church of England Record Centre at Bermondsey, Durham University Library, the Glamorgan Record Office, the House of Lords Record Office, the Lincolnshire Archives, London University Library, the National Register of Archives, the Public Record Office, Southampton University Library and University College London Library.

However, three sources stand out above all others, two institutional and one private. The completion of this thesis would never have been possible had the incomparable resources of the Bodleian Library not been relatively close at hand. The nature of the research was such that those resources were distributed between the Law Library, the Old and New Libraries and the Radcliffe Camera, and there were also occasional forays to Oxford libraries as different as St Peter's Hall and the Codrington Library. The other institution to thank is the Gladstone Library at Hawarden which generously gave me a precious week of both calm and stimulation, quite apart from the richness of its collections, at a critical stage in the preparation of this thesis. That week had a value quite disproportionate to its duration.

The involvement in the reform process of Sir John and Dr John Nicholl, père et fils, could easily have been underestimated if special access to the Merthyr Mawr Papers had not been granted, thanks to the kindness and patience of Murray McLaggan. One consequence of that gesture by a private owner may be a belated evaluation of the careers of both those Welsh civilians, although the task proper would lie somewhat beyond the scope of this thesis.

Finally, a sincere word of appreciation to Patrick Polden at Brunel and to Michael Lobban, formerly at Brunel and now at Queen Mary College, for having the fortitude to supervise this piece of research.
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<td>AJLH American Journal of Legal History</td>
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<td>BIHR Bulletin of the Institute of Historical Research</td>
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<td>CJ Commons Journal</td>
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<td>DNB Dictionary of National Biography</td>
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<td>Ecc LJ Ecclesiastical Law Journal</td>
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<td>EHR English Historical Review</td>
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<tr>
<td>GP Graham Papers, Bodleian microfilm</td>
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<tr>
<td>HLRO House of Lords Record Office</td>
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<td>IHR Institute of Historical Research</td>
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<td>JEH Journal of English History</td>
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<tr>
<td>LC Law Chronicle</td>
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<td>LJ Lords Journal</td>
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<td>LM Law Magazine</td>
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<td>LO Legal Observer</td>
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<td>LR Law Review</td>
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<td>LT Law Times</td>
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<td>MMP Merthyr Mawr Papers</td>
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<tr>
<td>P.P. Parliamentary Papers</td>
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<tr>
<td>RHS Royal Historical Society</td>
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<td>SJ Solicitors' Journal</td>
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<td>TRHS Transactions of the Royal Historical Society</td>
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<td>WP Wellington Papers, Southampton University Library</td>
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Chapter 1: The condition of the ecclesiastical courts in the 1820s; 'such a cosey, dosey, old-fashioned, time-forgotten, sleepy-headed little family party'.

The celebrated satirical passages in *David Copperfield* doubtless capture some of the atmosphere of Doctors' Commons as it was in the late 1820s, when the youthful Dickens started there as a freelance reporter. However, his observations convey little or no information about the history of that institution and about the increasingly anomalous jurisdictions exercised within its confines, and nothing whatsoever about the arrangements outside London.

The buildings known as Doctors' Commons, in Great Knightrider Street between St Paul's Cathedral and the Thames, were where civilian lawyers, namely, the judges, advocates and proctors in the ecclesiastical courts which sat there, 'applied rules and followed procedures that grew originally in the canon and mercantile laws of continental Europe'. Standing apart from the traditions of the common law and equity, and even physically separate from Westminster Hall, the courts and practitioners at Doctors' Commons had different modes of procedure, relied upon different forms of evidence, and enjoyed a monopoly over a number of specialized jurisdictions which had not changed much since the Reformation.

The College of Advocates, originally an offspring of Trinity Hall Cambridge, had existed formally since 1511, had occupied the same premises at Doctors' Commons since 1671, deceptively like an Inn of Court, had acquired its Royal Charter in 1768 and had subsequently bought the freehold of those premises.

The advocates, the civilian barristers, were doctors of civil law. They had completed a course of at least eight years of study at Oxford or Cambridge before being elected as Fellows of the College and being admitted on the fiat of the Archbishop of Canterbury. In their first year advocates were required to attend the courts but remain silent. They were always relatively few in number, seventeen at the time of incorporation and no more than twenty-six in 1858. In the late 1820s there were about twenty advocates, although not all of them would have been practising. The permanent judges at Doctors' Commons, distinguished civilians like Scott, Nicholl and Lushington, were drawn from the ranks of the advocates and were ecclesiastical appointees, but it was normal for any practising advocate to act as a surrogate.

The principal courts at Doctors' Commons, all of which took turns to sit in the Common Hall, were the Court of Arches, the Prerogative Court of Canterbury, the
London Consistory Court, the Admiralty Court and the High Court of Delegates. The Court of Arches, which Sir John Nicholl had presided over as Dean since 1809, was the appeal court for the twenty-two diocesan courts, and for most of the inferior courts, within the Province of Canterbury. Nicholl was also Judge of the Prerogative Court which had an overriding testamentary jurisdiction for that Province, both contentious and non-contentious. The contentious jurisdiction was confined to disputes about the validity of wills of personal property, not their construction since the Court of Chancery had been concentrating upon that jurisdiction from the close of the sixteenth century. Even so, because the Prerogative Court claimed jurisdiction over *bona notabilia*, personal effects above the value of £5 in more than one diocese within the Province, it handled about 80% of all contentious business and an even higher proportion of all non-contentious business. Between 1827 and 1829, the latter business was averaging 6,500 probates and 3,500 administrations annually.

The London Consistory Court, presided over by Stephen Lushington since 1828, handled relatively little probate business but was, instead, an important matrimonial court. The Admiralty Court, under Sir Christopher Robinson since 1828, 'administered laws of sea use which had come to form part of the general law merchant of Europe.' The court had been busy with lucrative prize causes during the Napoleonic Wars, and a number of advocates of that generation had become uniquely expert in international law. Finally, the High Court of Delegates, sitting in the Common Hall, heard appeals from the Admiralty Court and from the ecclesiastical courts at Doctors' Commons.

The second tier of practitioners at Doctors' Commons was formed by the proctors, the civilian solicitors. They numbered over 100 in 1829, and probably about 130 with their clerks. Proctors were required to be articled for seven years with a senior proctor. They were then admitted, first as notaries and then as proctors, with the authority of the Archbishop of Canterbury and the support of three advocates and three proctors. Although the registrars of the Prerogative Court and the London Consistory Court were sinecurists, the deputies they employed were experienced proctors and usually in private practice at the same time. The courts at Doctors' Commons had tables of fees, revised as recently as 1829, but the bills of costs submitted by proctors to their clients were governed only by customary rules and were taxed by other proctors, the deputy registrars.

2
All these activities were contained within the double quadrangle at Doctors’ Commons, and were housed variously in the Common Hall, in the storage and search room areas of the Registry of the Prerogative Office, in the chambers of the advocates, in the offices of the proctors, and in the library and dining room.

The equivalent arrangements at York were no more than a microcosmic shadow of what existed at Doctors’ Commons. The Province of York embraced only four dioceses, York, Carlisle, Chester and Durham, and the probate business there was one fifth of what London was claiming. The diocesan court at Chester, which included industrial Lancashire prior to re-organisation, was almost as busy as its provincial court. The judge at York, Granville Venables Vernon, and his sinecurist registrar were members of, and appointed by, the ruling archiepiscopal family. Vernon himself and the three advocates who practised there were barristers by training, but the deputy to the registrar was an experienced proctor and the eight proctors in practice had served a five-year clerkship. Also unlike the arrangements at Doctors’ Commons, the court-room and the registry of wills were housed in the Minster and its precincts.

At diocesan level and below, there were 300 or so ecclesiastical courts and will registries across both Provinces which were even less adequately staffed and housed than at York. Although there were exceptions, the normal arrangements experienced by the public, and described by antiquarians like Betham and Protheroe, were clerical judges with no legal qualifications; sinecurist registrars employing proctors or solicitors as their deputies; the absence of a bar of advocates; little or no opportunity for practitioners to gain any breadth of experience; no properly defined court fees; and poor and insecure storage for original wills.

There was, in other words, no concentration of civilian skills and expertise outside London, and it was rare, for example, to find a proctor who had trained in London and moved elsewhere.

Other kinds of jurisdiction still exercised in the 1820s by the ecclesiastical courts, such as church rates, tithes, pews and defamation, attracted much attention from the early decades of the nineteenth century, especially as exercised in the diocesan and inferior courts. But it was the prize of testamentary business, almost 50% of the business passing through those courts, which was to prompt rivalries between the metropolis and the rest of the country, between centralisation and decentralisation, between the monopolists at Doctors’ Commons and the country practitioners and
even between common law and equity lawyers. Those rivalries dominated and delayed all legislative attempts to alter testamentary jurisdiction until the Probate Act was passed in 1857.
Notes to Chapter 1.


4. For the encroachments made by Parliament and by the courts of common law and equity, see H.E.L., i, pp. 618, 620-21, 629.


6. Ibid., p. 78.


12. H.E.L., xii, pp. 75-77.
Chapter 2: Pressures to reform the ecclesiastical courts; 'a spiritual court was not the most favourable sound to the ear'.

In January 1828 the Duke of Wellington formed a ministry which included Lyndhurst as Lord Chancellor and Peel as Home Secretary. Lyndhurst had already served as Lord Chancellor under Canning and Peel had considerable ministerial experience as Chief Secretary of Ireland and as a reforming Home Secretary. Prior to that date there had been only sporadic attention paid in Parliament to aspects of the performance of the ecclesiastical courts, first on the occasion of 'Lord Stowell's Act' in 1813, and secondly when a Royal Commission investigating the fees of the Courts of Justice reported in 1823 and 1824 on the courts sitting at Doctors' Commons.

Immediately after Wellington had assumed power, however, came Brougham's comments in February 1828 about the method of appointing the judges in the ecclesiastical courts; criticisms expressed by Joseph Hume and others in June and July 1828 about sinecures and about Sir John Nicholl's judicial conduct; concerns expressed in March 1829 about the security of the wills kept at Doctors' Commons; demands made in Parliament in May and June 1829 for a reform of the courts; a further stage was reached in June 1829 in a prolonged case of clerical discipline; and, finally, there was the influential presence of Peel in Wellington's cabinet. These factors, taken in combination, were to bring about a Royal Commission to inquire into the workings of the ecclesiastical courts.

Lord Folkestone, the radical peer, had drawn attention in the Commons in 1812 to the harsh treatment of Mary Ann Dix, a slander case, at the hands of the Bristol Consistory Court. Briefed by Sir Samuel Romilly, he had questioned the lack of qualified ecclesiastical judges, the charges imposed by such courts and their inappropriate use of excommunication, and had called for the reforming of the inferior courts at least, those below diocesan level. Sir William Scott, later Lord Stowell, then Judge of the Admiralty Court and the leading civilian in the Commons, acknowledged in private the imperfections of the courts but was reluctant to act until he was requested to do so by the Prime Minister, Spencer Perceval. Scott's subsequent proposals to abolish the inferior courts and to introduce qualified judges were mutilated in the Lords by resentful bishops, and what was enacted in 1813 was little more than the reserving of excommunication for
cases requiring spiritual censure and some regulating of the conduct of proctors. Three separate reports dealing with the courts at Doctors' Commons appeared in 1823 and 1824, the work of the Courts of Justice Fees Commission. The Commissioners had heard no witnesses, had relied upon the statistical information supplied by the officers of the courts and had taken it on trust that the registry of wills was secure. Their main recommendations were that there should be uniformity of court fees between the several courts at Doctors' Commons and some regulating of the conduct of their officers.

Then, with Wellington in power, Brougham delivered himself of his great speech in the Commons in February 1828. His principal concerns were with the need for reforms in the common law and the law of real property but he was not inhibited, despite his admission of having 'little experience of their practice', from also attacking what he regarded as being the worst features of the ecclesiastical courts at Doctors' Commons and elsewhere, namely the continued appointment of the judges by prelates rather than by the Crown and their continued payment by fees rather than by salary. He also criticised the outdated machinery of the appeal court for both Provinces, the High Court of Delegates. When that debate was resumed later in February, support for the proposed reform of the High Court of Delegates came from an experienced advocate, Joseph Phillimore, who had also been asking for statistical returns about the business of the ecclesiastical courts. Similar requests were made in the following month by Robert Gordon, MP for Cricklade and Edward Protheroe, MP for Evesham.

However, the most sustained pressure upon the Government to do something about the ecclesiastical courts came not from Brougham but from Joseph Hume, the indefatigable radical MP. As early as 1824 Hume had been questioning the costs associated with taking out probate at Doctors' Commons and asking for returns of probate business generally.

Then, in June and July 1828, Hume was presented with two opportunities to attack the courts. The first was a Private Bill to secure an interest for the family of Archbishop Charles Manners Sutton in the lucrative sinecure of the Principal Registrarship of the Prerogative Court of Canterbury. The Bill went through, but Hume found allies in the Commons in the form of Daniel Whittle Harvey and Joseph Phillimore, and almost fifty MPs voted for the defeated amendment to regulate that kind of ecclesiastical patronage in the future.
The second opportunity came when Hume presented a petition accusing Sir John Nicholl of judicial misconduct. It was alleged that in an expensive and protracted will suit at Doctors' Commons, *Peddle v. Evans*, Nicholl had not allowed the petitioner's attorney to challenge the proctor's fees and had threatened to have his advocate, Dr John Lee, removed from the court. In the event, Hume was not ready to present the petition on the due date, Nicholl left London for his estate in Wales and he was defended instead by Stephen Lushington, the Judge of the London Consistory Court.  

Lushington's outspoken performance in the Commons was published in the *Mirror of Parliament* and he was sued for libel by Peddle's solicitor. Amid all that furore and recrimination, Hume and Harvey were able to complain about the harshness of the rules at Doctors' Commons and about the family ties between the officers of the Prerogative Court and its judge, and then to call for a 'commission to examine into the state of the ecclesiastical courts'.

In January 1829, Nicholl was asked by civil servants to enquire into the security arrangements at Doctors' Commons, following suggestions that the Registry was at risk from fire. Nicholl acknowledged the irreplaceable nature of the wills kept in the Registry, the contents of which made it comparable in his view with the Bank of England, but he explained that the building and its staff were controlled and paid for not by the Crown but by the sinecurist Principal Registrar. That worrying anomaly of a public service being privately owned, and also at risk from fire, was to become general knowledge when the exchanges with Nicholl were subsequently published.

Later in 1829, Nicholl found himself again involved in extra-judicial responsibilities and in such a way as to bring the circumstances of the ecclesiastical courts directly before Parliament, although that was not by design. In March 1827, towards the close of Lord Liverpool's administration, Nicholl had been asked by Peel as Home Secretary to 'undertake the conduct of a Bill' which would implement the recommendations of the Courts of Justice Fees Commission relative to the ecclesiastical courts at Doctors' Commons. That request was repeated in the following July when Peel was Home Secretary under Wellington and in terms which suggested that such a simple Bill should meet with no difficulties.

Nicholl eventually, on 12 May 1829, moved for leave to bring in a Bill which proposed to do little more than harmonise fees between the London courts. Peel, evidently sensitive by then to the intervening and wider interest being shown in
those courts, sought to confine the debate to what were intended to be uncontroversial reforms; but both Peel and Nicholl also hinted that there would be another 'proper occasion' for making changes in principle. None of that deterred Hume from reciting what was to become a familiar litany of criticisms of the courts and their practices and from doing so at every available stage of the Bill. He wanted to abolish the monopoly of business enjoyed by the proctors at Doctors' Commons; he wanted to better regulate the fees charged by the proctors and to have a table of fees displayed in public; he wanted to end the practice of proctors 'taxing each others bills'; he wanted to prevent officers of the courts retaining partnerships 'in a proctor's house of business'; and he wanted the judges to be salaried and not to have any personal interest in the level of court fees. He also raked over Nicholl's alleged behaviour in Peddle v. Evans; he attacked sinecurism and Nicholl's family connections with 'no less than five individuals practising or otherwise employed in that court'; he argued that the Bill would give the judge even more unfettered power; and he asked that it be deferred until the returns of the business of the courts were available to the Commons. Despite the efforts of Peel, Nicholl and Lushington to suggest that further reforms might be contemplated after the passing of the present Bill, Hume and his supporters persisted in the view that such a 'patch-work quilt measure' would only delay more extensive reforms and prevent the bringing of the courts 'under the operation of the statute law'. Amid descriptions of the courts as 'a pest and a nuisance and an 'Augean stable', Hume tried but failed to attach a number of amending clauses to the Bill. It passed the Commons, went quickly through the Lords and was enacted on 12 June 1829, shortly before the end of the session.

What remained outstanding, however, when the session ended on 24 June, was not only the Government's collective memory of such relentless and bruising criticisms from Hume over the issue of the ecclesiastical courts in general, but also a late motion from Joseph Phillimore to bring in a Bill in the following session to deal with the jurisdiction of the inferior courts at least.

At exactly this time there was a further inducement to look at another aspect of the ecclesiastical courts. The superiors of a clergyman, Dr Edward Drax Free, had been trying since October 1823 to grapple with the problem of his alleged immoral behaviour, but it was only in June 1829 that he was sentenced by Nicholl in the Court of Arches to be deprived of his Bedfordshire living and to pay costs. That sentence was later upheld by the High Court of Delegates in February 1830.
was regarded as scandalous by 1829 was not only the original behaviour of Free but also the inability of tiers of courts to deal firmly with the matter. Eldon was to refer obliquely to this case as constituting the immediate necessity for the subsequent Royal Commission, and much later the Bishop of Exeter also implied that it had influenced the decision of the Duke of Wellington to set up the Commission.

Finally, the presence of Peel as Home Secretary must also be counted as an influence upon that decision. Although not a lawyer by training, his early stint as Chief Secretary for Ireland and his creditable five years as Home Secretary under Lord Liverpool had made him disarmingly skilful in dealing with lawyers. He was convinced that legal offices should be filled on merit alone, and that practitioners should be closely involved in any reform of their own practices. This concern with efficiency and with collaboration rather than confrontation was apparent when he was engaged in the reform and consolidation of the criminal law, consulting a number of judges and members of the Bar in advance and openly acknowledging their contributions.

The same concern was apparent in Peel's attitude to the Church of England, its institutions and its privileges. When the Government was preparing the ground for the repeal of the Test and Corporation Acts in 1828, Peel had only just come round himself to accepting the case for repeal. He persuaded his Cabinet colleagues that 'no decision on the course to be pursued by the Government should be taken without previous communication with the highest authorities in the Church, and an earnest effort to act in friendly concert with them, in order that, if the ultimate decision should be in favour of concession, the Church might have the credit of cheerful and voluntary acquiescence'. On the other hand, he argued that 'an eager and unavailing opposition...would...increase whatever might be the amount of danger'. Again, in a later commentary on his great speech in the Catholic Emancipation debate in March 1829, he explained how his loyalty to the Church of England was tempered by his belief that it needed to be saved from itself, whether it was resisting relief for Catholics or some reform of its own courts. And he was to write similarly about the 1835 Ecclesiastical Commission. 'I purposely formed the Commission of persons decidedly friendly to the Establishment...placing upon the Commission a large proportion (as compared with the lay members) of the highest spiritual authorities...I did this for the purpose of propitiating towards the intended reform of the Church the good will and confidence of the Church itself.'
So, there may not have been the same intense or dramatic pressure to have an inquiry in respect of the ecclesiastical courts as there had been in advance of the Chancery Commission of 1824 and the Common Law Courts and Law of Real Property Commissions of 1828. However, the cumulative effect of criticisms of the ecclesiastical courts during 1828 and 1829, together with the gradualist approach to reform of Peel as Home Secretary, brought about the same result.

On 18 February 1830, in the debate on the King's Speech, Peel mentioned the setting up of a Royal Commission. His main task, as agreed by the Cabinet, had been to report upon the progress being made by the existing Common Law and Real Property Commissions, but he took the opportunity to 'advert to another Commission that had been recently appointed...; for the purpose of inquiry into the present state of our Ecclesiastical Law with a view to revising the proceedings had in suits in the Ecclesiastical Courts from the commencement of a suit till its close.'
Notes to Chapter 2.


7. An Act for the better regulation of Ecclesiastical Courts in England and for the more easy recovery of Church Rates and Tithes. 53 Geo.III c.127.

8. P.P. 1823 (462) vii; 1824 (43) ix; 1824 (240) ix.


13. Ibid., xix, 5 June 1828, cc.1035-36; 16 June, cc.1371-73.


17. PRO HO 43/36/238, 31 July 1828, Peel to Nicholl.

18. The Bill was prepared by Nicholl, Tindal as Solicitor-General and Lushington, see P.P. 1829 (230) i; see also CJ, 84, 1829, p.289.

19. Hansard, 2d.ser., xxi, 12 May 1829, c.1318, but the Mirror of Parliament, 12 May, pp.1589-90, provides a more intelligible account of what Peel and Nicholl said than does Hansard.


21. Manchester has commented on the way in which members of the Jenner-Nicholl family showed remarkable enthusiasm for this branch of the law', see Manchester, A.H. 'The Reform of the Ecclesiastical Courts', AJLH, 10,(1966), pp.59-62.


27. In the Commons Peel replied simply and economically to the perorations of John Williams in 1824 and Brougham in 1828, see *Hansard,* 2d. ser., x, 24 Feb. 1824, cc. 403-4; xxii, 18 Feb. 1830, c. 651.


34. *Hansard,* 2d. ser., xxii, 18 Feb. 1830, c. 653.
Chapter 3: Preparations for the Ecclesiastical Courts Commission; 'the Canon Law Commission'.

This chapter describes the care with which the Duke of Wellington went about choosing the membership of a Commission which was to examine the workings of the ecclesiastical courts, how he took advice and how he made decisions. It was, as much as anything else, the balanced composition of the Commission which gave its findings such weight and authority during the many attempts by successive governments to translate those findings into legislation.

It is less clear than in Peel's case how Wellington came to be convinced that there should be an inquiry. Being in the House of Lords, he was sheltered from the attacks of Hume and others, although that did not prevent him from being irritated by Peel's frequent demands for reinforcements on the Treasury Bench. Nonetheless, he trusted Peel's handling of legal policy matters to the extent of expecting his Lord Chancellor to consult with Peel about proposed reforms in the Court of Chancery, for example, and he is likely to have been influenced by Peel's pragmatism towards legal reforms. Indeed, Wellington himself had been prepared to shift ground on Catholic Emancipation because of his assessment of the violent consequences for Ireland of not doing so. His conversion to the idea of an inquiry into the ecclesiastical courts could perhaps be described, as was his shift to the idea of Catholic Emancipation, as 'a strange revolution of conduct (though not of opinion)'.

There was nothing remarkable about the Government's choice of a royal commission as the instrument for conducting such an inquiry. After a period of decline in the eighteenth century, when they had given way to select or departmental committees as forms of inquiry, royal commissions had been reinstated in the early nineteenth century to deal with the new problems associated with the Colonies and the Industrial Revolution. Sir John Sinclair, the pioneer of statistical surveying, observed in 1802 that 'for the important purpose of legislation...inquiries on a great scale are essential', and from 1800 onwards royal commissions were appointed on an average of one a year. In fact, the Ecclesiastical Courts Commission was the twelfth royal commission appointed for England and Wales since 1815, and many of those preceding it had had a legal connotation.

What was remarkable, however, was the speed at which Wellington responded administratively to the variety of criticisms of the ecclesiastical courts made in 1828
and 1829. Nicholl's Ecclesiastical Courts Bill reached the statute book on 12 June 1829 and Parliament was prorogued on 24 June. By 2 July, Wellington was writing to William Howley, the Archbishop of Canterbury, to tell him that the ecclesiastical courts might have to be considered in the next session of Parliament and to propose a meeting on the subject. On the same day, he mentioned to Mrs Arbuthnot the prospect of a 'Commission relative to the state of the Ecclesiastical Law'. By 4 July, he was telling his Cabinet that such a Commission would have to be considered during the recess. Then, after Wellington and Howley had met on 6 July, Howley wrote the following day to offer his considered thoughts about the Commission and its composition.

On 2 July 1829, Wellington had merely mentioned to Howley that 'the Proceedings in Ecclesiastical Courts may come under consideration in the next session of Parliament', and had asked to see him 'for a moment'. The letter was brief but its tone was courteous. Wellington had been Prime Minister only since January 1828 but he had quickly grasped the subtleties of his relationship with the Church of England and its dignitaries. He had displayed an admirable combination of speed, tact and cunning in recommending that Howley rather than Van Mildert should succeed to the vacant see of Canterbury in July 1828 only a few days after the death of Sutton, part of a game of episcopal musical chairs which also brought Blomfield from Chester to London. Howley's letter of 7 July reveals that six possible members of the proposed Commission had been mentioned at the meeting, 'three Bishops and three Civilians'. It can safely be deduced that the three bishops referred to would have included Howley himself and two of the most senior bishops who were eventually to be among the first appointees, namely Charles James Blomfield, Bishop of London and John Kaye, Bishop of Lincoln. In the event, Howley did not join the Commission until later. The three civilian lawyers being considered at that initial stage would certainly have included Sir John Nicholl, Dean of the Arches, and Sir Christopher Robinson, the Admiralty Judge. The third civilian was probably Stephen Lushington, Judge of the London Consistory Court rather than Sir Herbert Jenner, the King's Advocate. However, Howley's most remarkable contribution was to suggest the addition of the three 'Chief Justices...all men of great weight and ability and two of them in the House of Lords'. He was referring, although not quite accurately, to Charles Abbott, Lord Tenterden, Chief Justice in King's Bench; to Sir Nicholas
Tindal, who had become Chief Justice of Common Pleas in June 1829; and Sir William Alexander, Chief Baron of the Exchequer. All three senior common law judges were subsequently made Commissioners. So too was William Draper Best, Lord Wynford, Howley's second peer, who had resigned on health grounds in the previous month as Chief Justice of Common Pleas. Howley's reasoning in suggesting those senior common law judges was that 'a measure which affects the proceedings of one of the most ancient Courts of Law of the Kingdom should not only be framed with mature deliberation on the best information and advice, but should have, as far as possible, the concurrent support of all the authorities which the public is accustomed to expect'. What Howley suggested in private to Wellington might well have been intended to win the approval of those in the Commons who were critical of the ecclesiastical courts, but it reads as unlikely advice from one who consistently opposed reform and who might be thought to have feared rather than welcomed the opinions of those judges. As later revealed by the deliberations of the Board, which is how the Commission consistently described itself, the inclusion of Tenterden, Tindal and Wynford in particular helped to give the Commission more obvious authority than any of the earlier or existing legal Commissions. Howley's letter concluded by counselling Wellington 'to guard against misapprehension or alarm, and to make the measure free from exception before it is brought forward'.

It is evident that the Prime Minister had also been in early communication with his Lord Chancellor, John Singleton Copley, Lord Lyndhurst. He wrote to Lyndhurst from Walmer Castle on 24 July to remind him about the Commission. The letter is indicative, at one and the same time, of the close control in this matter which Wellington was exercising over the relevant members of his Cabinet, the troublesome nature of his dealings with the ailing King, the importance of demonstrating to the King that Howley was in agreement with what was proposed and Wellington's own strong sense of Howley's place in the scheme of things. 'Have you done anything yet respecting the enquiry into the Ecclesiastical Courts? Before you send it down either you or I must write to the King and explain the nature and objects of the enquiry, and that it is entered upon in concert with the Archbishop, etc etc. The King will then send for the Archbishop, to enquire. If we don't explain beforehand, he will decline to sign the Commission; and the explanation and enquiry from the Archbishop will then be awkward'. Lyndhurst's reply was prompt and detailed. On 27 July he reported to Wellington that he had prepared a memorandum...
on the objects of the proposed Commission and had shown it to Nicholl and Lushington; Nicholl had already agreed the text and the Commission would be prepared as soon as Lushington replied. Lyndhurst's letter concluded by saying, 'I think it better not to mention anything upon the subject of it to the King until the whole is completed and ready for execution'.

Wellington secured the royal approval for the Commission early in August and returned the memorandum to Lyndhurst on 6 August. By 12 September, Lyndhurst, writing from Walmer Castle and presumably with the immediate authority of Wellington, was in a position to tell Peel that the provisional list of Commissioners consisted of the Archbishop of Canterbury, the Bishops of London and Lincoln, with Tenterden, Tindal, Alexander and Wynford, as suggested by Howley, and with four civilians, Nicholl, Robinson, Lushington and Jenner. Lyndhurst also noted that all the bishops so far selected 'because they were supposed to be the most fit for the task allotted to them', happened also to be Cambridge graduates. He indicated which of the other members were Oxford graduates, invited Peel to suggest the names of 'one or two Bishops from the University of Oxford' for adding to the list, and seems to have had it in mind to produce the final list in a matter of days. In fact, details of Peel's 'Oxford' nominees, William Van Mildert of Durham and William Carey of Exeter, were not sent to Lyndhurst until 10 October. The importance attached to the man rather than to the see was confirmed later when Christopher Bethell, Bishop of Gloucester, was translated first to Exeter and then to Bangor without ceasing to be a Commissioner; and when Carey moved from Exeter to St Asaph without losing his place.

As the process of choosing Commissioners continued, Howley contacted Wellington in mid-October to tell him that Henry Ryder, Bishop of Lichfield, wanted to be included in the Commission. Wellington passed Howley's letter to Lyndhurst and asked if it was still possible to add Ryder's name, 'however, the name must not be included till I shall have spoken to the King'. When Wellington wrote to Howley on 26 October he gave him the names of Peel's two nominees and asked him to inform the chosen bishops about the objects of the Commission and to seek their assistance. He was also evidently anxious to press on with forming the Commission. 'It is desirable that no more time should be lost, as the labours of the Commission ought soon to commence. Indeed, so much time has elapsed since I
took the King's pleasure upon the subject and conveyed it to the Lord Chancellor, I imagined that the Commission had passed the Great Seal. It later transpired that Howley had written promptly to Van Mildert and Carey but not to Ryder, and, although Wellington still seemed to want to add Ryder's name as late as 29 October, that did not happen. By mid-November, Wellington was still closely in touch with what was happening and informed Lyndhurst that the King had consented to Van Mildert and Carey being added to 'the Cannon Law Commission'.

It had also occurred to Wellington, although nothing came of it, to extend the Commission's remit to include the Church of Ireland and thus to add the names of two Irish bishops. He mentioned this possibility to Howley in his letter of 26 October and to the Lord Lieutenant on 27 October.

It seems, therefore, that the thirteen members of the Commission had all been chosen by November 1829. In December, Lyndhurst showed Peel the final version of the remit and was told that 'it will answer the purpose pretty well'. The Commission was issued on 28 January 1830 and the Commissioners had held three meetings before Peel made his announcement in the Commons.

What the Commissioners were required to do was to 'make a diligent and full Enquiry into the course of proceeding in Suits and other Matters instituted or carried on in the Ecclesiastical Courts of England, from the first process and commencement to the termination thereof, and into the process, practice, pleading and other things connected therewith, and to enquire whether any and what parts thereof may be conveniently and beneficially discontinued or altered, and what (if any) alterations may be beneficially made therein, and how the same may be best carried into effect; and further, to enquire into the Jurisdiction of such Courts, and whether such jurisdiction may in any and what respects and in any and what cases be conveniently and beneficially taken away or altered'.

The first alteration in that remit was made almost immediately by the addition of 'Wales' to the scope of the Commission. The omission was addressed at the first meeting of the Commissioners on 4 February 1830. It prompted an exchange between Lyndhurst and Peel, and the Lord Chancellor's approval for the inclusion of Wales was received at the second meeting on 9 February.

Other changes followed upon the death of George IV. On 5 July 1830, a second Commission was issued which added three more members, gave the Commission powers, with a quorum of three, to summon officers of the ecclesiastical courts and
examine them under oath, and required that a report be presented within two years of the date of the Commission. 27

Who then were the Commissioners, why were they chosen and what qualities and experience did they bring to the Inquiry?

In its completed form, from July 1830 onwards, and in order of precedence, the Commission consisted, first, of the Archbishop of Canterbury and the Bishops of London, Durham, Lincoln, St Asaph (previously Exeter) and Exeter (previously Gloucester and later to be Bangor). Secondly, the common lawyers were the three sitting senior Judges and the recently-retired Chief Justice of Common Pleas. Thirdly, and importantly as it transpired, came the three senior civilian judges and the King's Advocate. There was no place on the Commission for men like Brougham, Hume and Joseph Phillimore whose criticisms had helped to bring it about, or for an experienced advocate such as William Adams who had sat on the Courts of Justice Fees Commission and who was to appear as a witness.

William Howley, Archbishop of Canterbury, was in his mid-60s when he became First Commissioner in July 1830. He had been tutor and academic before his unexpected appointment to London in 1813, but had never had a parish, 28 and he owed his move to Canterbury in July 1828 to the Duke of Wellington. Howley had opposed the repeal of the Test and Corporation Acts and the Catholic Emancipation Bill, and he was later to oppose, initially at least, the Reform Bills. In fact, his reputation came to be coloured by the scornful remarks of Whig politicians about his attitude to Parliamentary reform, and by unfavourable comparisons drawn between his qualities of leadership and those of Blomfield. 29 Nonetheless, he was the most senior Anglican churchman and the person with whom Governments of both persuasions had to deal, and his own courts at Doctors' Commons, the Court of Arches and the Prerogative Court, would be at the centre of any inquiry. Wellington had taken the greatest possible care over consulting Howley about the Commission, and had been given shrewd advice in return. Howley would later, at the invitation of both Whig and Tory governments, chair the Ecclesiastical Duties and Patronage Commission, appointed in June 1832, and then the Ecclesiastical Duties and Revenues Commission, appointed in February 1835. His contribution as First Commissioner of the Ecclesiastical Courts Commission will be examined in more detail below.

Charles James Blomfield, Bishop of London, was named as the original First
Commissioner on 28 January 1830. He was then in his early 40s and approaching the height of his powers. From being a classical scholar and country parson, he had been promoted rapidly to a rich City of London living, to the Archdeaconry of Colchester, and then to the see of Chester, before returning to London in 1828. His correspondence when he was at Fulham Palace demonstrates his administrative skills and his close control over his clergy. The assessment by F.W.Cornish that Blomfield was 'the statesman Bishop, creating, stimulating and working by means of public organisation' was probably just. He trusted Peel 'as the only person on whom we can thoroughly rely,' and he was to serve on Peel's Ecclesiastical Commission and to work constructively with him during Peel's Second Ministry. Blomfield chaired most of the meetings held by the Commission between January and July 1830, at which point Howley became First Commissioner, but, when he was rubbing shoulders with formidable common lawyers and civilians, his influence was less than might have been expected.

William Van Mildert, Bishop of Durham, and the only representative of a Northern diocese on the Commission, was then in his 60s. He had been regarded by Wellington as a possible successor to Howley as Bishop of London, was ranked next after Blomfield in episcopal seniority, and was one of Peel's 'Oxford' nominees. After an early career spent in relative obscurity, he had emerged to become Professor of Divinity at Oxford and then Bishop of Llandaff, before moving to Durham. Despite his combative reputation, and despite later claims made about him as a Commissioner, he made no discernible contribution. He attended only the first two meetings, did not interview witnesses, did not do any drafting and had to be tracked down to put his signature to the General Report. It is true that he was in poor health, but his main distraction about this time is likely to have been the scheme for creating what was to become the University of Durham.

John Kaye, a Cambridge graduate, had presided over the sprawling diocese of Lincoln since 1827. Prior to that he had been Master of a Cambridge College, Regius Professor of Divinity at Cambridge and Bishop of Bristol. He had favoured the repeal of the Test and Corporation Acts, but had opposed Catholic Emancipation. He chaired several of the early meetings of the Commission in the absence of Blomfield and attended quite regularly. Kaye's registrar at Lincoln, Robert Swan, was hostile to any encroachment upon the jurisdiction of the diocesan courts; Lincolnshire MPs opposed centralisation; and Kaye himself was to disapprove of the direction taken by
the reform of testamentary jurisdiction in the 1840s.

Ranked after Kaye was William Carey, Peel's second 'Oxford' nominee. He was Bishop of Exeter when made a Commissioner but was translated to St. Asaph in April 1830. Carey was one of the more assiduous episcopal attenders and, like Kaye, he sometimes chaired meetings.

The last of the five bishops appointed was Christopher Bethell, then Bishop of Gloucester and a Cambridge graduate. Confusingly, Bethell was translated from Gloucester to Exeter on 8 April 1830 and then to Bangor on 28 October 1830.

The phalanx of senior common law judges appointed as Commissioners was formed by Tenterden, Tindal and Alexander, together with the former Chief Justice of Common Pleas, Lord Wynford.

Tenterden was in his late 60s when appointed, one of the oldest of the Commissioners. His rise through the judicial ranks had been rapid, at least from 1801. It has been said that he 'took little part in politics in the House of Lords' but as a resolute Tory he had been unsympathetic to the criminal law reforms of the 1820s, and had opposed the abolition of the death penalty for forgery, the Corporation and Test Bill and the Catholic Emancipation Bill. He was later, during the second year of the Commission, to oppose every stage of the Reform Bills between March and June 1831. Tenterden's attendance record as a Commissioner was poor after the first few meetings, but his opinions were sought separately when both the Special and General Reports were being drafted. He died in November 1832, thus depriving the Commons Select Committee in 1833 of his evidence.

Tindal was in his mid 50s when appointed a Commissioner, and had been made Chief Justice of Common Pleas only a few months earlier. Having been Solicitor-General since 1826, he had been caught up in a game of musical chairs which had ultimately advanced his career. Tindal was not at all punctilious about attending meetings of the Commission, quite possibly because of his new duties, and his direct contribution seems to have been less than others might have expected.

The third serving common law judge to be appointed a Commissioner, was Sir William Alexander, then Chief Baron of the Exchequer. At the age of 70 he was almost the oldest member. He was an equity lawyer by training and experience, and had served on the Courts of Justice Commission for nine years, succeeding Campbell as First Commissioner in 1819. His performance on the Ecclesiastical Courts Commission was very different. On his own admission, he 'attended very
little' and his explanation was that whilst he was Chief Baron 'it was a maxim with me never to attend to any thing else when I had any business of that office to perform'. Only after his resignation as Chief Baron in November 1830 did he 'attend the Commission for some time'.43 In fact, he was abroad for his health when the other Commissioners were working on the General Report and he did not sign it, although he had signed the earlier Special Report.

The fourth senior common lawyer was Wynford, five years younger than Tenterden but recently retired. He is said to have 'displayed temper and bias on the bench'44 and he was later to oppose the Reform Bills through their several stages. Wynford was plagued with ill-health,45 but in spite of that, and possibly because he was freed of other duties, Wynford played a willing and important part in the deliberations of the Commission, and especially so during its second year, 1831, when work had begun on drafting sections of the General Report.

Two more common lawyers were added in July 1830. What Sir Edmund Codrington Carrington and Robert Cutlar Fergusson had in common was that both were in their early 60s when appointed, both had made their mark as lawyers in the Colonies and both had come late to Parliament. Carrington attended more meetings of the Commission than did Fergusson, but neither man was assiduous in attending or in contributing. Like Van Mildert, Fergusson had to be sought out to sign the General Report.

The four civilians appointed as Commissioners were Nicholl, Robinson, Lushington and Jenner.

At this stage Sir John Nicholl was the doyen of the civilians and also the oldest of the Commissioners, at just turned 70. He had been a Tory MP since 1802 and was later to vote against the Reform Bills. Having succeeded Sir William Scott as King's Advocate in 1798, and Sir William Wynne as Dean of the Arches and Judge of the Prerogative Court in 1809, Nicholl found himself the leading civilian on the Government side in the House of Commons when Scott became Lord Stowell in 1821. As an MP and a civilian he had experienced at first hand the attacks in the House of Commons upon the ecclesiastical courts in 1812 and again in 1828 and 1829. In those later years the attacks had been specifically addressed to his own court and his own person. In 1829, when he was piloting the Ecclesiastical Courts Bill through the Commons at Peel's request, and doing so under much pressure, he had indicated that he thought some reforms might be appropriate. He had also been
consulted by Lyndhurst about the remit of the Commission. Nicholl enjoyed the respect of his fellow civilians, and was on friendly terms with Stephen Lushington, a younger civilian and his political opposite, who had defended him in the Commons in 1828. Despite his age and judicial commitments, Nicholl was one of the most regular attenders at meetings of the Commission. He was always anxious, nonetheless, to leave London for Wales at the beginning of the Parliamentary recess, and he was absent when the Commission continued to sit during August and September 1831. Nicholl prepared the first draft of the Special Report on the jurisdiction of the High Court of Delegates, and drafted the heads of the General Report. He kept in touch with the work of the Commission throughout its sittings, either formally with the Secretary or informally with Lushington.

Robinson was six years younger than Nicholl and had followed him in 1809 as King's Advocate. In 1821 he had succeeded Stowell as Judge of the London Consistory Court, and succeeded Stowell again in 1828 as Admiralty Judge, a post in which he remained until his death in 1833. Robinson was to have an excellent record of attendance at meetings of the Commission and may have played a part in questioning witnesses. He certainly helped to draft the final version of the Special Report and sections of the General Report.

As King's Advocate, Sir Herbert Jenner was ranked below Nicholl and Robinson and above Lushington. He had been judged by Wellington's Cabinet to be safer than either Lushington or Joseph Phillimore when the post of King's Advocate was being filled in January 1828. Much later, when he was Jenner-Fust and Dean of the Arches, he was to find himself at the centre of controversy over his involvement in *Gorham v. Bishop of Exeter*.

Stephen Lushington was the most junior civilian and the most junior in precedence of all those appointed in January 1830. When Commissioners were added in July 1830 he was placed just above Cutlar Fergusson. He was in his late 40s and had had a more varied and less predictable career than most of his fellow Commissioners. He had entered Parliament, briefly, as early as 1806, but had been an MP more or less continuously since 1820, opposing the slave trade and favouring Catholic Emancipation. He was to sit in the Reformed Parliament as MP for the densely populated constituency of Tower Hamlets until 1841. He had been admitted as an advocate in 1808, and had been a member of the High Court of Delegates when he was a young and inexperienced advocate, precisely the 'mockery' which Brougham
Notes to Chapter 3.


3. WP1/1000/8, 6 Feb. 1829, Wellington to Lyndhurst.


8. WP1/1035/6, 2 July 1829, Wellington to Howley.


11. WP1/1030/37, 7 July 1829, Howley to Wellington.


15. WP1/1034/1, 27 July 1829, Lyndhurst to Wellington.

16. WP1/1042/8, 6 Aug.1829, Wellington to Lyndhurst.

17. BL, Add.MS 40136, ff.57-59, 12 Sept.1829, Lyndhurst to Peel.

18. Ibid., f.60, 10 Oct.1829, Peel to Lyndhurst. Blomfield was similarly anxious to achieve a balance between Cambridge and Oxford graduates appointed to sees, see WP1/1087/22, 25 Jan.1830, Blomfield to Wellington.


22. See n.1.


ff.68-70, 6 Feb.1830, Lyndhurst to Peel; 8 Feb.1830, Peel to Lyndhurst.

26.Church of England Record Centre, Minutes of the Ecclesiastical Courts Commission,(subsequently cited as Minutes), ff.4-5.


32.Blomfield, op.cit., i, pp.81-82.

33.Lady Lavinia Spencer urged Blomfield to go to Chester as a stepping-stone to his return as Bishop of London, see Blomfield, op.cit.,i, pp.93-94.

34.Ellenborough thought that Wellington had made a mistake in recommending that Blomfield be moved from Chester to London and claimed that Lyndhurst shared his misgivings, see Colchester, op.cit.,i, p.173.


36.Blomfield, op.cit., i, p.139.


42. When the drafting of the General Report was under way, Lushington was disappointed that 'Ch. J. Tindal has not yet given us the benefit of his attendance', see MMP, L.209, 1 Sept. 1831, Lushington to Nicholl.

43. P.P. 1833 (670) vii, p.486. Commons Select Committee on the Admiralty Court, etc.

44. Walker, op.cit., p.127.

45. Despatches, op.cit., vi, pp.520-23; Colchester, op.cit.,ii, pp.48-49.


47. The seasoned advocate, William Adams, had told Nicholl that he was retiring with no feeling of dissatisfaction 'towards the persons of my Judges...', see MMP,


50. Colchester, op. cit., i, p.3.


56. BL, Add. MS 40316, ff.62-65, 18 Dec. 1829, Lyndhurst to Peel; 23 Dec. 1829, Peel to Lyndhurst.
Chapter 4: The gathering of evidence by the Commission; 'we have examined professional persons, conversant with the principles and practice of the ecclesiastical courts, and of the courts of common law.'

Just as the correspondence between Wellington and his Cabinet colleagues throws a remarkable light on how the Commission was formed, so too do the Minutes of the Commission help to explain how the Commissioners went about their business.

The Board, as it consistently described itself in the Minutes, had its first meeting on 4 February 1830 and its last meeting on 15 February 1832, sitting on eighty-one occasions. It produced two Reports. The Special Report on the jurisdiction of the High Court of Delegates was issued on 25 January 1831, and the General Report, with its appendices, was issued on 15 February 1832. Since both Reports proved to be of great importance, this chapter will concentrate upon how the Commissioners gathered the evidence on which they were to base their General Report and how the testamentary jurisdiction of the ecclesiastical courts came to dominate the proceedings, despite the Commission's wider remit. Chapter 5 will deal briefly with the evidence relating to the High Court of Delegates and the drafting of the Special Report.

The Commissioners gathered evidence about the workings of the ecclesiastical courts in six different ways. First, by selecting and interviewing thirty-four witnesses. Secondly, by issuing sets of questions to be answered by the judges and registrars of the ecclesiastical courts. Thirdly, by calling for a series of statistical returns from the courts. Fourthly, by consulting statistical information already provided for Parliament. Fifthly, by receiving the views of those who chose to write to the Commission. And, sixthly, by drawing upon the expertise of the members of the Commission, a source which is more readily discernible at the drafting stages of both the Special and General Reports.

Despite distractions about finding a permanent venue and whether the Treasury would sanction free postage, the Board soon decided, at its second meeting on 9 February, that it needed to prepare a series of questions which would elicit 'information in writing' from the judges and registrars. On 22 April, Lushington submitted four sets of questions which were revised by the Board and then sent out. Every provincial and diocesan judge was asked if he performed his duties in person, how any deputy was appointed, what income went with the office and what
legal education he had had. Every judge surrogate was asked similar questions. Every principal registrar, an office almost always filled by a sinecurist, was asked how he had been appointed, whether he performed his duties in person and, if not, what contractual relationship there was with his deputy and how the income of the office was divided. The fourth and longest set of questions was addressed directly to the professional deputy registrars, the business managers of the diocesan courts. It was the information elicited by this set of questions which was to give to the Commissioners, and also to the critics of the courts, an extraordinarily comprehensive picture of the frequency of court days, the types of causes dealt with, who was allowed to practise in the courts and what their qualifications were, what fees were charged and on what authority, how much testamentary business was handled, if the deputy registrars themselves practised as proctors, whether the wills were in safe keeping, and, finally, how the problem of *bona notabilia* was dealt with.

There can be no certainty about when the answers to these questions were in the hands of the Commissioners. Some answers are dated, or can be dated by internal evidence, but most are not. Murray reported on 13 July 1830, the last meeting of the Board before the recess, that only a few answers had been received, but by 8 November 1830, when the Board resumed its sittings, nearly all had come in. It seems reasonable to assume, therefore, that most of the answers were not available to the Board during the main period when witnesses were being interviewed, but that they were more or less complete when the Board was turning its collective mind towards drafting the General Report. The evidence contained in the answers would then have taken its place side by side with the witness evidence.

The second decision taken on 9 February was that each Commissioner should be provided with a set of the relevant statistical returns to the House of Commons. By the fourth meeting on 23 February the Board had also decided to ask for details of prisoners committed in consequence of any proceedings in ecclesiastical courts, and by the sixth meeting on 10 March it had been decided, at the prompting of Nicholl, to ask for information about causes heard between 1787 and 1829 in the three principal courts at Doctors' Commons, the Court of Arches, the Prerogative Court and the London Consistory Court, and about appeals heard between 1800 and 1830 in the High Court of Delegates. At its eighth meeting, a fortnight later, the Board recognised the need to see the tables of fees for the London courts, and then, at the
meeting on 24 March, it called for copies of the First Report of the Real Property Commission which had been received in Chancery in May 1829. The Second Report of that Commission had also appeared by the time the Board interviewed some of its Commissioners in November 1830.

Meanwhile, early in March, whilst the Board was still sorting out what evidence to seek and how best to seek it, it was faced with a further distraction. On 10 March, Blomfield raised the question of finding 'a more summary and effectual' method of enforcing clergy discipline. By the following meeting the Board had agreed that it would be premature to try to frame disciplinary rules without making further enquiries and without considering the existing position of the ecclesiastical courts. The issue of clergy discipline was never put to witnesses, and it did not come before the Board again until 14 February 1831 when the drafting of the General Report was under way. At that meeting, Howley, who was by then First Commissioner, tabled an outline plan and by 7 March he was ready to offer a more detailed plan. As will be shown below, the link between clergy discipline and the reform of the ecclesiastical courts was to be a feature of parliamentary debates, and was a contributory cause of delays to the reform process.

By the end of March 1830, the way was clear for the Board to begin to summon witnesses. That interviewing phase lasted, with intervals, from 31 March to 6 July and from 12 November to 13 December 1830. It calls for three introductory comments.

First, the criterion for selection was that the witnesses were 'professional persons conversant with the principles and practice of the ecclesiastical courts and of the common law courts', either as practitioners or as users. Among the London practitioners, those interviewed included two of the deputy registrars from the Prerogative Office and two other London deputy registrars; four London proctors who plied their trade at Doctors' Commons; and three London advocates. Among the London users were five experienced London solicitors, the Comptroller of the Legacy Duty Office, the King's Proctor, and the Treasury Solicitor. From ecclesiastical courts outside London, the Board saw four judges, two deputy registrars, an archdeacon, and two antiquaries with a knowledge of the courts. In a separate category were the members of other commissions of inquiry.

Most of the witnesses called were based in London and knowledgeable principally about the business transacted at Doctors' Commons, and much of the questioning
concentrated upon that institution. Those circumstances were to rankle with the diocesan practitioners and provide them with ammunition for their later attacks upon aspects of the General Report.

Secondly, neither the General Report nor the Minutes explain the drafting of the questions which were put to the chosen witnesses or throw light upon which Commissioners put the questions. All that can be said with certainty is which Commissioner chaired a particular meeting and which other members were present. By contrast, there can be no doubt that the text of the replies from witnesses was an accurate record of what was said. The Board employed a shorthand writer, a member of the Gurney dynasty, who made two copies of what each witness said. One copy was retained by Murray and the other was sent to the witness for 'verbal corrections'. In July 1830 Murray had to issue reminders to witnesses about returning the text. The next step was to print the corrected evidence, because that was 'the least expensive and most convenient plan' of reproducing it, and then to circulate the printed copies among the Commissioners.14

Thirdly, a briefing document had been prepared in advance of the interviews for the use of the Commissioners. The text of the document was not recorded in the Minutes, but it was seen by at least one witness, the retired advocate, William Adams, who gave evidence on 31 May. He described it, approvingly, as dealing with 'the nature, jurisdiction and practice of the Ecclesiastical Courts'. The Board began its interviewing phase by looking at the security and ownership of the Prerogative Office or Registry at Doctors' Commons and at the business conducted there. It was predictable that the Board would address itself urgently to the custody of wills, and especially those at Doctors' Commons, given the recent and disturbing exchanges between Nicholl and the Home Office. What was at issue was how the Registry was constructed, controlled and funded and how the safety of the wills there could be improved. The Home Office had also been receiving letters, mostly complaints but occasionally practical suggestions, about matters which might be thought to come within the remit of the Board. These were sent, selectively, by Samuel March Phillipps, Peel's Under-Secretary at the Home Office, to Murray. It can hardly have been a coincidence that a scheme for a general registry of wills in London, submitted to the Home Office by Thomas Watts and passed to the Board on Peel's instructions, was tabled on 24 March, the day when the Board decided to investigate the condition of the Registry, 'its enlargement and greater security'.15 At
that meeting, Murray was asked to call for interview, on 31 March, two of the three deputy registrars, Nathaniel Gostling and Charles Dyneley. Both men were experienced London registrars and proctors and they were knowledgeable enough at their own level of business. Both were called back on 7 April.

What Gostling and Dyneley were able to tell the Board about the contents of the Registry should already have been known to the civilian Commissioners. All the business connected with the processing, custody and searching of wills of personal property proved in the Prerogative Court was transacted there. That business was on the increase and there was acknowledged to be insufficient incremental space for the storage of wills and inadequate search-room arrangements for their consultation. The two witnesses reckoned that the Registry was handling about 6500 probates per annum and that all the incremental space would be occupied in less than two years. At a time when there was a widespread fear of fire damage, and justifiably so, the Board decided to interview the Registry’s own surveyor, John Batson, on 7 April. Despite there being a wheelwright’s yard adjacent to the Registry, Batson was reasonably reassuring. No other registries were accorded such direct attention by the Commissioners and none was so important, but a common theme among the answers provided by the diocesan deputy registrars was that the wills in their custody were not kept in fire-proof conditions.

It was also confirmed by Gostling and Dyneley that the Registry itself was the private property of the Principal Registrars, the Revs. George and Robert Moore, sons of a former Archbishop. As sinecurists, they received the gross receipts of the Registry and in turn appointed and paid three deputies to manage all the business. In 1827, the gross receipts had been about £15,000 annually and out of that sum the Moores had paid all the staff, including ‘the person who opens and shuts the windows’. Gostling received about £900 annually, and Dyneley and Iggulden, the third deputy registrar, received just under £800 each. What remained, some £8,500 net, was divided between the Moores. The answers provided by other principal registrars and deputy registrars at the diocesan level were to tell a similar story. None of the registries was in public ownership, properly speaking. For the most part they were located, by arrangement with Dean and Chapter, in the cathedral or its precincts where the court was usually held. In some instances the wills were kept in the dwelling-house of the deputy registrar and occasionally in a local church, as happened in the sees of Ely and Oxford. The answers were also to make clear that
the office of principal registrar in the diocesan registries in both provinces was invariably a sinecure. It was usually filled by the present or previous bishop with a member of his own family, and there was an unequal division of the fees between the sinecurist and his qualified deputy registrar, always to the advantage of the sinecurist and often without any written agreement.

Storage and security arrangements apart, much of what Gostling and Dyneley had to say to the Commissioners about their own business routines at Doctors' Commons duplicated the information contained in the Courts of Justice Fees Report of 1823, but there were three important matters mentioned in evidence which deserve special attention.

First, the separate jurisdiction over wills of personal property; secondly, the bona notabilia rule, and, thirdly, the division of business between what was non-contentious and what was contentious.

Gostling and Dyneley explained that as deputy registrars they dealt only with the non-contentious or common form business arising from succession to the personal property of deceased persons possessed of bona notabilia in the Province of Canterbury. Their duties were confined to wills of personal property, because of the historic division between real and personal property, but that business was considerably augmented by the equally historic claim made by both the provincial courts to probate jurisdiction when a testator left goods worth more than £5 in more than one diocese, bona notabilia. The Commissioners were to discuss this rule and make controversial recommendations about it, but it continued to be disputed at intervals over the next twenty-five years as reforming legislation was attempted. A practical and cumulative consequence of the rule was that, since the Province of Canterbury contained twenty-two dioceses compared with a mere four in the Province of York, Doctors' Commons handled the bulk of probate business, had the highest income from court fees, and could boast the greatest concentration of professional skills among its judges and practitioners.

Gostling and Dyneley also explained the division between non-contentious business, which they could handle, and contested causes, which were determined by the judge. In a well-regulated court this divide manifested itself in other ways. The deputy registrars derived their income from the registry fees, whilst the judge, who had no salary as such, derived his income from the judge's fees. Nicholl had been appointed by the Archbishop of Canterbury, but he had no say in the management of
the Registry itself, other than in drawing up the table of court fees, and he had no authority to choose the Registry staff.

The Board saw two other London deputy registrars, John Shepherd of the London Consistory Court on 22 June and Francis Hart Dyke of St. Paul's Cathedral on 3 July. Shepherd described a court sitting at Doctors' Commons with a legally qualified judge, Lushington, who performed his duties in person. However, the arrangements for storing that Court's wills at St. Paul's Cathedral were frighteningly inadequate, and Shepherd, like the deputy registrars at the Prerogative Office and elsewhere, had a sinecurist principal registrar who took two-thirds of the fees. Dyke, on the other hand, who happened to be a member of the Jenner clan, had failed to make a return and had little to tell the Commissioners.

The Commissioners further pursued the question of what was done at Doctors' Commons by interviewing four proctors, Edward Toller on 3 May, and Pulley, Bowdler and Fox on 8 May. Toller had been a proctor for forty years and had also been the disgruntled plaintiff's proctor in Peddle v. Evans. He explained and defended the procedures he was familiar with, the way in which written evidence was taken by experienced examiners for use in the courts, the advantage to the judge of being able to read those depositions at his leisure, and the reasonable amount of time and cost involved in a complicated dispute when compared with common law procedures. Charles Bowdler and William Fox, both with long experience as proctors, were taken over similar ground and responded similarly. The evidence given on 8 May by William Mills Pulley was confined to the problem of defamation.

The final category of London practitioners to be interviewed was represented by three advocates, William Adams, seen on 31 May, and Joseph Phillimore and John Dodson, both seen on 5 June. Adams, retired by then, gave an informed, considered and firm performance. He accepted that testamentary jurisdiction, although it was the staple of the courts, was no longer a spiritual matter, but he did not want to lose the painstaking procedures developed by the courts at Doctors' Commons, especially the reliance of those courts upon written evidence. Nor did he want to lose the valuable skills and experience honed by the judges, advocates and proctors alike. By the same token he thought that the abolition of the inferior courts, where procedures were defective and skills were lacking, would bring 'great benefit to the public'. Phillimore supported that idea, as he had done in the Commons, and argued that the diocesan courts should be confined to non-contentious business and all disputes transferred to
London. Dodson, who was later to become Dean of the Arches, was in broad agreement with his fellow advocates.

When it came to those who made use of Doctors' Commons, and could be expected to provide an outside view, the more cohesive group was formed by a number of 'respectable solicitors in extensive practice'. Those seen at three meetings between 26 April and 3 May were Samuel Sweet, Charles Chatfield, Thomas Metcalfe, Thomas Hamilton and J.W. Freshfield, solicitor to the Bank of England.

The question and answer exchanges between the Commissioners and their solicitor witnesses introduced a number of topics which were later to feature in the General Report to a greater or lesser degree. These included the relative cost and duration of any contested suit in the Prerogative Court, the existence of two different modes of execution and proof for wills of real and of personal property, the case for a general registry of wills in London and the relative level of charges made by proctors. A view common to all but one of the solicitor witnesses was that the ecclesiastical courts were slow and expensive by comparison with the courts at Westminster Hall. Examinations on paper were thought to be not only a more expensive way but also a less flexible and certain way of getting at the true facts when compared with the viva voce examination of witnesses in an open court. There did happen to be general satisfaction, rather than otherwise, with the charges made by proctors, but there was support, nevertheless, for the idea that solicitors and barristers should be allowed by courtesy to practise in the ecclesiastical courts, and that proctors and advocates should be given similar access to the common law courts. This throwing open of testamentary business to the 'profession' was to become a regular demand in the legal press.

The solicitor witnesses were also asked if proctors touted for business, and Chatfield, speaking of Doctors' Commons, claimed that 'even the porters at the gate frequently solicit persons to go to particular proctors'. Nicholl disapproved of Chatfield's evidence, although Dickens was to make exactly the same claim. What all the solicitor witnesses favoured, often without prompting, was the idea of a general registry in London, not only for wills but also for marriages, baptisms and burials. They thought that such a comprehensive system of registration would reduce the cost of searches, especially for small estates, and would reduce also the risk of fraud, 'the more such information is concentrated...the greater facility there is for the conduct of business'. There was, however, general unease among this group of witnesses about
the continued existence of two modes of trial for wills of real and of personal property with the consequent risk of a double trial. It was suggested to the Board that the Statute of Frauds should be applied to wills of personal property, reducing the attesting witness requirement from three to two. Sweet went so far as to recommend, prophetically, the 'arming' of one court only with the power to determine questions of validity.

Freshfield from the Bank of England took a markedly individualistic line in his evidence. The Bank relied upon Prerogative Court probates and his main preoccupation was with demanding strong proof of the time and place of death and burial in order to avoid fraud. He was also alone among the solicitors in preferring examination on paper to the viva voce examination of the common law, the latter seeming to him to be principally a trial of the skill of the counsel and the nerves of the witness. Again unlike the other solicitors, he spoke approvingly about the length of time taken in the ecclesiastical courts and the charges made, and he saw no advantage in common lawyers being admitted to practise there. What Freshfield did have in common with his fellow solicitors was his support for the idea of a single probate registry in the metropolis.

The first official user proper was interviewed on 11 May by a Board which included all the civilian Commissioners. The Comptroller of the Legacy Duty Office, Thomas Gwynne, had already alleged that there were instances of fraudulent practice in the 'country courts' where stamp duty paid by executors and administrators had been misappropriated by court officials. The Board had also received, forwarded by the Home Office, a similar complaint made by Frederick Randall in Cambridge and levelled at the Ely Archdeaconry Court, and Gwynne confirmed that the Deputy Registrar of that Court had decamped with stamp duty funds and 'is not likely to return'. He claimed that in that level of court there was at best much neglect and at worst some evidence of fraud on the part of both officials and public in the handling of payments. Not surprisingly, Gwynne agreed with a direct question from the Commissioners that the abolition of the inferior jurisdictions, at archdeaconry and peculiar level, would 'tend to the security of the revenue'. However, he also thought that even the procedures in the Prerogative Office were 'too loosely conducted' and would be improved by requiring proctors, first, to inquire more closely into the identity of strangers with whom they were eager, and impliedly over-eager, to do business, and, secondly, to verify the date of death of a testate or intestate person.
Nicholl had not waited for this interview with Gwynne before he acted. On the day that he had tabled Gwynne's letter of complaint, 8 May, and probably with Freshfield's similar comments of 30 April also in mind, Nicholl had issued directions to all officers and practitioners of the Prerogative Court. He required them to exercise the greatest possible vigilance in passing grants of probate 'because of recent instances of fraud', to ensure that the person applying for the grant was legally entitled to it and to administer an oath, as prescribed by Nicholl, which set out the time of death of the deceased.22

Two other officials were invited to describe their respective involvement with the Prerogative Office. On 22 May, the Board interviewed, first, Iltid Nicholl, the King's Proctor and cousin to Sir John Nicholl, and, secondly, George Maule, the Treasury Solicitor. When persons died illegitimate, unmarried, without next-of-kin and intestate, the division of labour was that matters to do with personal property were referred to the King's Proctor and matters to do with real property were referred to the Treasury Solicitor. Like Gwynne and Freshfield, both officials were concerned that the identity of parties and proof of death should be thoroughly investigated and established.

It was also in May that the Board saw the first of its 'country' witnesses, Revd. George Martin, Chancellor of Exeter. Martin did preside in person over the dual diocesan courts at Exeter, and, in spite of lacking a legal education as he admitted in his written answer, he was regarded by Lushington as being the most able of the clerical judges.23 When interviewed on 17 May, Martin was ready to concede that, 'as a mode of arriving at the truth, I think oral far preferable to written evidence' as well as being a means of saving both expense and time. He also thought that there was some advantage in being able to see in court the manner and the tone of voice of witnesses. He was equally willing to acknowledge that there were 'different degrees of proficiency' among the proctors who practised in his own courts, and he attributed any slowness and expense there to the fact that they were essentially attorneys, not trained and qualified as proctors and not able to gain the right kind of experience because of the declining business of the Exeter courts. The separate written answers from the Deputy Registrar at Exeter, Ralph Barnes, would inform the Board that none of the eight proctors had been required to serve a five year qualifying clerkship and that all but two were attorneys. Martin's final comment on the expense of a suit was that there was 'too great latitude in the forms of the Ecclesiastical Court,
and that any litigant may draw his antagonist into great expense and delay’, as had happened with Dr Free. However, Martin was only compliant to a degree and his direct solution to the problems he had described was to suggest, first, that the public would be better served by having access to efficient diocesan courts than by the deliberate transferring of business to London, and, secondly, that the raising of the *bona notabilia* limit would help to direct business to the ailing diocesan courts.

The next clerical judge to be interviewed, on 22 May, was the Revd. Matthew Marsh, Chancellor of the Salisbury Consistory Court. Marsh had been in office for eleven years and he too presided in person but had had no legal training. Like Chancellor Martin, Marsh was ready to concede that viva voce examinations would save time and expense and would produce a more satisfactory decision than written depositions, but he went somewhat further in agreeing that it would be 'a very good thing' if the variety of peculiar jurisdictions within the Diocese of Salisbury, 'were all merged into one.' In general, however, Marsh was an unimpressive witness and, despite his experience, he was least informed and most vulnerable when being questioned about his own court. He told the Commissioners, as if to compensate for his lack of legal training, that he had read Oughton and studied the law reports of Haggard, Phillimore and Adams. He knew little about how his own fees as Chancellor were calculated, being content to accept a lump sum of £140 paid to him by his Deputy Registrar, and he was resigned to the fact that his six proctors would always give priority to their main business as local solicitors. Finally, when the Commissioners confronted him with a sequence of questions which seemed designed to test his knowledge of his duties, Marsh begged for more time 'to answer questions of this nature, as I may be led into some mistake'.

The third and most senior of the other judges to be interviewed was Granville Venables Vernon, MP and barrister, who presided over the Archbishop of York's four courts. He was, therefore, but only in a narrow sense, the counterpart of Nicholl in London. Vernon's father was the Archbishop, by whom he had been appointed in 1818, and the dynasty was still holding 'the fattest jobs' at York as late as 1851.

There were layers of significance in the decision to interview Vernon. The Province of York had been given no direct representation on the Board. Van Mildert might have defended his Archbishop's interests but did not attend meetings. The courts at York, whilst they enjoyed provincial status, were known to have no body of
professional practitioners remotely comparable to Doctors' Commons, and the Board itself was later to imply that York stood in the way of an efficient concentration of testamentary business in London.

Vernon was interviewed twice, on 24 May and 29 May. He explained that he presided over both the Prerogative and Consistory Courts at York. He decided contentious matters personally but left non-contentious business to his deputy, a barrister appointed by him. The deputy was paid £200 annually out of Vernon's average fee-income of £1200 annually, most of which derived from probates and administrations. As business then stood, ten wills were proved in the York Prerogative Court to every one proved in the York Consistory Court, and Vernon's simple explanation of that was that taking out probate thus 'saves inconvenience and the risk of invalid probate'. Much of his evidence suggests that he was making unprompted concessions in order to please the Board and keep his own tier of courts. For example, he agreed that the inferior jurisdictions should be 'annihilated' because of their 'irregular practice and varying rules', and proposed the union of the diocesan with the prerogative jurisdictions. He thought that there was much to be said for the viva voce examination of witnesses and was ready to jettison the ancient jurisdiction over defamation and brawling. Despite all that, he preferred a judicial decision to that of a jury and reminded the Board that bringing witnesses to York could be expensive 'because our diocese extends upwards of 100 miles in length'.

Turning from judicial matters, Vernon explained to the Board that the sinecure office of Principal Registrar at York was filled by Egerton Venables Vernon, another son and appointee of the Archbishop, but that the duties were performed by his deputy, Joseph Buckle. That relationship of sinecurist and working official existed in the Prerogative Court in London and throughout the diocesan courts, but the Board pressed Vernon into agreeing that the combined fee-income of his courts would be sufficient to support a principal registrar and a deputy registrar, both legally qualified and both performing their duties in person. As at Doctors' Commons, all the York wills were kept in a single registry which was owned by the Principal Registrar and it was acknowledged by Vernon that the storage arrangements were unsatisfactory. Vernon also said that there had been no complaints about the fees charged by the eight proctors who practised at York, but he claimed to have struggled to make them conform to 'the practice of Doctors' Commons', and thought that they would gain more experience if, as he had suggested, business was transferred from the four
diocesan courts to the York Prerogative Court.

The Board was to see another type of Chancellor when it interviewed George Wharton Marriott as late as 13 December 1830. Marriott, who lived in London, was Chancellor of St David's at Carmarthen, and described his credentials in his written answer to the Board. 'I have had a regular legal education, and was in practice as a Special Pleader nine years; and am of twenty years' standing at the Bar, during fifteen of which I was in practice at London, and on the Midland Circuit'. Marriott was an unimpressive witness despite his experience. He had to admit to the Commissioners that his duties were performed by three unqualified surrogates, all clergymen, at Carmarthen, Haverfordwest and Brecon, although he kept the judicial fees. The separate written answers from Marriott's surrogates had not been submitted to him beforehand and he seemed to know little about the activities of the three sets of deputy registrars and the fees they charged. In fact, the answers from the surrogates and the deputy registrars were critical of their Chancellor's failure to provide a table of court fees, a failure which had thrown the charging procedures in all three courts into some confusion. In his final remarks, Marriott said that he did know that the question of a general registry of wills in London was 'before the legal profession', but he had no suggestions to make in response to the Commissioners' stock question about how 'expense and delay' might be reduced in the ecclesiastical courts.

The last of the clerical witnesses to be seen by the Commissioners during May 1830 was Charles Goddard, Archdeacon of Lincoln. What Goddard had to say about the moribund state of the Archdeaconry Court at Lincoln can hardly have come as a surprise to a Board which, on the day, included the Bishop of Lincoln himself, three other bishops and three civilians. The earlier questioning of Martin, Marsh and Vernon had suggested that the Board already took an unfavourable view of the inferior jurisdictions. That view could only have been confirmed by Goddard's dispirited evidence. 'The Archdeacon's Court is, in fact, a nullity at Lincoln, nothing has been done in it within memory'. Despite its condition, as Goddard told the Commissioners, the Court boasted both a judge and a registrar, nephew and son respectively of a former Bishop of Lincoln, George Pretyman Tomline, and both appointed by Tomline before Goddard had arrived in Lincoln. By contrast, the written answers were to reveal that the Consistory Court at Lincoln had a civilian judge, William Battine, and an able, professional registrar in the shape of Robert
Swan. Swan had been re-appointed by Bishop Kaye as recently as 11 July 1829, about the time when Kaye might have known that he would become a Commissioner. Early in 1830, Swan had published a treatise on the ecclesiastical courts which contained, as did his written answer, a long account of the alleged usurpation by the Prerogative Court of Canterbury of Lincoln's ancient jurisdiction over *bona notabilia.*

Neither Battine nor Swan was called to give evidence to the Board, but Swan was to give much trouble to successive governments as a champion of the diocesan courts.

The Board received other information at first-hand about the arrangements at the local level when it interviewed William Ward of Chester on 12 June and John Kitson of Norwich on 3 July.

At this time, the Diocese of Chester in the Province of York was the most extensive in the Kingdom, and also the most densely populated in parts because it included industrial Lancashire. Its testamentary business had increased rapidly with the growth of population and the creation of personal property, and it had the third busiest probate registry after London and York. And yet the Chester Consistory Court was one of the worst examples of its kind. It was presided over by an octogenarian, clerical Chancellor with no legal training; the Registry was in the hands of a sinecurist appointed as a minor in the 1760s; the unqualified surrogate judge was the son-in-law of Ward, the Deputy Registrar; there were no advocates; and two out of the five proctors were Ward's sons. As recently as 1826, Lushington had warned Brougham about bringing a suit in the Chester Court, 'to proceed in the Consistory would indeed be desperation with such a judge as now presides...a more imperfect tribunal than Chester cannot be imagined and the delay would be endless'. Instead, Lushington had recommended the Court of Arches under Nicholl as 'the only place where there is a chance of justice with reasonable dispatch'.

The last of the working registrars to be seen was John Kitson, on 3 July and then again on 6 July, by which time his written answers were in the hands of the Board. Like Chester, Norwich had a clerical judge appointed for life in 1814 by Henry Bathurst, Bishop of Norwich. Unusually, though, Kitson shared his post with another member of the Bathurst family, a minor who performed no duties but received half the fees. Again like Chester, there were no advocates but the six proctors did take advice from their counterparts at Doctors' Commons. Much of Kitson's first interview reads like a test of his professional knowledge rather than a genuine
attempt to gather information, but otherwise he provided the Board with details of a
typical diocesan registry.
That kind of information, with an emphasis on the custody of wills and access to
them, was what Protheroe and Betham had to offer to the Board. Edward Davis
Protheroe, a West Country MP with an antiquarian bent, was interviewed on 12
June. He had visited many of the local registries and was scathing about the storage
conditions there, especially at St. Paul's Cathedral and at York Minster. Nor was
Doctors' Commons exempt from criticism. What Protheroe wanted to see was the
abolition of the inferior courts, one efficient registry in each diocese and a
metropolitan registry holding copies of all wills. He recognised that one consequence
of such changes, and it was something which endured as an issue until 1857, was
that the dispossessed would have to be compensated. Sir William Betham, the Ulster
King of Arms, was recommended to the Board by Protheroe. In his interview, on 22
June, he was able to address the Board from an even wider experience than
Protheroe about the serious risk to wills and the need for secure storage facilities.
In a quite separate category from all the other witnesses were those who were still
serving members of the Real Property Commission, Campbell, Tyrrell and Hodgson,
with Stephen from the Common Law Commission. By the time of those interviews,
in November 1830, both the First and Second Reports of the Real Property
Commission were in print. The evidence given by John Campbell on 12 November
and by John Tyrrell on 22 November gave the Board a clear and toughly-expressed
idea of how differently others regarded the ecclesiastical courts. Campbell, who had
been the first Chairman of the Courts of Justice Commission and then Chairman of
the Real Property Commission, said that he wanted to see the 'valuable rights and
privileges' of the Church confined to spiritual matters and clergy discipline, but that
the wholly secular probate business should be concentrated in the hands of a Court
of Probate in London, relying upon viva voce evidence, with recourse to a jury when
the facts were disputed, and with surrogates 'to perform ministerial acts outside
London'. Tyrrell, who was to be the author of the Fourth Report of the Real Property
Commission when it appeared in 1833, would then recommend the outright
abolition of the testamentary jurisdiction of the ecclesiastical courts. When he gave
evidence in November 1830 he echoed Campbell in calling for a new court, but
demanded also that there should be one mode of execution and proof for wills of
every description. Both Hodgson, on 29 November, and Stephen, on 6 December,
Notes to Chapter 4.


2. There are two copies of the Commission's Minutes in the Church of England Record Centre at Bermondsey. It must be assumed that they are in the custody of the Church of England rather than the Public Record Office because the Commission's Secretary, C.K. Murray, later became Secretary to the Ecclesiastical Commission. Confusingly, both volumes are bound as 'Ecclesiastical Commission'. All subsequent references to the minuted business of the Commission will cite only the date of the relevant meeting.


4. Ibid., General Report.

5. General Report, Appendix B, Parts I and II.


7. Ibid., Appendix D, No.12.

8. Ibid., Appendix C, Part II.

9. Ibid., Appendix C, Part I.

10. Ibid., Appendix C, Part V.

11. P.P. 1829 (263) x.

12. P.P. 1830 (575) xi.

13. See n.1.
14. At least one set of printed copies of evidence has survived, see MMP, L.79/2.

15. PRO HO 43/38/249,256, March 1830, Phillipps to Murray.

16. The Commission's subsequent analysis of the number and type of causes records the average number of probates granted in the Prerogative Court as being 6621 over the previous three years. Only the York Court with 1613 and the Chester Court with 1209 could reach four figures, see General Report, Appendix D, No.7.

17. York Minster had been the object of an arson attack in 1829; the Bishop of Bristol's palace was to be attacked and burned in 1831; the Houses of Parliament were to be destroyed by fire in 1834; and in 1843 the risk of fire in a centralised probate registry provided Sir Robert Inglis with a debating point, see Hansard, 3d.ser., lxviii, 10 April 1843, c.799.

18. Dr Howard Elphinstone was to refer to 'the registrars whose names generally correspond with those of the deceased bishops', see Hansard, 3d.ser., lxvii, 9 Feb. 1843, c.333.


21. PRO HO 43/38/282, 3 April 1830, Phillipps to Murray.


23. University College London, Brougham Papers, ms.4159, June 1833, Lushington to Brougham, 'Martin is the very best Chancellor I know amongst all the clerical Chancellors - clear headed, laborious and conscientious'.
Chapter 5: The Special Report; 'The constitution of this Court [of Delegates] had been long complained of'.

By contrast with the drafting of the General Report, which was to occupy the Board over some twelve months, the preparation of the Special Report on 'The Jurisdiction of the Delegates' took only five weeks from start to finish and that period included Christmas 1830. There are a number of explanations for this speed of action. First, there was the impatience of Brougham, the new Lord Chancellor, to receive a special recommendation about the fate of the High Court of Delegates. Secondly, the civilians and common lawyers on the Commission were already familiar with the Court because advocates and puisne judges acted as appeal judges from time to time as required. And, thirdly, the Board's manner of questioning of witnesses confirms that the abolition of the jurisdiction of the High Court of Delegates was being contemplated by the Board from an early stage in the proceedings.

The history of the Court has been surveyed comprehensively by Duncan, and it may, therefore, be sufficient to say here that it had its origins in the Henrician Acts of Appeals which abolished the right of appeal to Rome from the ecclesiastical courts in England and replaced it with a Court independent of Papal control and answerable to the Crown. The new court then developed as a single court with an appellate jurisdiction over all civil law matters, ecclesiastical and Admiralty, and it was characterised by its appointment of judges on an ad hoc basis, chosen in ordinary cases from the ranks of civilians and common lawyers. By the beginning of the nineteenth century the High Court of Delegates was still in being in a recognisable form, despite the inroads made by Westminster Hall upon the jurisdiction of those courts which sent appeals to the Delegates.

There was, however, an equally long history of dissatisfaction with the Court. Sir Leoline Jenkins had proposed reforms in the 1680s when he was Judge of both the Admiralty and Prerogative Courts, and in 1828, Dr Joseph Phillimore, speaking in the Commons, had described the Court as 'a source of complaint for more than a century'. It is true that the Courts of Justice Fees Commission had looked at the activities of the Delegates in 1824, but its remit had been a limited one and its report had been descriptive rather than critical, confining itself only to recommendations about consistent fee charges.

What are likely, however, to have had a more immediate influence upon the thinking
of the Commissioners were, first, certain events which had brought the High Court of Delegates to the attention of Parliament before and about the time that the Board was appointed; secondly, the evidence given to the Board; and, thirdly, press comments on the subject.

Brougham's great speech in the Commons in February 1828 had had the High Court of Delegates as one of its subsidiary targets, 'one of the worst constituted courts which was ever appointed ...the course of its proceedings forms one of the greatest mockeries of appeal ever conceived by man'; and in the resumed debate Peel had readily conceded that the Court was capable of improvement. Then, early in 1830, Parliament was made aware of the proceedings in the testamentary cause of *Dew v. Clark and Clark*. That cause, where it was alleged that the testator was insane, had dragged on for seven years between the Prerogative Court and the High Court of Delegates at a cost of some £10,000, and had led to an unsuccessful application to the Court of Chancery for a Commission of Review, the imprisonment of one of the parties, and a petition to the House of Lords calling for an inquiry into the High Court of Delegates.

When William Adams had given evidence on 31 May 1830, he had mentioned a document 'prepared for the use of the Commissioners respecting the nature, jurisdiction and practice of the Ecclesiastical Courts', but it seems that that document had also floated the idea of the Privy Council being an alternative to the High Court of Delegates as a tribunal of appeal. Both Adams and Phillimore, the latter on 5 June, were given the opportunity to speak critically about the existing appeal arrangements. In April and May the solicitor witnesses and proctor witnesses were asked what they thought about those arrangements, and on 28 June the Board had planned to interview two witnesses exclusively about the High Court of Delegates, namely Edward Winslow and Henry Birchfield Swabey. Winslow was Secretary of the Commission of Appeal to the Lord Chancellor and Swabey was one of the Deputy Registrars to the High Court of Delegates. Because Swabey was ill, Winslow was seen on 3 July, just before the recess, but Swabey was not interviewed until 13 December, when he became the final witness. Winslow was predictably precise about the procedure for appeals and about the typical composition of the Court. Swabey covered much the same ground but, from an association with the Court which went back to 1811, he had more to say about the recurring difficulties in securing the services of busy common law judges as Delegates and seemed to accept
that a standing tribunal would improve matters. What Swabey feared, however, as he expressed himself in an additional statement to the Board, was the transfer of the appeal jurisdiction to the Privy Council and the loss of what was 'properly ecclesiastical'.

What the consensus of that evidence from several witnesses amounted to, and what the Board recorded in its Special Report, was that the practice of forming a special body of Delegates in each case was cumbersome. It imposed additional expense and delay upon litigants, and the decisions of the Court lacked uniformity as a consequence and were not explained. It was also recognised by witnesses and Board alike, first, that the appointment of advocates as appeal judges carried with it some risk of bias, and, secondly, that the less competent or inexperienced advocates were being asked to scrutinise the decisions of their seniors, a set of circumstances which could lead to divisions of opinion and the further expense and delay of a Commission of Review.

Finally, in the early months of 1830, The Times had greeted the Board's appointment with its own suggestions about what reforms were needed and with the publishing of a number of articles and readers' letters about the ecclesiastical courts. Among these were criticisms of several recent decisions made by the High Court of Delegates and a swingeing attack upon the shortcomings of that Court, 'The accumulated ills of the inferior jurisdictions are as nothing compared with a radical defect in the superior and superintending court'.

However, notwithstanding these other influences, it was Brougham's impatient initiative in December 1830 which triggered such prompt action on the part of the Commission. He had taken his seat on the Woolsack only on 22 November, but Charles Greville, Clerk-in-Ordinary to the Privy Council since 1821, was able to confide to his diary on 1 December that Brougham was 'full of projects of reform in the administration of Justice, and talks of remodelling the Privy Council as a Court of Appeal, which would be of great use'. The Board's Minutes on 13 December record that a letter was tabled from Brougham which invited the Board to consider the transfer of the appellant jurisdiction of the Delegates to the Privy Council. A letter from Wynford on the same topic was received at the same time. A thinly attended meeting was then adjourned until 21 December. By that time the Board was better attended and somewhat differently constituted, with Howley in the chair, and with William Carey, Bishop of St Asaph, Wynford, Nicholl, Robinson, Jenner,
Carrington and Lushington present, and it was decided to reply to Brougham's letter. According to a partially deleted passage in the Minutes for 17 January 1831, the text of that reply was provided in a paper submitted by Nicholl. His paper agreed with what Brougham had suggested and it corresponded exactly to the text of the third paragraph of the Special Report as eventually published. The Board was pre-occupied on 5 and 10 January with deciding upon the heads of the General Report, but on 17 January 1831 it was again asked by Brougham to provide 'a special or partial Report on the Jurisdiction of the Delegates for the present consideration of His Majesty's Government'. At that meeting, chaired by Howley, it was resolved that Nicholl's earlier paper 'be adopted as the basis of a Special Report' and that a Committee consisting of Tindal, Nicholl and Robinson, all of whom were then present, should draft the Report for the next meeting. In fact, by the time of the next meeting on 25 January, that Committee, with the assistance of Lord Tenterden, had 'settled the draft' and copies had gone out to all the Commissioners with the warning that the Report was to be finalized on 25 January. So it was that the Special Report, essentially the work of a civilian judge with assistance from two common law judges and a fellow civilian judge, was approved with some slight alterations on 25 January. It was signed by the Commissioners present at that meeting, namely the Archbishop of Canterbury, the Bishops of London and St Asaph, Tindal, Nicholl, Robinson, Jenner, Lushington and Fergusson, and Murray was directed to obtain the signatures of the absent Commissioners. The additional signatures of Van Mildert, Alexander and Carrington appear on the original Report which was presented to Brougham on 31 January 1831, but those of the Bishops of Lincoln and Bangor and of Lord Wynford are missing. The defects found by the Board in the High Court of Delegates had included the absence of 'uniformity of decision' and rules of procedure; the use made of inexperienced advocates as judges, so that 'appeal was...from the most learned of the civilians to the least learned and the least employed', as Holdsworth has elegantly put it; and also the delays and expense associated with the review process.

What the Board recommended, briefly and directly, was that the appellate jurisdiction of the ancient High Court of Delegates should be transferred to the Privy Council; that a sufficient number of court days should be provided for the new business; that 'Privy Councillors conversant with legal principles' should be in attendance; and that the Elizabethan Commission of Review should be abolished.
The obvious comparative advantages of locating that jurisdiction in the Privy Council were that the hearings of its appeal committee were held in public; that it had already developed rules of procedure to deal with appeals from colonial courts; and that reports of its decisions were published, although only since 1829.14

The Board's choice of the Privy Council as an alternative was not only sensible but also predictable, and yet the wording of the Special Report at p.7 would seem to suggest otherwise. 'We might have found difficulty in proposing an unobjectionable substitute, if our attention had not been directed to the expediency of removing that Jurisdiction to the Privy Council'. The likely explanation, however unworthy of the Board, is that it was making a sycophantic gesture in the direction of the new Lord Chancellor who had put that suggestion to them, although the timing of all the evidence gathered by the Board makes it clear that several witnesses had already been invited to comment upon the idea of the Privy Council as an alternative court of appeal. In the event, the Board's unfortunate phraseology presented Robert Maugham's fledgling Legal Observer with the opportunity to express mock disbelief that the Board had been unable to think of such a solution for itself.15

In other respects, the Special Report was favourably received by the Legal Observer. As early as 12 February 1831, it was giving advance warning that the Board had recommended 'the entire abolition of the Court of Delegates; and ...that the appeal from the Ecclesiastical Courts shall be made to the Privy Council'.16 It printed the Special Report 'at length' in May 1831, and in a leading article on 11 June 1831 it commented upon the Report in some detail, although not always accurately. However, in that article, the Legal Observer also created a fashion which was to be followed by Brougham in July 1832, and then for decades to come by Ministers of both political persuasions when they were promoting legislation based upon what the Board had recommended. That fashion was to preface any reference to its work with a tribute to the prestige and authority of the Commissioners themselves. 'This Report is deserving of attention, as well for the improvements which it suggests, as the persons who recommend them. A reform which unites the suffrages of the learned Chief Justices of the three Courts of common law, the Archbishop of Canterbury and three leading bishops, the Judges of the Ecclesiastical Court, Dr.Lushington and Mr.Fergusson, will hardly be objected to by the most zealous stickler for the ancient ways of the constitution'.17

When, in July 1832, Brougham presented the Bill to transfer the appellate
jurisdiction of the High Court of Delegates to the Privy Council, he too chose to emphasise that he was implementing the recommendations 'of those learned and most respectable individuals, the Ecclesiastical Commissioners'. He then rehearsed the defects of the old system, much as the Board itself had done, and acknowledged that the Privy Council would need to be strengthened. The Bill itself was short, and so too was Brougham's speech by his standards. Nor did he expect any opposition. Only the Marquess of Westmeath was hostile at third reading in the Lords on 12 July, and that was caused by his displeasure over the Contempt Bill. Brougham's Bill was passed without difficulty, and thus the Act of 1832, which was to take effect from 1 February 1833, repealed much of 25 Henry VIII c.19 and the whole of 8 Eliz. c.5. The appeal committee of the Privy Council was given the jurisdiction to hear appeals from the ecclesiastical courts and the Admiralty Court. As Brougham had promised, and in order to strengthen the judicial function of the Privy Council and more clearly define its increased jurisdiction, a further Act was passed in the following session which created the Judicial Committee of the Privy Council. Those serving on the Judicial Committee, under the presidency of the Lord Chancellor, were to include the Privy Councillors who were 'the chief legal authorities', the Chief Justices, the Master of the Rolls, the Vice-Chancellor, the Judges of the Prerogative Court and the Admiralty Court, the Chief Judge of the Bankruptcy Court and former Lord Chancellors.

Taken together, the 1832 and 1833 Acts represented a total and non-partisan acceptance and implementation of the recommendations contained in the Special Report. At the same time, it has to be said that these relatively uncomplicated measures were the only results to flow from the work of the Ecclesiastical Courts Commission in a direct, immediate and unopposed fashion.
Notes to Chapter 5.

1. *Hansard*, 3d. ser., xiv, 5 July 1832, c.80, reporting Lord Brougham.


5. P.P. 1824 (240) ix.


7. LJ, 62, 1830, p.6. Petition of Thomas Clark. Lyndhurst told the Lords that he had 'examined all the papers in the cause, amounting to 500 folio pages and...had heard it argued for several days', see *Hansard*, 2d. ser., xxii, 5 March 1830, cc.1307-08.


11.Bethell had ceased to be Bishop of Exeter in Oct.1830 when he was translated to Bangor.


13.The Special Report occupies barely four printed pages. It would be correct to deduce that it was 'hastily composed' but wrong to say that it was requested 'shortly after' the Board began its work, see Duncan, op.cit., pp.28-29.

15. LO, ii, 11 June 1831, p. 81.


17. LO, ii, 11 June 1831, pp. 81-82.


19. An Act for transferring the Powers of the High Court of Delegates, both in Ecclesiastical and Maritime causes, to His Majesty's Council. 2 & 3 Will. IV c. 92.

20. An Act for the better administration of Justice in His Majesty's Privy Council. 3 & 4 Will. IV c. 41. In reviewing Brougham's authorship of legislative reforms, Holdsworth described this Act as 'One of his best pieces of legislation', see H.E.L., xiii, p. 644. However, Greville, who came to dislike and distrust Brougham, had seen the draft of a Bill to create the Judicial Committee early in January 1832 and felt that Brougham's 'deep game' was to transfer as much power as possible to himself, see Strachey and Fulford, op. cit., ii, pp. 342-44.
Chapter 6: The General Report; 'It was hardly possible to have higher authorities than these'.

The combined evidence of both the Minutes of the Board and its General Report allows a number of comments to be made about how it functioned and how its major recommendations were arrived at in the period from January 1831 to February 1832. The Board was hard-working, meeting regularly and even holding meetings during the summer recess in 1831, although the contributions made by individuals did vary considerably. Much of its time was taken up with the problems associated with testamentary jurisdiction, even though that staple business was not mentioned specifically in the broad remit. None of the Board's major recommendations came about effortlessly, with the exception of an early consensus on the fate of the inferior courts. Finally, all the important drafting was done by lawyers, either the civilians or the senior common law judges.

By the end of that second year the Board had produced a General Report which acknowledged that testamentary and matrimonial causes were temporal rather than spiritual in character; that causes such as church rates were 'of a mixed description', and that others, such as clergy discipline, were 'of a spiritual kind' (pp.12-13). The Report, despite its confusing structure, went on to make a number of recommended 'alterations'. The most important and influential of these were concerned with temporal matters, namely the consolidation of the existing ecclesiastical courts (pp.21-24); regulations governing the surviving courts (pp.64-67); compensation for loss of office (pp.68-69); ownership of the registry at Doctors' Commons (pp.42-43); changes in testamentary law (pp.31-32); and matrimonial causes (pp.43-44). There was also an assortment of comments and recommendations about the other mixed and spiritual jurisdictions (pp.44-61).

On 31 January 1831, responding to a bureaucratic enquiry from the Home Office about Murray's duties, Howley told the new Home Secretary, Melbourne, how matters then stood with the Board. It had been sitting for a year; it had received 'voluminous' evidence from thirty-four witnesses and answers from more than 300 ecclesiastical courts; it had 'held frequent deliberations'; and it had prepared the Special Report. The tone of Howley's response was firm, belying Eldon's description of him as 'the quietest, meekest man in the country'. On 7 March 1831, Howley also reminded Melbourne that the services of the individual Commissioners 'are
that was not true of the other Commissions then sitting and it may have given the Board more flexibility in the way it worked.\textsuperscript{5} With thirty-six meetings under its belt by 21 December 1830 and with the Special Report almost ready by then, the Board turned its attention to the General Report. The meeting on 5 January was the first of forty-five devoted to that phase of the business. Apart from Howley and Blomfield, the prelates attended only intermittently. Kaye of Lincoln had missed a number of meetings before he reappeared on 7 February 1831, and Van Mildert was absent throughout. The senior common lawyers were not always in attendance when they were needed, although they contributed in other ways.\textsuperscript{6} Alexander was a notorious absentee,\textsuperscript{7} and Carrington and Fergusson were ineffective even when present. By contrast, the four civilians were the most consistent attenders, especially Nicholl and Lushington, and even when Nicholl was in Wales during the summer of 1831 he was kept in touch. At the first two meetings on 5 and 10 January, chaired by Blomfield and Howley respectively, and with Wynford present, but otherwise dominated by the presence of civilians, the Board began its consideration of what it should recommend about the jurisdictions exercised by the ecclesiastical courts. As regards the inferior courts, the peculiars and the manorial courts, the view taken at that initial stage, and never revised, was that their jurisdictions should be discontinued (p. 22). That view was to be challenged in time only by a handful of self-interested MPs and petitioners, but never by the diocesan registrars. It was also agreed, propositions which later had to be revised, that all the non-contentious business from the inferior courts, and the testamentary jurisdiction from the archdeaconry courts, should be transferred to the diocesan courts. A further and important recommendation settled at this early stage, but only after some hesitation, was that all the ecclesiastical courts, including the diocesan courts, should surrender their contentious jurisdiction to the appropriate provincial court in London or York. The original resolution on 10 January, evidently reflecting the preferences of the London civilians present, had been that London should have a monopoly of contentious business. That resolution was amended on 25 January when it was decided instead to divide the jurisdiction between London and York. In brief, therefore, it had been decided by 7 February that the diocesan registries were competent to handle non-contentious probate business but that disputes were to go to the higher courts. By that date those resolutions had been passed and then
printed for internal use. When the Archbishop of York met the Board on 28 February, presumably at Howley's invitation, he was in general sympathy with the proposals to date.

Inextricably linked to these issues of jurisdiction was the rule of *bona notabilia*. It surfaced on 14 February when Nicholl tabled a paper, seemingly his own work and subsequently printed, which suggested new regulations for dealing with the existing 'objections and inconveniences' of the rule. The definition by Burn was that 'where the party dying within the province... hath *bona notabilia* in some other diocese than where he dieth', the jurisdiction over probates and administrations lay with the appropriate provincial court; and it was accepted that £5 was the qualifying value. The inconvenience of the rule was that if the existence of *bona notabilia* was discovered after a diocesan probate had been granted then that grant was null and void. In the past the Prerogative Court of Canterbury had been ready to strike down any such probates defiantly or mistakenly granted by a lesser court, and since the middle of the fifteenth century the Archbishop's officials had been handling a substantial volume of lucrative probate business.

In brief, what Nicholl's paper was now suggesting was that *bona notabilia* should be abolished when the inferior courts were abolished, and that the non-contentious business thus released should be so divided that the diocesan registry where the deceased was domiciled would handle the smaller grants and the provincial courts would handle the larger grants. Nicholl believed that that compromise would not only remove an inconvenient doctrine but would also form 'an equitable arrangement between the different interests'. The Board discussed his paper and took no immediate action, although the question of having such a division appeared as a resolution on 4 August and was raised again on 30 August.

Meanwhile, on 27 May, Lushington submitted a draft text dealing with peculiars and with *bona notabilia*, not as a discussion document but as one of the contributions he had been asked to make to the drafting of the Report. At that stage his aim can have been no more than to describe those topics. However, his later protest to the Board, on 17 August, about leaving any non-contentious business with the diocesan registries seems to have brought about a shift of opinion. By 30 August, the Board was re-considering its position on the diocesan courts and the York courts. The York courts were to be left intact, but on 19 September the Board decided, as the only way of remedying the mischief of *bona notabilia*, that the diocesan courts should be
stripped of their entire testamentary jurisdiction and that it should be transferred to the provincial courts (p.23). It was noted on 17 November that drafting adjustments needed to be made and a version of the text produced by Lushington on 27 May was re-printed for the Board and then immediately revised in order to reflect that new recommendation. When such a sweeping recommendation became widely known it was regarded by the country registrars as a direct threat to their livelihood, by the bishops as a potential weakening of their status and by the practitioners at Doctors' Commons as a herald of extra business.

However, the Board had not quite finished its scrutiny of the consolidating of the courts. At some point it was agreed that the Court of Arches and the Prerogative Court should be united, as should their York counterparts (p.24). Then, as late as 2 February 1832, the Board looked again at the 'expediency of maintaining the Provincial Court at York', and it was resolved at a meeting chaired by Howley that it would be 'highly desirable' to transfer the provincial jurisdiction of the York courts to London. On 7 February, when Howley told the Board that the Archbishop of York would object to losing his jurisdiction, the intended recommendation was converted instead into an undisguised expression of doubt about the wisdom of giving such an enlarged jurisdiction to York as well as to London (p.73).

Another cluster of recommendations also became necessary as a consequence of the consolidation of the courts. These were the 'Regulations for carrying all the proposed Alterations into effect', mentioned as early as 7 February and designed to create uniformity. For example, the appointment of the judges was to be confirmed by the Crown, and the judges and officers were to perform their duties in person and to be salaried from an independently-managed fee fund.

That fee fund would also be used to give the judges and officers in the abolished courts 'due compensation for existing interests'. That consequential need was noted as early as 7 February and developed by Lushington in a special paper on 17 August. From textual evidence, his paper became the finished recommendation, with its examination of offices held, the basis of entitlement, the source of funding and the principle of performance of duties in person (p.68).

There had been representations to the Board about the need for a single and comprehensive registry of wills in London, Nicholl's correspondence with civil servants was known to the Board, and informed witnesses such as Gostling, Dyneley and the antiquarians had been questioned about conditions in the Registry at Doctors'
Commons. So, although the matter was not addressed again until 26 July, and then only briefly, it was noted that 'the present office in Doctors' Commons is inadequate to its present business'. By that time, judging from the answers being received about the deplorable conditions throughout the diocesan registries, the case for an enlarged central registry would have been strengthened. Then, on 10 August, a resolution framed at a meeting chaired by Howley, and with Lushington among those present, argued for a secure metropolitan registry of wills which was to be in public ownership and which was to receive wills transferred from the local registries. Lushington produced a new paper on this subject a week later, and a brief but direct recommendation appeared in the Report (p.42). However, a difficulty which the Board was aware of, but never resolved firmly enough, was that the continued existence of parallel arrangements at York would always preclude a properly comprehensive registry in London.

As well as considering the consolidation of the courts and all the changes consequent upon that consolidation, the Board had also addressed itself to 'testamentary law' itself.

The stages by which jurisdiction over succession to personal property was abandoned by the common law courts and was assumed by the ecclesiastical courts by the reign of Henry II, and how that division was subsequently 'deepened and perpetuated', have been described in incomparable detail by Holdsworth.15 None of that historical background greatly interested the Commissioners in 1831. What they saw, and it was obvious enough, was that when a will sought to devise real property and bequeath personal property the validity of that will was determined by two different tribunals and two different modes of trial. In a common law court a judge and jury determined the validity of a devise of real property on viva voce evidence; in an ecclesiastical court a judge determined the validity of a bequest of personal property on written evidence. The mischief readily identified was that of 'double trial and conflicting determinations', and what the Board proposed as a remedy emerged only after 'repeated and deliberate consideration' among the Commissioners. What was recommended was that the validity of all wills 'disposing of Real and Personal Estate, or either, should be determined by Trial in one and the same Court and the Probate made final and conclusive evidence of Title to Real and Personal Estate'. That clumsy drafting reveals nothing about the tensions within the Board over this issue and manages to suggest that the recommendation went further than it could
have done.

At its meeting on 5 January 1831, the first at which the General Report was in contemplation and an occasion dominated by the civilians, the Board framed two propositions connected with determining the validity of wills. First, that viva voce evidence could be substituted for written depositions. Secondly, that an amended form of the Statute of Frauds should provide the requisite solemnities for all wills. According to that measure, wills of real property had to be in writing, signed by the testator or by some other person in his presence and by his direction, and attested by three or four credible witnesses. On 31 January and 14 February, the Board considered further propositions dealing with the circumstances in which ecclesiastical judges might allow viva voce evidence and might direct a jury trial in their own court or before a nisi prius judge. As the Report was to explain, the Board was not concerned with the respective merits of oral or written evidence but simply with bringing about the same mode of trial for all wills. It regarded the introduction of trial by jury as similarly inevitable because it was so firmly established as a means of testing the validity of wills of real property. These issues were revisited at intervals between July and September 1831 and were being strongly advocated by Lushington. But as late as November it seems that the conclusive drafting of this part of the Report was being delayed because neither Tenterden nor Tindal had given their opinions. Finally, on 12 December 1831, Tenterden wrote to the Board. He had, he said, no wish to remove any business from the ecclesiastical courts and was content with the resolution that the validity of wills of personal property could be tried by a jury before an ecclesiastical judge, or, at the discretion of that judge, before a nisi prius judge. He was also content that the validity of 'mixed' wills could be similarly determined, if so desired by one of the parties, and he seemed to be giving his grudging agreement to a suggestion from Nicholl that an ecclesiastical judge could call in a common law judge as an assessor. What Tenterden would not agree to, however, was the exercise of jurisdiction by an ecclesiastical judge over wills of real property only. He believed that the ecclesiastical courts would lose nothing by leaving the trial of wills of real property to the common law courts, and he warned that Parliament would never give such power to an ecclesiastical judge, regardless of what the Board might recommend. When his letter was tabled on 14 December, the Board promptly abandoned a resolution which had envisaged extending the jurisdiction of the provincial courts. In the light of that detail the
clumsy recommendations which appeared in the Report must be construed as referring only to wills of personal property and to 'mixed' wills. Even so, the proposed alterations were still a significant and practical response to criticisms. The Board's comments and recommendations concerning the remaining areas of jurisdiction exercised by the ecclesiastical courts had no direct bearing upon testamentary jurisdiction and they need only be mentioned briefly.

There was little discussion about matrimonial suits. Other than recommending that causes for separation be transferred to the provincial courts (pp.43-44), the Board was content to suggest that Parliament should decide such matters. The cluster of causes of 'a mixed description', church rates, tithes, pews, dilapidations and sequestrations, was addressed separately by the Board, although successive Governments were to fall into the trap of adding clauses dealing with these matters to measures which were principally concerned with testamentary jurisdiction.

When it came to the criminal jurisdiction still exercised by the courts, the clear aim of the Board was to end it by the transfer of brawling and defamation suits to the common law courts.

The exception to that general rule was clergy discipline, although the Board claimed that 'the instances have been very rare'. The scandal of Free's case was certainly in the collective mind of the Board. It was mentioned as early as 16 February 1830; Blomfield asked for a more effective disciplinary procedure on 10 March; and by 24 March the Board was seeking the details of the proceedings against Free, presumably from the High Court of Delegates. After the Board had begun work on the General Report, Howley suggested a way of proceeding, in outline on 14 February 1831 and in detail on 7 March. Although his plan was subsequently scrutinised by Wynford and Alexander and revised by Blomfield, it can safely be said that Howley was its architect and that it was completed by 14 June 1831. What the Board recommended, and what the Church Discipline Act 1840 implemented, was that clergy discipline issues be removed from the ecclesiastical courts as such and brought under the personal jurisdiction of the bishops, assisted by legally qualified assessors (pp. 57-61). When Howley described this tribunal in his Charge of 1832 as being based upon the *forum domesticum* of former ages, he added, somewhat artlessly, that 'as a member of that Commission I heartily concurred in the recommendation'.

Although clergy discipline and testamentary jurisdiction were treated separately by the Board, their paths were to cross later. The delay in legislating to put the
appropriate disciplinary machinery in place at diocesan level was to be a factor which held up the recommended transfer of testamentary jurisdiction from the diocesan courts to London.

The part played by Lushington as a junior member of the Commission demands a special but brief comment at this point. He has been described variously as 'the principal draftsman' of the General Report, and as having 'considerably contributed' to it. The latter tribute seems nearer to the mark. No scrutiny of the Minutes could leave any doubt that Lushington drafted the sets of questions to be sent out to all the courts; that he prepared an exceptional number of papers for the Board, either on request or voluntarily; and that he worked with Murray to stitch together the agreed sections of the Report for publication. However, it is equally true that Nicholl prepared 'an enumeration of the chief points and topics' for the Report, and that Tenterden, Tindal, Wynford, Robinson and Jenner, as well as Nicholl and Lushington, contributed in various ways to the detailed drafting.

But, whatever the balance of credit may have been, Lushington's most crucial and timely intervention was the 'Private Paper' he submitted to the Board on 17 August 1831, a document usefully discussed by Waddams. Lushington chose to set out his views about what the Board ought to be doing at precisely the time when agreed resolutions were being gathered together, and he was emphatic, before it was too late, about 'the Alterations which I deem indispensably necessary for the public advantage'. Put simply, Lushington was opposed to the continuance of the testamentary jurisdiction of the inefficient provincial court at York and to leaving even smaller grants with the similarly inefficient diocesan courts; and he also wanted to see the introduction of trial by jury, viva voce evidence and consistent formalities, even though the consequent reduction in litigation would damage his own profession of advocate. As it happened, he was privately despondent at this time, telling Nicholl that 'The further we proceed the more difficult appears our task; I must say that for me I am both tired of the work and apprehensive of the consequences'. Nonetheless, despite his misgivings, all the changes and revisions Lushington sought were subsequently adopted or preferred by the Board.

The final meeting of the Board on 15 February 1832 was devoted to the signing of the General Report. It was presented to Brougham as Lord Chancellor 'in his private room at the House of Lords' on the following day. In statistical terms, what the labours of the Board had produced over two years were the brief but effective
Special Report and the more substantial General Report of seventy-eight pages. With the General Report were four appendices. Over more than 250 pages, Appendix A set out the verbatim evidence given by the witnesses interviewed. Appendices B to D recorded the questions put to the courts and registries and the answers received, the categories of business conducted by those courts and details of other papers and returns consulted by the Board.

However, it was the limited nature of the 'alterations' to be made in the testamentary courts and in testamentary law which gave the work of the Board its lasting importance. By contrast with what the Real Property Commissioners would be recommending, it was still envisaged that the jurisdiction and the business would be left in the specialised hands of civilian judges, advocates and proctors. As it turned out, the proposals exerted a continuing influence, especially with Governments when they were framing bills. That was partly because the proposals were conservative, and Governments were attracted to gradualism, but partly also because of the reputations of the Commissioners themselves. On the other hand, what was to weigh against the proposals in some quarters was that they favoured the concentration of a court and registry in London to the detriment of local arrangements. For that reason they were vulnerable to being portrayed as yet another example of centralisation, a phenomenon to be attacked 'as foreign to the national spirit'.

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Notes to Chapter 6.

1. When Cottenham was presenting his Consolidation Bill in 1836, he appealed to the authority of the Ecclesiastical Courts Commission, see *Hansard*, 3d ser., xxxi, 12 Feb. 1836, c.328.

2. Church of England Record Centre, Bermondsey, Minutes of the Ecclesiastical Courts Commission. All dated references to the business of the Board are drawn from these Minutes.

3. Abraham Hayward was particularly severe upon the way in which the General Report was drafted, see *LM*, vii, pp.263-98.


5. The members of the Common Law and Real Property Commissions, with the virtuous exception of John Campbell, were paid £1200 annually to compensate them for the loss of professional earnings, and both the Home Office and the House of Commons kept an eye on the progress being made by such Commissions, see Collinge, J.M. *Officials of Royal Commissions of Inquiry, 1815-1870*. London, IHR, 1984, pp.14-15; Hardcastle, Hon. Mrs Mary, ed. *Life of John, Lord Campbell*. London, John Murray, 1881, i, pp.455,464; PRO, HO 43/39, pp.50,102; and, for example, P.P. 1831-32 (512) xxvi.

6. In September 1831 Lushington confided in Nicholl, who was at Merthyr Mawr, that 'The Report of the Ecclesiastical Commission I fear must be long postponed - Lord Tenterden is at present unwell & Ch.J.Tindal has not yet given us the benefit of his attendance', see MMP,L.209, 1 Sept.1831, Lushington to Nicholl; but Lushington's evidence to the Commons Select Committee in 1833 described how Tenterden and Tindal gave their opinions upon the suggestions of others, see P.P.1833 (670) vii, p.53.
7. Alexander told the Commons Select Committee in 1833 that he had not been a regular attender at meetings of the Board, see P.P. 1833 (670) vii, pp.108-12.

8. MMP, L.101, 'Resolutions No.1'. The practice of the Board was to have important discussion papers printed so that they could be studied by the Commissioners. A number of these discussion papers have been found among the Merthyr Mawr Papers.

9. MMP, L.101, 'Proposed regulations relating chiefly to Bona Notabilia'.


12. MMP, L.101, 'Private Paper by Dr Lushington, August 1831'.

13. Ibid., 'Draft General Report, Part II, Peculiars - and Bona Notabilia, as amended by the Board, November 1831'; 'Draft General Report, Diocesan Courts - Peculiars - and Bona Notabilia, as further amended, November 1831'.

14. When Lushington gave evidence to the Commons Select Committee in 1833 he said that the General Report 'leans towards' the abolition of the York jurisdiction and that was what he thought should be done, see P.P. 1833 (670) vii, p.54.

15. H.E.L., i, pp.625-30; iii, Chapter V.


20. *Waddams*, op. cit., pp.18-20, 119 n.119. For the printed version of Lushington's 'Private Paper', which appears to correspond to the draft in the Lushington Papers, see n.12 above.

21. Lushington wrote in a similar vein in 1833, after his evidence to the Commons Select Committee, see University College London, Brougham Papers, ms. 4160, 5 Oct.1833, Lushington to Brougham.

22. MMP, L.209, 1 Sept.1831, Lushington to Nicholl.

23. PRO, Petty Bag Office, C.223/21A.

Chapter 7: Attempts to reform the ecclesiastical courts, 1832-1834; 'All is marked by what most of the wisest men around us consider to be the vice of modern legislation - all is "centralisation" as it is called'.

The period of some nine years or so, following the appearance of the General Report of the Ecclesiastical Courts Commission in February 1832 and until the commencement of Peel's second ministry in September 1841, was marked, first, by the initial inactivity of Earl Grey's administration and by the differing receptions given to the General Report; secondly, by a challenge mounted by the Real Property Commissioners to the testamentary recommendations of the General Report; thirdly, by the activities of Brougham and Sir James Graham; fourthly, by the further scrutinies carried out by a Commons Select Committee in 1833 and by a Lords Select Committee in 1836; fifthly, by the protests of the country registrars; and, throughout the early part of the period until the doldrums of Lord Melbourne's second ministry were reached in 1835, by a miscellany of failed attempts by successive governments of both persuasions, and by individual MPs, to implement the main recommendations of the General Report.

This chapter will look at the period from 1832 to 1834, the final stage of Grey's ministry. In Part I it will examine the contrasting receptions given to the General Report; and the diversion created by Brougham's reforming measure. In Part II it will examine the impact of the Fourth Report of the Real Property Commissioners upon various interests; the significant involvement of Sir James Graham as First Lord of the Admiralty; the arbitration by a Commons Select Committee; and the emergence of the country registrars as a force opposed to centralised reform.

Part I: How the General Report was received.

Lyndhurst and Lushington, recalling the lack of response by Ministers to the General Report in 1832, were agreed that 'nothing was done...because the House was then occupied with the consideration of the Reform Bill'. That was certainly true in the immediate sense, but there are also indications that the priorities of Grey himself, when he was not preoccupied with parliamentary reform, security abroad and Irish affairs, may have been the more general reform of the Church of England and the reform of real property.
Soon after taking office in November 1830, Grey was in touch with a number of the leading prelates who were also Commissioners, Howley, Blomfield, Van Mildert and Kaye, but those exchanges were not about the work of the Ecclesiastical Courts Commission. And when Grey wrote to Howley, and later to Blomfield, in October 1832, to tell them about his concern for the condition of the Church of England and that 'the attacks of its enemies & the wishes of its friends seem equally to point to the necessity of some reform', his remarks were not about implementing the General Report. What Grey had in mind then was the scrutiny of the revenues of the Church by the Ecclesiastical Revenues and Patronage Commission, with the aim of bringing about the equalising of benefices and the prevention of pluralism and non-residence.

There was also a marked contrast between the way in which his Government failed to deal promptly and in concert with the General Report, and how it responded to the four more or less contemporaneous Reports made by the Real Property Commission. Those Reports appeared in May 1829, June 1830, May 1832 and April 1833, when the work of the Ecclesiastical Courts Commission was in contemplation, in being and in assimilation. Although, as Sokol suggests, the four Reports may not have provoked much discussion in Parliament of the issues involved, the legislative results were plain enough. The Real Property Commissioners themselves 'drafted several bills for consideration by Parliament'; Campbell as First Commissioner worked hard to bring them before the House of Commons; and the consequence, directly or indirectly, was a series of implementing enactments in 1832, 1833 and 1837. But there were no indications in the Minutes of the Ecclesiastical Courts Commission, either in its first year during Wellington's administration or in its second year during that of Grey, of any offer or requirement to prepare draft bills. The Real Property Commission would have provided a precedent for this task, were a precedent needed, and several of the lawyer members of the Ecclesiastical Courts Commission were certainly equipped to draft bills or to direct their drafting.

By comparison with the initial silence of politicians, the immediate reception given to the General Report outside Government and outside Parliament was anything but muted.

The most notable press reactions came from the recently-founded weekly *Legal Observer*, from the quarterly *Law Magazine* and from *The Times*. Robert Maugham's *Legal Observer* was aimed at solicitors generally, although its readership probably tended to reflect his links with the metropolitan practitioners.
In April 1831, Maugham had taken the opportunity to put solicitors 'in possession of the rules and practice and the regulations' of the ecclesiastical courts in London, as introduced by Nicholl, and then had found space in June 1831 to set out, and generally welcome, the contents of the Special Report. It is hardly surprising, therefore, that successive issues of the *Legal Observer* between 7 and 28 April 1832, should have carried summaries of the various parts of the General Report. The editorial tone throughout was approving; there was no baiting of the Commissioners as had happened with the Special Report; and there was no hint that the General Report might be capable of provoking other commentators to criticism.

On the other hand, the reception given to the General Report by Abraham Hayward's *Law Magazine* in April 1832 was idiosyncratic, entertaining and, for most of its considerable length, critical. Hayward welcomed the seeming readiness of the Church of England to submit its jurisdictional privileges to the same 'test of expediency by which all the rest of our national institutions are to be tried'; and he welcomed also the proposed abolition of the inferior courts and the handling of the sensitive subject of compensation. However, he was dismissive not only of the way in which the Report was organised but also of what he found to be its indecisive tone, best exemplified by the late reprieve for the York Court. 'The doubt expressed...as to the Provincial Court of York affords an apt illustration of the besetting sin of the Report, the weak, wavering, ambiguous and often shuffling tone of it. We have hardly a plain, direct, straightforward, intelligible proposition, without a "perhaps" or "possibly", throughout.'

However, Hayward was more than a reviewer with a 'shrewdly biting tongue'. He was also in a position, it seems, to predict the likelihood of a clash in the near future between the Ecclesiastical Courts Commissioners and the Real Property Commissioners. One set of Commissioners had proposed an enlargement of the testamentary jurisdiction of the retained ecclesiastical courts, whereas Campbell and his fellow-Commissioners 'are expected to propose the transfer of the whole testamentary jurisdiction to the Civil Courts'. Hayward made his accurate prediction a year before the Fourth Report of the Real Property Commission appeared. He also predicted some competition, without being in any way specific about the grounds, between what had been recommended in the General Report and what Brougham had in mind as Lord Chancellor, 'who is about to bring in a bill on these matters'.

It was *The Times* which provided the public with a necessarily simplified account of
what had been recommended, but an account which was on the whole more balanced and informative than had appeared in either of the professional periodicals. In 1832, and until the breach over the freedom of the press two years later, *The Times* supported the Whig administration, and its editor, Thomas Barnes, was a long-standing ally of Brougham. That powerful newspaper, which had a circulation of 10,000 by 1834, had taken a close interest in the appointment of the Ecclesiastical Courts Commission and had published a number of editorials in the early months of 1830 about what the Commission might inquire into and what its recommendations ought to be.

So, in a long and mostly approving editorial on 28 August 1832, *The Times* listed and explained the actual recommendations for the benefit of its lay readership. The proposed changes in the testamentary law were regarded as the most important recommendations, but there was regret that the Report had not dealt firmly enough either with the need for an efficient and reformed Prerogative Office, to which the retention of the York jurisdiction ran counter, or with the regulating of proctors' charges.

As well as the reaction to the General Report in the legal periodicals and in the national press, there was a different and more keenly felt reaction from a small group of country registrars who seemed to be capable not only of arguing their own case but also of calling upon influential support. The answers provided by the diocesan registries in 1830 suggest that there would have been barely two dozen such officials in the Province of Canterbury, outside London; four or five in the Province of York; and fewer than ten in Wales. Professionally, they were a mixture of variously qualified proctors, notaries public and local solicitors. What they had in common with the relative handful of proctors from a similarly mixed background who practised in those courts was that all their careers and livelihoods would be threatened by the Report's proposed centralising of the profitable non-contentious business.

An early response to the Report came from John Haworth, the junior of two Deputy Registrars at Lichfield, in a pamphlet which was published in 1832 and which went into a second edition. Hawarth's credentials were unusual in that he had been admitted as a proctor at Doctors' Commons and had moved to Lichfield as recently as 1828. His main argument, fairly reasonable in tone, was that the diocesan officers and proctors were being condemned without being heard and that there needed to be
a separate scrutiny of the diocesan registries to see what could be done to improve them. He thought it wrong to abolish them in order to solve the problems caused by the rule of *bona notabilia*, when the abolition of the inferior courts alone would do much to reduce the risk of mistakes and fraud. Hawarth's relatively limited aim was to retain only non-contentious business at diocesan level, and he was able to give a number of examples of how important it was for the Diocese of Lichfield to have a cheap and accessible probate registry.

Where Hawarth appeared to be objecting in isolation, another experienced registrar was about to become the principal spokesman for the officers in the Province of Canterbury, and a thorn in the flesh of Ministers. Robert Swan had performed the duties of Registrar of the Consistory Court of Lincoln since 1821 and had been re-appointed in 1829. As a solicitor he was active in Lincolnshire politics in the Tory cause, and as a proctor he had published a treatise on the probate functions of the diocesan courts early in 1830. He had not been called as a witness before the Ecclesiastical Courts Commission, which probably rankled with him, but he had at least put his argumentative stamp upon the written answers submitted from Lincoln. Because the Bishop of Lincoln, John Kaye, a cautious reformer of the Church of England from within, had served as a Commissioner, he was approached in private by his own Registrar. On 23 February 1832, Swan, clearly worried about his future, asked Kaye if he could see the General Report 'and know my sentence, although I am persuaded it is a very severe one'. He had been prompted to write thus because he had been told by William Fox, Deputy Registrar of the Commissary Court of London, that 'the Report of the Ecclesiastical Commissioners is printed'.

When the Report did become available, Swan's response to the perceived danger was to organise the drafting, presenting and publishing, early in 1833, of a Memorial to the Lord Chancellor, a significant choice of presentee. It was predictable that the Memorial would be largely hostile to the Report; it was offered in the collective name of the registrars in the Province of Canterbury; and it was signed by Swan as their 'Hon. Secretary'. The Memorial of 1833 was important because it was the first co-operative pamphlet in defence of the position of the diocesan registrars; because it asked for more than Hawarth would have settled for; and because it made a calculated appeal to those opposed to centralisation.

The main protest was against the recommendation that all contentious and non-contentious testamentary business should be transferred to Doctors' Commons, the
abolition of the York jurisdiction being taken for granted. It was pointed out that the written questions put to the dioceses had never mentioned such a Draconian possibility, that the consultation process had been too narrowly based because the witnesses interviewed had been predominantly advocates from Doctors' Commons and London solicitors, and that the recommendation was not 'the legitimate result of the evidence before the Commissioners'. Like Hawarth, the registrars did not dispute that there were evils to be corrected and did not object to the abolition of the inferior courts, but their own proposed solution was otherwise totally different from that recommended. It was based instead upon the need to provide local justice, 'a boon of the highest importance for the public'. What they wanted to secure, without suggesting a precise model, was a tier of diocesan courts, with qualified judges and altered procedures, which would be capable of dealing with contentious testamentary business; and a second tier of country registries to deal with non-contentious business. To accommodate these arrangements, the current rule of bona notabilia would be modified so that a locally granted probate would be voidable only by sentence and not void automatically, and so that an old rule would be revived whereby the right of probate followed the usual place of domicile of the deceased. Consistent with its chosen themes of local justice for local people and its opposition to centralisation, the Memorial concluded by asserting that 'It is not the true policy of this great empire to aggrandise the metropolis...to sacrifice the convenience of its members in the more distant parts to the ease of those who have the fortune to be placed in the chief city of the empire...We think we see in the proposition in question, a forgetfulness of these principles'.

Another pamphlet, anonymous and undated, but evidently from a local source and published about this time, was similarly critical of the 'desire to bring everything to London, and to make one great fancied metropolitan emporium of law and intellect'.

However self-interested the particular motives of the registrars may have been their argument was a recognisable one. The alleged menace of centralisation in its various forms as something 'foreign to the national spirit' was to become a generally recurring theme from about this period. In December 1832, a proposal by Nassau Senior that there should be 'a highly centralised administration of the Poor Law' was opposed by the Political Economy Club; the Bishop of Exeter castigated 'centralisation' in his Charge of 1836; the evils of excessive centralisation were a
factor in the creation of the county courts;\textsuperscript{27} public health legislation was to be challenged in 1847 because it represented 'centralised despotism';\textsuperscript{28} and, over time, 'arguments about the proper role of the state were debated primarily in terms of centre and locality'.\textsuperscript{29}

The decision to present a Memorial to the Lord Chancellor can only have been taken with the knowledge that Brougham already had legislation in mind and with the aim of influencing that legislation.\textsuperscript{30} Hayward had mentioned the prospect of such a bill from Brougham as early as April 1832. It is also known that Henry Bellenden Ker was working on an Ecclesiastical Courts Bill from September 1832, at least; that he was doing so in collaboration with Lushington and under the general direction of Brougham; and that a draft of sorts was ready by January 1833.\textsuperscript{31} That kind of collaboration exactly fits Lobban's account of Brougham's piecemeal legislative programme at this time, one that was reactive to the enthusiasms and convictions of a close circle of supporters.\textsuperscript{32} Ker was an enthusiastic law reformer who had worked with Brougham before, and he happened to be worrying over the drafting of the Privy Council Bill and the Ecclesiastical Courts Bill at the same time. Lushington had long been on friendly terms with Brougham, despite their contrasting characters, and he badly wanted to see the correct implementing of the Commission's recommendations.

In May 1833, the \textit{Legal Examiner} had referred to the probability of legislation 'ere long';\textsuperscript{33} and Robert Swan was in London by the end of May in order 'to obtain any specific information whether or not the bills for the reform of the Ecclesiastical Courts were to be introduced into Parliament during the present Session'. Swan, as he reported to Kaye on 15 June, could not find out what was happening about Brougham's legislative timetable, but he thought it impossible that bills could be introduced so late in the session 'unless they are to be hurried through without discussion. Whatever may be done, I trust it will not turn out to be of so sweeping a nature as was first intended, indeed from what I learn from the Lord Chancellor's secretary, I feel persuaded that the memorial has made a favourable impression on his lordship'.\textsuperscript{34} Swan had evidently failed to understand Brougham's tactical approach to legislation and his capacity for losing interest in a problem if it did not admit of a self-contained solution.

Brougham's first version of a reforming Ecclesiastical Courts Bill in July 1833, based upon the recommendations in the General Report, turned out to be no more
than a ballon d'essai. The Legal Observer assumed that to be so, despite its admiration for his energy, and Brougham himself referred much later to 'his wish at the time that it should stand over for further consideration'. It is even doubtful if a recognisable bill existed at first reading in the Lords on 12 July 1833. As early as September 1832 Ker had told Brougham that the subject was 'one of considerable difficulty'; a year later the Bill was still 'a dreadful hodge podge'; and Lyndhurst was unable to find a copy when he needed it in 1835.

However, what Brougham seems to have intended can be pieced together from his speeches in the Lords in July 1833 and March 1835. On the first occasion he was introducing his own Bill, and on the second occasion he was reacting to the efforts of Peel's administration to pilot another version of the Bill through the Commons.

On 12 July 1833, close to the end of the session and immediately after the defeat of his 'Local Courts Bill', Brougham introduced three new reforming bills, including his Ecclesiastical Courts Bill. What he then claimed was that the Commissioners had recommended 'no less than nine bills...It had, however, been thought better that the whole of those Bills should be consolidated into one measure'. The account he gave in 1835 seemed to contradict that sequence of events. Whatever the factual accuracy or inaccuracy of Brougham's speeches, they did expose the difficult choice between trying to implement the recommendations in the form of a composite bill, parts of which might be opposed to the detriment of the whole, and trying to carry a series of separate but compatible bills. In September 1833, Ker was to advise that Brougham's measure should be divided 'again into several bills', and it will be shown below that successive administrations were to face the same dilemma. All that Brougham disclosed about the contents of his Bill was done in a hurried and muddled fashion before he moved on to the other new bills. It would amend the law 'concerning the proof of wills with respect to real as well as personal property'; it would abolish the peculiars and transfer their jurisdiction to the diocesan courts; and it would implement the recommendations dealing with criminal jurisdiction, clergy discipline, sequestrations and dilapidations. In that short statement he did not properly clarify his position either towards the testing of wills of real property or towards the retention of the diocesan courts.

That lack of certainty about Brougham's attitude in July 1833 became instantly irrelevant and for two reasons. First, his Bill went no further that session. Brougham later explained that fact not only in tactical terms but also in terms of how busy
Parliament then was, 'they had quite enough to do during the few weeks between the 12th July and the 29th August, when Parliament was prorogued'. Secondly, the initiative to implement the recommendations of the Commission was already passing in practice to different hands within Grey's Cabinet and for different reasons.

Part II: The Fourth Report of the Real Property Commission and the Commons Select Committee of 1833.

The two intervening new events in April 1833 were the issuing of the Fourth Report of the Real Property Commission, which was received in Chancery on 18 April and ordered to be printed on 25 April, and the death of Sir Christopher Robinson, the Admiralty Judge, on 21 April.

In their Fourth Report, dealing with wills, the Commissioners described themselves as faced with 'two modes of innovation' in respect of testamentary jurisdiction. On the one hand, they could recommend the transfer of business which was generally acknowledged to be non-spiritual to a court of common law, or, on the other hand, they could agree with the Ecclesiastical Courts Commission that the jurisdiction of the provincial ecclesiastical courts should be enlarged. As Abraham Hayward had predicted a year before, they came down in favour of the former recommendation.1 The immediate reasoning behind that choice was that 'public utility' would be better served by transferring the business to an existing tribunal, the Court of Chancery, than by 'constituting a new Tribunal, or one which, though old in name, would in most of its principles and forms of practice be new'. That was how they regarded the alterations proposed by the other Commission. Both sets of Commissioners wished to see 'a General Register Office...in the Metropolis', but for the Real Property Commissioners it was to be an integral part of a new and secular system of registering wills. Tyrrell, the author of the Fourth Report, provided a terse description of the comparative advantage of this preferred arrangement when he gave evidence to the Commons Select Committee in June 1833, 'the usual proof of wills in the testamentary courts called probate in common form is nothing more than registration in a more expensive form than would be required for the purposes of a well-regulated register office'.2 In brief, therefore, the Real Property Commission proposed that 'Probate of Wills be discontinued and the whole Testamentary Jurisdiction of the Spiritual Courts, contentious and voluntary, be abolished'.

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The impact of these proposals upon the civilians at Doctors' Commons, who now found themselves facing the same risk of losing business as the country practitioners, has been described by Manchester and by Waddams, both relying upon the *Law Magazine*. Manchester has said that the Fourth Report 'so jolted the civilians' that they asked Sir James Graham, then First Lord of the Admiralty and responsible for the Court of Admiralty, another sphere of civilian activity, to move for a Select Committee of the House of Commons to arbitrate between the conflicting recommendations of the two Commissions. Waddams, quoting from the *Law Magazine*, has likened the Fourth Report to 'a shell thrown into Doctors' Commons'. What the *Law Magazine* could only speculate upon at the time was that 'the proposition to transfer the testamentary jurisdiction to the equity courts has frightened the civilians exceedingly, and at their suggestion, it is supposed, Sir James Graham has moved for and obtained a select committee to inquire into the Admiralty and Ecclesiastical Courts'. That speculative version of events was misplaced. Graham's own account of these events, set out in his correspondence with Grey and, much later, with Peel, tells a different story. Graham explained that it was the accident of Robinson's death coupled with his own zeal for tackling Admiralty problems which brought about his involvement in the reform of the Admiralty and Prerogative Courts, and prompted the 'extensive changes' he came to have in mind. Graham's role in these matters as First Lord of the Admiralty *vis-a-vis* that of Brougham as Lord Chancellor would seem to bear out Donajgrodzki's argument about the difficulty in predicting which Cabinet member might take the lead in promoting a particular piece of legislation. It is also likely that the divisions within Grey's Cabinet, and the loose rein upon which both Brougham and Graham were allowed to act, created the circumstances in which both men could be involved in trying to frame separate measures, each of which had a bearing upon the recommendations in the General Report.

Graham was a complex individual, both personally and politically, and, as Erickson has suggested, he may have seemed an unexpected choice for the Admiralty when Grey's administration was formed late in 1830. Nonetheless, he had busied himself from the start with getting the measure of his unfamiliar task and, by early in 1832, he was ready to propose 'sweeping reforms in all branches of the Admiralty'. So, when Robinson died, Graham believed that there was an opportunity to extend his reforms to the Admiralty Court. The Court still retained the 'power to try cases on
seamen's wages, collisions and other torts at sea, salvage...and, in wartime, prize.9

Sitting at Doctors' Commons, it was served by the same corps of advocates and proctors as the ecclesiastical courts, and the judgeship was a Crown appointment.

What the intensive nature of Graham's correspondence with interested parties reveals is how much energy he put into trying to bring about the efficient consolidation of judicial offices in the Court of Admiralty, for which he was directly responsible, and in the Prerogative Court, for which the Archbishop of Canterbury was responsible. In that context the conflicting Fourth Report of the Real Property Commission was an irritant to him.

Writing to Grey on 6 May 1833, Graham drew his attention to the then judicial vacancy and to a number of 'objectionable' features of the office of Admiralty Judge.10 Graham concentrated first upon how the judge was remunerated, an unsatisfactory mix of a salary voted annually and capriciously by the Commons, and fees which fluctuated so greatly from peace to war that a judge might have 'a strong and direct money interest in favor of war'.11 What he wanted to achieve was a solution which would uphold the dignity and salary of the office sufficiently for eminent civilians to be attracted to it; and yet in peace-time circumstances he thought it 'preposterous now for the first time to give a large fixed salary for the discharge of duties which are light'. What Graham arrived at, with an uncluttered mind, was the idea of consolidating the judgeships of the Admiralty Court and the Prerogative Court. 'The practitioners in the two courts are the same; the learning, the habits, of the two are identical; and in time of peace at least the labor of the two united is not greater than one diligent and competent judge might perform'.

To achieve that end, Graham understood that he would have to create a single, properly salaried and pensionable post, appointed by the Crown and likely to tempt 'men of eminence', whilst at the same time debarring them from sitting as MPs; and that he would have to introduce a bill into Parliament for that purpose. A particular difficulty, readily acknowledged by Graham, was that 'the Crown appoints the Judge of the Court of Admiralty, and the Archbishop of Canterbury the Judge of the Prerogative Court'. However, he urged upon Grey the view that Howley, who had been willing to surrender a 'large amount' of patronage at the request of the Ecclesiastical Revenues Commission, might be prepared to do so again in respect of the Judgeship of the Prerogative Court because 'it was conducive to the public good'.12 Since time was pressing, Grey was asked to arrange a meeting with Howley
so that Graham could secure the Archbishop's consent. That consent would leave Graham free to press ahead with the appointment of Sir John Nicholl, the long-serving Dean of the Arches, as Admiralty Judge ad interim, with securing the approval of a Commons Select Committee for his scheme of consolidation and with drafting the appropriate measures.

Graham was meeting and corresponding with Nicholl in May 1833. On 26 May 1833, he was able to send to Grey a memorandum, prepared by Nicholl but also annotated in another hand, which set out two options for dealing with the business of both courts. In outline, the first option was that two salaried judges should be appointed by the Crown, one to preside over the Admiralty Court and the other to preside over the Prerogative Court, but at the same time acting jointly so that 'each Judge should be assistant to the other, and preside in either Court in the absence of the other Judge'. The second and temporary option was the appointment of an exact replacement for Robinson as Admiralty Judge on the understanding that the office would be surrendered in the event of 'any new arrangement to be proposed by Government'. Graham favoured the first option, as did Brougham who had been present when Graham met Nicholl, although both options maintained the desired complement of civilian judges within the revised Privy Council. 'On either Plan there would be two judges - which in many respects would be advantageous to the public. Indeed without two judges it seems scarcely possible that the Appeal Jurisdiction from those Courts before the Privy Council could be competently & satisfactorily administered'. Another essential feature of both options was Nicholl's willingness to serve as Judge of the Admiralty Court for the time being. The conditions attached to his doing so, and 'distinctly understood by the Lord Chancellor and by me', had already been set out in Graham's letter to Nicholl on 21 May 1833. But within days of writing thus to Nicholl, Graham had come to realise, as he makes clear in his letters to Nicholl on 25 May and to Grey on 26 May, that the equilibrium of his consolidation scheme was threatened by the conflicting recommendations contained in the Reports of the two Commissions. Nicholl had to be told that those differences, as well as the preferred version of Nicholl's own proposal, would need to be referred to a Commons Select Committee for arbitration. Graham also told him, by way of encouragement, that 'The Govt. is decidedly favourable to the adoption of your first Plan & I have no doubt that on enquiry the Committee will be induced to recommend it; & I hope & believe that a
Bill embodying the proposed arrangement founded on the Report of the Committee will pass before the end of the Session'. Grey was then informed in Graham's typically brusque fashion what his First Lord of the Admiralty had decided to do in response to the Fourth Report of the Real Property Commission. 'I greatly prefer Sir John Nicholl's Plan, and the adoption of the Report of the Ecclesiastical Commissioners: but on the whole, in a case of so much difficulty and doubt, it appeared safe to refer the entire Question to a well-chosen Committee: and I have given notice for Thursday next, when I shall move for a Committee on the subject; and I hope to obtain a Report sanctioning the substance of Sir John Nicholl's First Proposition, which will be the groundwork for the introduction of a Bill to be passed in the present session...improving the jurisdiction both of the Admiralty and Spiritual Courts'.

Graham moved quickly to bring about the appointment of the Select Committee 'to inquire into the Office and Duties, the Appointment, Salary and Emoluments of the Judges of the Prerogative Court and of the High Court of Admiralty, of the Dean of the Arches, and of the Judge of the Consistory Court of London'. That momentum was maintained throughout the proceedings of the Committee. It was appointed on 10 June 1833, met on nine occasions between 12 June and 1 July and reported on 15 August.

Hayward was dismissive of Select Committees in principle, deploring the need to repeat 'facts and arguments' that were already in print, and at great length and great expense. He described this particular Committee as 'notoriously attended almost exclusively by members induced by personal interest or acquaintance with the civilians to attend'. It had a membership of thirty-three, including Graham himself; Peel; the First Commissioners of the Real Property Commission and the Common Law Commission, Campbell and Pollock; Lushington, who also gave evidence, and Fergusson from the Ecclesiastical Courts Commission; the Lord Chancellor's brother, William Brougham; Dr John Nicholl, the advocate son of Sir John Nicholl, who had entered the Commons as MP for Cardiff in the previous year; and two instinctive opponents in the House, Joseph Hume and the High Church spokesman, Sir Robert Inglis. The interests of the Admiralty as such were represented by two junior Lords, Henry Labouchere and Sir John Pechell, and by John Jervis, counsel to the Admiralty. Labouchere, who was then MP for Taunton, chaired the meetings. The Committee drew its evidence from the relevant reports of several Commissions,
Ecclesiastical Courts, Real Property, Common Law and Admiralty Court of Ireland, and from interviews with sixteen witnesses who were described as being 'of the highest authority in the various branches of the law of the country'. If Hayward was critical of the membership of the Committee itself, he could have been equally so about the selection of witnesses. Almost all of them had either served on the Ecclesiastical Courts Commission or given evidence to it. Tindal, Alexander, Nicholl, Jenner and Lushington were in the first category; and Vernon, Adams, Swabey, Fox, Kitson, Tyrrell and Freshfield were in the second category. The only genuinely new voices were Robert Swan from Lincoln, representing the country registrars in effect, and William Richard Hamilton with his Foreign Office experience of advocates as advisers on international law. The two remaining witnesses, Tinney and Duckworth, had both served on the Real Property Commission.

All the witnesses reacted predictably throughout, almost always offering 'facts and arguments' which were already on record. When questioned about the 'conflicting opinions' contained in the two Reports, the senior civilians wanted to see testamentary business concentrated in a single and unified ecclesiastical court and registry at Doctors' Commons. That solution would direct the business to where there was a concentration of civilian skills and experience, prevent the destruction of the profession, and help to preserve the 'law of nations' expertise possessed by the advocates. The common lawyers similarly held to their preference for a secular probate registry in London which would act administratively, and for the handling of contentious testamentary business by the Court of Chancery; although some witnesses, Jenner, Alexander and Tindal, doubted whether Chancery could take on the extra burden.

The sense of what Nicholl and Lushington, and also Tindal, had to say about the York jurisdiction was that it should be transferred to London, and had only been spared previously out of deference to the Archbishop of York. On the question of the likely judicial work-load at Doctors' Commons, which had been the starting point for Graham's involvement, Lushington stood apart from his fellow-civilians. He thought that one judge might be sufficient, although he conceded that much would depend upon 'what extent of jurisdiction shall be bestowed upon these courts.' By contrast, Nicholl was convinced that there should be two interchangeable judges, not least so that one would be available to hear appeals to the Judicial Committee of the
Privy Council from the judgements of the other. The interests of the country practitioners were represented by Vernon, Swan and Kitson, but their evidence made no impact upon the outcome. Vernon was questioned exclusively about the implications of transferring the York jurisdiction to London, and he repeated the performance he had given before the Ecclesiastical Courts Commission. Shortly before his interview, Swan told Bishop Kaye that 'Both reports...have consigned us to destruction and differ only in the disposal of our effects'. On the day, accompanied by Kitson, Swan set out the anti-centralisation arguments contained in the Memorial to Brougham, but his offer to summon more of his fellow-registrars as witnesses was ignored. In earlier interviews, the civilian witnesses from Doctors' Commons had spoken disparagingly about the poor professional standards at diocesan level, suggesting that the practitioners there could always find alternative business as solicitors. Only Lushington asked that they 'be dealt with with a due regard to justice'. In fact the Select Committee's Report was to make no mention of Swan's evidence and the likely predicament of those he represented, an omission which was greatly resented.

When the Report was presented in August 1833, offering 'the outlines of the system to be adopted', it came down firmly on the side of all that the Ecclesiastical Courts Commission had recommended, with the additional suggestion that the York jurisdiction be ended. Thus, as well as its enlarged testamentary jurisdiction, one metropolitan court was to have jurisdiction over all the other matters reserved to it by the General Report.

Where the Committee had hesitated was over what the judicial complement should be for the new Ecclesiastical Court and a somewhat enlarged Admiralty Court jurisdiction. What was difficult for anyone to calculate was the likely effect of transferring to London all the testamentary business, including that from 'the great manufacturing and commercial districts', hitherto handled at Chester, as well as the growing Admiralty business generated by trade with the Far East. The Committee decided to leave it to Parliament to say whether there should be a second judge. However, as regards the conditions of judicial service and other service, the Committee proposed an amalgam of what the General Report had recommended, what Graham and Nicholl had discussed only a few weeks before and what Nicholl had said in evidence. Judges were to be Crown appointees and paid a fixed salary and pension out of the Consolidated Fund; existing 'efficient officers' of the
Prerogative and Admiralty Courts were also to be salaried; sinecures were to be abolished; court fees and proctors' fees were to be regulated so as to prevent any extra cost in bringing testamentary business to London and so as to reduce or discontinue 'all office fees on smaller properties'; and a general fee fund was to be created, out of which compensation would be paid to sinecurists and to judges and officers of the courts to be abolished. It was also calculated, leaning heavily upon what Nicholl had said in evidence, that when these changes had been made 'a very considerable surplus will annually be at the disposal of the public'.

The Report of the Select Committee, with its Minutes of Evidence, was ordered to be printed on 15 August,26 and seems to have been generally available by late September 1833. There were detailed reactions to it from the Government, from the press and the legal periodicals, and from the country practitioners and their supporters, all of which helped to define the positions which the opposing forces were to occupy for the next twenty years or so. As far as the Government was concerned, the Report was an endorsement of what Graham had wanted and he subsequently busied himself with the preparation of appropriate measures. The press and the periodicals, with one notable exception, contented themselves with fully describing the contents of the Report. Finally, denied publicity for their cause in the Select Committee Report itself, the country registrars, 'the pamphleteering gentry' as they were dubbed by Hayward,27 were to mount their own defence in print against the findings of all three inquiries.

Nicholl had been sent 'the general substance' of the Committee's Report with remarkable speed, because he responded from Merthyr Mawr on 18 August to say that he thought it formed the basis for draft measures even though he did not 'concur entirely in every part of the Report'. He wanted the drafting to be done during the recess and then sent to him, and he offered to prepare the procedural regulations for the reformed courts himself.28 When Graham replied on 23 August, he promised to send Nicholl the printed version of the Report and Evidence, when ready, and to speak to Brougham and Jenner within days about the 'preparation of two Bills, one for the regulation and extension of the jurisdiction of the Admiralty Court, the other for the regulation and alteration of the Spiritual Courts in conformity with the Report of the Ecclesiastical Courts Commissioners'.29 His aim was to show both drafts to Nicholl and to discuss them with him. Graham later mentioned the involvement of James Parke, as well as Nicholl and Jenner, in the 'joint direction' of the Bills, but
the drafting of the Ecclesiastical Courts Bill, which Graham was to describe as being 'of great legal nicety and peculiar difficulty' was placed in the hands of a 'Mr. Maule'.

On 7 January 1834, Nicholl, writing from London, resumed his dialogue with Graham. He had experienced a difficult term in which he had barely coped with the task of presiding over the Admiralty Court as well as his own courts, and he had had to 'leave a remnant in each Court to the ensuing term'. Nicholl was willing, in spite of an indisposition, to carry that load into the new term 'should it be absolutely necessary', but he was so impatient with the drafting delays that he asked Graham, with Brougham, to authorise the immediate appointment of a second judge. His proposal was that he should remain as Admiralty Judge but be replaced at the Prerogative Court by someone who would then remain in that post 'under the promised Bill'. Nicholl judged that a Bill providing for that appointment would be approved by Parliament, although, like others, he thought that any such measure would be more likely to pass if stripped of clauses dealing with church rates and clergy discipline and the like.

Replying on 9 January, Graham acknowledged the advice about separate measures, and wrote confidently about drafting progress under Jenner's direction, but he was unwilling to agree to any appointment without consulting Brougham and before the return of Parliament. On 23 January, Nicholl was told that both Graham and Brougham were agreed that no step should be taken which 'fettered the discretion of the legislature'; and Graham referred to the difficulties surrounding the reforms. 'In matters of so much delicacy and importance the danger of precipitation is great; and by your continued assistance we may proceed cautiously and ultimately arrive at a satisfactory arrangement'. Nicholl agreed to continue with his extra duties.

Both the Law Magazine and The Times were aware in February 1834 that a Bill was in preparation, but Nicholl had to ask again, in March, about progress towards completing the draft Ecclesiastical Courts Bill. He was told by Graham that Jenner would be spoken to and that 'I hope to have the measure in a tangible shape when you return to London'.

The 'matters of delicacy and importance' mentioned by Graham on 23 January 1834, but previously hinted at in his letter of 23 August 1833, may refer to his realisation that to carry the reform of the ecclesiastical courts through Parliament would 'require all the force and authority of the Government'. That was at a time when local
opposition was brewing and when John Campbell, First Commissioner of the Real Property Commission and thus linked with a different solution, was Solicitor-General and then Attorney-General under Grey. Those complicated circumstances, which Graham appears not to have discussed directly with Nicholl, could also relate to what he later wrote to Peel about the need for Nicholl's involvement, 'This temporary arrangement made avowedly for the purpose of giving time to effect the most important recommendations of the Ecclesiastical Commissioners'. 39 Meanwhile, The Times had responded to the publication of the Select Committee's Report by reproducing it verbatim, but without a commentary, on 17 October 1833, and the Legal Observer had done the same in its October supplement. 40 It was quite otherwise with the Law Magazine.

Abraham Hayward had taken a close interest in the progress of all the law reforming Royal Commissions and had been won over by the Real Property Commission's recommendations on testamentary jurisdiction. That preference, coupled with his dislike of Select Committees, caused him to write critically at intervals about the efforts of the civilians at Doctors' Commons 'to preserve the largest possible share of practice to themselves'. 41 However, his main attack came in the form of a substantial review of the Select Committee's Report, although delayed by 'press of matters' until May 1834. As well as rehearsing the more familiar criticisms associated with the 'expensive and anomalous' establishment at Doctors' Commons, Hayward dismissed the claims made by the advocates that their profession needed to be preserved for reasons to do with international law, and suggested that common law and equity barristers would be 'equal to questions involving the construction of treaties'. Nor did he spare the country registrars for claiming that not only their livelihood but also the rights of the poor were under siege. 42

The country registrars referred to by Hayward had not only produced a number of pamphlets in response to the proposed changes, but had also by now formed themselves overtly into a fighting Committee, as Swan's Memorial had earlier hinted.

Their first champion, albeit a transitory one, was an Irish barrister and jobbing journalist, Michael Joseph Quin. Whatever his reason for joining the fray and publishing his pamphlet early in 1834, Quin mounted a skilful defence of the ancient institutions that were to be abolished and questioned the motives of the two Commissions and the Select Committee. 43 All the arguments for preserving local
testamentary courts were deployed. Local courts were precisely what the Lord Chancellor was engaged in reviving; wills should be retained locally in order to be accessible; local knowledge would prevent fraud; proving wills in London would be more expensive; the country practitioners were competent to handle non-contentious business; local arrangements could be consolidated and improved at diocesan level; and the evil of *bona notabilia* could be removed by letting the jurisdiction follow the usual domicile of the testator.

As for the two Commissions, Quin asserted that the civilians exaggerated their own skills and simply wanted to enlarge their jurisdiction at the expense of the Court of Chancery, whilst the common lawyers were 'zealous for destroying that jurisdiction altogether'. Throughout his forty-eight page pamphlet, Quin displayed an immediate command of the kind of rhetoric which the country registrars and their supporters were to employ consistently. For example, 'which of the professions...shall be enriched by the spoils of the country jurisdictions'; 'The conflict now becomes severe. It is hand to hand - shield to shield - foot to foot'; and, writing critically of Campbell's evidence to the Ecclesiastical Courts Commission, 'everything must be done on the novel system of centralisation'.

In its review of Quin's pamphlet on 18 February 1834, The Times said that Parliament should not be swayed by such partisan arguments in considering reforms but should instead apply the test of 'general benefit and utility'. That opinion provoked an immediate response, on 20 February, from 'A Barrister', probably Quin himself, which echoed the pamphlet and deplored the 'monstrous proposition that...a poor man from near Newcastle or Carlisle should be obliged to travel 300 miles to see his father's will'.

About the same time as Quin's pamphlet appeared, Ralph Barnes, who was then Deputy Principal Registrar at Exeter and close to his Bishop, Henry Phillpotts, brought out a pamphlet which took the form of an appeal to the 'People of England'. Both pamphlets seem to have been timed to coincide with the preparatory work on Graham's measures. Barnes' purpose was to inform the public about what was happening and to try to shape opinion. For Barnes and his ilk the two Commissions represented 'a powerful combination for metropolitan aggrandisement'. The Select Committee was merely the instrument for giving a civilian court 'a triumph over its rival', and had ignored local feelings. Other than bringing the response of the country registrars up-to-date, his case for proper local consultation
and consolidation of local arrangements was entirely consistent with Swan's earlier Memorial, but in its rhetoric it hovered uneasily between the plight of the poor and the plight of the country practitioners. 'If a Committee had been appointed coolly and deliberately to rob the poor man of his rights for the aggrandisement of the few, it could not have more effectually done its business than by seizing on the remuneration paid for business done at home for the support of judges and officers in the metropolis'.

Two other documents have survived which illustrate the hostile attitude of the country registrars at a time when legislation was believed to be imminent. Both are printed and both bear the title 'Local Testamentary Courts', but they may have been intended primarily for circulation among the registrars themselves rather than for general publication. The first document, undated, offers a point by point refutation of the reasons given by the General Report and the Commons Select Committee for abolishing all the local courts; and there is internal evidence to suggest that Swan may have been its author. The second document, dated 5 February 1834, embodies the resolutions of a Committee of country registrars which had met in London at the beginning of the Parliamentary session, with Swan as its secretary. The openly stated aim of the Committee was to 'meet from time to time, in order that they may firmly resist any clauses in the proposed bill which may tend to impair the efficacy of the local testamentary tribunals, and so to diminish the great public advantage of bringing home justice in a cheap and convenient form to every man's door'.

None of the threatened resistance was required during that session. Graham resigned from Grey's administration in May 1834 over the proposed spoliation of the Irish Church; Grey himself went out of office shortly afterwards and was succeeded by Melbourne's first and brief administration; and Jenner took over from Nicholl as Dean of the Arches and Judge of the Prerogative Court, leaving Nicholl responsible only for the Admiralty Court. The anticipated and feared Bill was shelved, although only for the time being as it transpired.

Sir James Graham's involvement in these events has been neglected or misunderstood by legal historians. In fact, he played a committed part in the latter years of Grey's administration in trying to implement the recommendations contained in the General Report, so much so that the measure he had had prepared became a template for other would-be legislators. Moreover, when Peel took office in December 1834 he was urged by Graham to press ahead with that legislation.
Graham went on to direct the efforts of Dr John Nicholl during Peel's second administration, and he was still a contributor to that particular cause of reform in the 1850s.
Notes to Chapter 7.

1. Bishop of Exeter's Charge of 1836, p.32.

Part I


7. Nicholl had contributed to the drafting of the Ecclesiastical Courts Bill in 1829; Tenterden 'at the end of his life drew several statutes', H.E.L., xiii, p.521; Jenner directed the drafting of Sir James Graham's Bills in 1833-34; and Lushington was similarly involved in 1835, MMP, L.82/1.

8. The appendices to the Report had not appeared when Hayward was writing his review for the April 1832 issue of the *Law Magazine* see LM, vii, p.264, but they were mentioned by *The Times* in August 1832. Two possible reasons for that delay are the bulk of the appendices, almost 600 pages, and the difficulties in recovering agreed witness evidence.

10. LO, i, 16 April 1831, pp. 369-71.

11. Ibid., ii, 11 June 1831, pp. 81-82.

12. Ibid., iii, 7 April 1832, pp. 372-73; 14 April, pp. 388-89; 21 April, pp. 402-04; 28 April, pp. 421-22.


15. DNB, ix, pp. 308-11.


18. General Report, op. cit., Appendix B, Part II, passim. *The Times* told its readers on 27 May 1830 that 'a snug registrarship must be a very good thing for a country attorney'.


21. In his Charge of 1828, Kaye had warned that, if churchmen shrank from the task of pointing out and correcting ecclesiastical abuses, it would be 'taken up and executed with unsparing severity by others who entertain no friendly feeling towards us, who keep their eyes incessantly fixed upon us with the sole intent of discovering our weaknesses, our failings, our errors', see Knight, Frances. 'Bishop, Clergy and People: John Kaye and the Diocese of Lincoln, 1827-1853', ( D.Phil. thesis, University of Cambridge, 1990), p.68. Dr. Knight's research, substantially re-worked, was published as The Nineteenth Century Church and English Society. Cambridge, Cambridge University Press, 1995.

22. Lincolnshire Archives, correspondence of Bishop Kaye, COR.B/5/28/2, 23 Feb. 1832, Swan to Kaye.


26. See n.1.

27. H. E. L, i, p.188.


29. Ibid., p.105.
30. P.P. 1833 (670) vii, p.136. Report of Commons Select Committee on Admiralty Court, etc.


33. Legal Examiner, i, 1 May 1833, p.121.

34. Lincolnshire Archives, correspondence of Bishop Kaye, COR.B./5/28/6, 15 June 1833, Swan to Kaye.

35. LO, vi, 20 July 1833, pp.209-10. In May 1829, Peel had advocated the introduction of a Bill that session to implement the recommendations of the Common Law Commission. 'The Bill might lie over during the Recess, but would there not be advantage in introducing it, as the best mode of drawing attention to the subject, and ensuring our being ready to proceed at the beginning of next Session', see PRO HO 43/37, p.213, 3 May 1829, Peel to Lyndhurst.

36. Hansard, 3d. ser., xxvi, 13 March 1835, cc.930-34.

37. University College London, Brougham Papers, ms.18158, 30 Sept. 1832, Ker to Brougham; ms.18164, 5 Sept. 1833, Ker to Brougham.


40. Ibid., xxvi, 13 March 1835, cc.930-34.

41. LO, vi, 20 July 1833, p.209, 'The Lord Chancellor is another Antaeus, and receives fresh strength from every overthrow...ere three days elapse, he brings in three fresh bills'.

42. University College London, Brougham Papers, ms.18166, 14 Sept. 1833, Ker to Brougham.

Part II


2. P.P. 1833 (670) vii, pp.83-85. Report of Commons Select Committee on Admiralty Court, etc.


5. LM, x, p.252.


10. Graham Papers (GP), Bodleian Library microfilm, 6 May 1833, Graham to Grey.

11. Brougham had drawn attention to the fluctuating remuneration of the Admiralty Judge, and the consequent risk of 'dreadful bias', in his great speech of February 1828, see Hansard, 2d. ser., xviii, 7 Feb. 1828, c. 152.

12. The patronage concessions by the prelate members of the Ecclesiastical Revenues Commission were later mentioned by Lushington in the Commons, see Hansard, 3d. ser., xxvi, 12 March 1835, c. 912.

13. GP, [May 1833], memorandum by Nicholl.

14. Ibid., 21 May 1833, Graham to Nicholl.

15. Ibid., 25 May 1833, Graham to Nicholl.

16. Ibid., 26 May 1833, Graham to Grey.

17. Graham had been similarly brusque with Grey on an earlier occasion. In November 1832, he told Grey that if Campbell was to be promoted he should be told not to proceed with the 'Register Bill... abhorred in our Northern Counties', see GP, 6 Nov. 1832, Graham to Grey.

18. BL, Add. Ms. 40318, ff. 15-19, 25 Jan. 1835, Graham to Peel. Nowhere in this important letter to Peel about the Commons Select Committee does Graham refer to pressure from Doctors' Commons.


21. Ibid., xi, p. 278.

23. Lushington covers this ground in an undated memorandum in the Brougham Papers, possibly prepared as the basis of his evidence to the Commons Select Committee, see University College London, Brougham Papers, ms.4160 (part).

24. Lincolnshire Archives, correspondence of Bishop Kaye, COR.B./5/28/6, 15 June 1833, Swan to Kaye.

25. LO, clxx, Supplement for October 1833, pp.497-99.


27. LM, x, pp.447-60.


29. Ibid., 23 Aug.1833, Graham to Nicholl. Jenner subsequently asked Brougham for a meeting to discuss the measures, see University College London, Brougham Papers, ms.45913, 29 Aug.1833, Jenner to Brougham.

30. See n.7. The printed version of Graham's Bill names 'Mr. Roscoe' as the draftsman, see MMP, L.82/1/1.

31. The Times, 20 Dec.1833, reported on The Triune that, 'owing to the indisposition of Sir John Nicholl, Dr Burnaby presided as locum tenens'.

32. GP, 7 Jan.1834, Nicholl to Graham.

33. Ibid., 9 Jan.1834, Graham to Nicholl.

34. Ibid., 23 Jan.1834, Graham to Nicholl.

35. Ibid., 23 Jan.1834, Nicholl to Graham.

36. LM, xi, p.278; The Times, 18 Feb.1834.
37. GP, 12 March 1834, Nicholl to Graham.

38. Ibid., 13 March 1834, Graham to Nicholl.

39. See n.18

40. See n.25.

41. LM, x, pp.1,27,252,493.

42. Ibid., x, pp.447-60.


46. MMP, L.109, 5 Feb.1834. *Local Testamentary Courts. Resolutions*. This version may have been sent to *The Times*. 
Chapter 8: Attempts to reform the ecclesiastical courts, 1834-1835; 'You startle me by the prophetic visions of the hostility of Country Attornies'.

The period from December 1834 to April 1835, Peel's 'Hundred Days', deserves close scrutiny. It was marked by the first proper governmental attempt to introduce into Parliament reforms which followed the recommendations contained in the General Report, albeit three years after its publication. This chapter will show that that attempt failed because of the early demise of the new administration, but that there were signs, repeated later in the same session, that even a non-partisan measure dealing with such issues would meet with locally-inspired opposition.

With Melbourne in office from 16 July 1834, and the session ending early in August, there was no further movement towards introducing Graham's Bill, although Melbourne did consider the need to bring in conciliatory measures in the following session to meet the grievances of Dissenters, notably over church rates. By the time that Parliament reassembled on 19 February 1835, in its temporary quarters following the fire which had gutted the Houses of Parliament, Melbourne had been dismissed by the King, Peel had formed his first and short-lived administration, the position of the Tories seemed to have been strengthened by the General Election in January 1835, the Ecclesiastical Commission had been appointed early in February 1835 and Graham's reforming measures had been revived behind the scenes.

Peel came to power in December 1834 committed to moderate reform of the Church of England. He had said as much in his Tamworth Manifesto, which appeared in the press on 18 December; he told the Bishop of Exeter on 22 December that 'the Church should avail itself of this, possibly the last, opportunity of aiding its true friends in the course of judicious reform'; and he appointed the Ecclesiastical Commission, on which he also served, as early as February 1835. Nor had Peel lost sight of the need to reform the ecclesiastical courts. Despite the pressures of forming a Cabinet and dealing with a multitude of claims upon his patronage, his attention had turned to 'the measure relating to the Prerogative and Admiralty Courts' even before he had completed 'the arrangements for the King's Government'.

Shortly before 24 December, he told Howley that he wanted to discuss Graham's draft Bill with Sir John Nicholl, who was by then the Archbishop's legal adviser as Vicar General, and to see the relevant papers. Nicholl responded on 24 December, suggesting a 'short, preliminary conversation' at which he could brief Peel and find
out what papers and other assistance might be needed. Peel's endorsement on that letter offered Nicholl an early meeting, the day after Boxing Day. At that meeting Nicholl was instructed to revive the draft legislation. By 31 December, Nicholl was reporting that Peel's 'wishes respecting the Ecclesiastical and Admiralty Courts Bills have been communicated by me to Sir Herbert Jenner, and he has already seen Mr Roscoe and in part revised the former Bill', but that Jenner, by then the Dean of the Arches, would need to take directions from Peel before proceeding further. It was also apparent that Nicholl had already suggested to Peel that the two Reports of the Ecclesiastical Courts Commission, to which he now added the Report of the Commons Select Committee, 'appear to furnish tolerably full information in order to judge the outline of the Bills proper to be offered to Parliament...if you can possibly find time just to run through these Reports'. According to an endorsement, both Jenner and Nicholl were asked to meet Peel on 2 January 1835, and Peel also asked to be provided with copies of the Reports named by Nicholl.

Nicholl prepared his own account of these compressed events. He recorded that it was he who took the initiative in approaching Peel about 'the state of the business'; that the meeting on 2 January was between himself, Jenner, Lyndhurst as Lord Chancellor and Henry Goulburn as Home Secretary, Peel having been called away; and that the papers were left with Lyndhurst with a view to a further meeting being arranged with Peel. That meeting never happened, but the new Attorney-General, Pollock, was directed to prepare a Bill based upon 'the documents delivered over to him'.

One of Peel's first acts as Prime Minister, on 9 December, had been to invite Graham to join his Cabinet. Although Graham declined that offer, he travelled specially from Netherby, his country seat near Carlisle, to see Peel in London on 13 December. The two men, Tory and Whig, met on friendly terms. Then, unaware that Peel had already begun to revive the draft legislation, Graham initiated an exchange of confidential letters in which he suggested to the new Prime Minister that he should do precisely what he, Peel, was already doing.

Writing from Netherby on 25 January 1835, Graham described to Peel in great detail how his own earlier involvement with the courts at Doctors' Commons had come about, provided a 'rough outline' of the main provisions of his Ecclesiastical Courts Bill and urged Peel to act upon it.

What Graham's Bill contained was of the greatest importance. That judgement relies
not upon the evidence of the hastily-written and incomplete 'outline' sent by Graham
to Peel, but upon Sir John Nicholl's own copy of the Bill for which he had waited so
impatiently. What that copy demonstrates is how closely Graham's Bill of 151
clauses followed the recommendations contained in the General Report and in the
Select Committee Report, including clauses to deal with jurisdictions other than
testamentary. It also demonstrates to what extent the 1834 draft was to shape later
draft measures, judging from Dr John Nicholl's annotations.
The main features of Graham's Bill can be described briefly. Clauses 1-33
consolidated the entire testamentary jurisdiction 'in a new court to be called His
Majesty's Court of Arches', with provision for the attendant apparatus of judge,
officers, advocates, proctors, fee fund and appropriate compensation for loss of
offices. Clauses 34-51 were concerned with the 'Probate of Wills'. Clause 34 gave to
the new Court of Arches 'Probate of wills of real property, and exclusive jurisdiction
upon the question of their validity', a clause later annotated by Dr John Nicholl as
'omitted in all subsequent bills'. Similarly sensitive was Clause 36 which
contemplated the issuing of commissions to diocesan judges 'to take preparatory
measures towards granting small probates', presumably included with a view to
pacifying local interests; Dr John Nicholl later referred to this concession as 'amply
sufficient for all purposes'.
Clauses 52-59 ended the criminal jurisdiction of the
spiritual courts. Clauses 60-77 dealt with 'Proceedings', and Clause 63 gave 'Power
to the Court in all contested suits to direct an issue to be tried by a Jury, and in
certain cases the Court shall direct an issue on the application of any party to a suit'.
Clauses 78-88 dealt with administrations, and the remaining clauses carried out the
recommendations of the General Report in respect of sequestrations, Clauses 89-99,
and clergy discipline, Clauses 100-151.
Graham told Peel on 25 January that the Ecclesiastical Courts Bill and the Admiralty
Court Bill had been drafted and approved just before Graham left office, and that
Howley had agreed the Bill's provisions, including the Crown appointment of the
Judge. When Peel replied on 31 January, apart from explaining the steps he had
already taken, he observed that the Bill was 'almost identical with' what had been
recommended to him, and he asked for Graham's continuing advice and support
from his side of the House for reforms which were motivated by 'the public interest
rather than party interest'.
However, these exchanges, between two men who were to become close friends and
political allies, dealt with more than the content and purpose of the proposed legislation. An apprehensive Graham, with his first-hand knowledge of constituencies far from London, had also told Peel that the new Government would need to be resolute in the face of likely opposition. 'I must frankly state to you, that the abolition of the local Spiritual Courts will raise a most noisy and powerful opposition on the part of a Body possessing great influence: I mean the Country Attornies; and it is a question worthy of the consideration of a Government whether the change proposed be so beneficial as to justify the risk of the conflict, and the certain great inconvenience.'

Peel made an extraordinarily combative response to Graham's warning about local opposition to reform, writing in the disdainful language he was to use in the Commons when the Tory Bill came to be debated on 12 March 1835. 'You startle me by the prophetic visions of the hostility of Country Attornies, for no man has a lower opinion than I have of the motives of such hostility, or a higher opinion of its powerful influence. I will again consider those parts of the Bills which are most likely to ruffle the tempers of those functionaries, but with a leaning to brave their wrath, and some little prejudice in favour of that to which they are very violently opposed'.

In December 1834, Peel had appointed Lyndhurst as Lord Chancellor, Jonathan Frederick Pollock as Attorney-General and William Follett as Solicitor-General. On 31 January, the day that Peel had replied to Graham, he also passed Graham's letter to Lyndhurst and asked him to note any of the observations upon the draft Bills which might need to be considered by the law officers. It is evident that Peel did have the risk of local opposition in mind. 'The Attorney & Solicitor General must be the best Judges of the probability of opposition from Country Attornies, & the extent to which they can carry it. I do not know that the chance of opposition from that quarter is much in disfavour of the Bill, so far as its real merits are concerned'.

The exchange of letters between Graham and Peel ended on 2 February, with Graham, still at Netherby but about to return to London, writing to thank Peel for reviving the draft measures and offering to discuss with him those details which did not derive from the General Report. Graham concluded by repeating his gloomy prediction about local opposition, 'The hostility of the Country Attornies must, I fear, be encountered; since the abolition of the local Tribunals and of Diocesan Registration is one of the principal foundations of the Measure, mainly insisted on by
the Ecclesiastical Commission, and this is the stumbling block in the way of local Practitioners'. In the event, those battle-lines between the reformers and their opponents were to be drawn on the first occasion that such a reforming measure was debated in the Commons.

The King's Speech, delayed until 24 February 1835 because of the contested election of the Speaker, announced the new Government's measures 'to improve the administration of justice in ecclesiastical causes, [and] to make provision for the more effectual maintenance of ecclesiastical discipline', an early indication that the new administration was intending to detach the clergy discipline clauses from Graham's draft Bill. Sir John Nicholl thought that was a proper distinction to make.

On 12 March, the task of speaking to the motions for bringing in two separate measures, an Ecclesiastical Courts Bill and a Church Discipline Bill, was given to Pollock. In its unofficially printed form, Pollock's Ecclesiastical Courts Bill, consisting of only fifty-eight clauses, was a much reduced and rearranged version of the 1834 draft. The sequestration clauses had been omitted and the clergy discipline clauses had been detached to form the second Bill. Among the other omissions were clauses dealing with compensation and also with trials of issues, omitted because they did not conform to practice in the Admiralty Court or because they proposed to admit serjeants and barristers as advocates in trials of issues. The sensitive Clause 34, giving the Court of Arches jurisdiction over wills of real property, was also dropped from the Bill and from its title. Curiously, Lushington spoke on 12 March as if he believed the clause to be still in place.

Since Pollock's Bill never reached the first reading stage, and since what he said about it on 12 March was not especially revealing, there must be an element of conjecture about why those adjustments were made. One explanation for the dropping of Clause 34 could be that the common lawyers, Pollock and Follett, had taken over the effective preparation of the Bill from the civilians and were not prepared to concede so much to them. Sir John Nicholl's own account of events and his private contacts with his nephew, Jenner, suggest this. On 16 March, shortly after the debate on the motion, Jenner complained to Nicholl that he had only just been invited by Pollock to comment on what was by then 'a printed copy of his Bill...I think we are not quite well used to being driven into a corner without sufficient opportunities of communicating our ideas to the drawers of the Bill'. He also claimed that Peel was not pleased to discover that Pollock had failed to consult the
civilians beforehand about the Ecclesiastical Courts Bill, and had failed also to consult the bishops about the Church Discipline Bill.\textsuperscript{18}

Whilst the tension between common lawyers and civilians may have been covert, there was no doubt about the open conflict between the Government which sought certain reforms and those groupings inside and outside Parliament which opposed them.

Pollock's performance on 12 March, and the ensuing debate on the motion, are better reported in the \textit{Mirror of Parliament} than in \textit{Hansard} or \textit{The Times}, with the important exception of a revealing exchange between Peel and Campbell which was captured only by \textit{Hansard}. However, all three versions give the impression that the debate was neither encouraging for the Government nor edifying as a Parliamentary occasion.\textsuperscript{19} Pollock set out the main features of a 'Bill to Improve the Administration of Justice in the Ecclesiastical Courts', as he then described it. He attracted the qualified support of Lushington and Fergusson from the other side of the House, but there was an argumentative and threatening response from Campbell who now favoured local probate arrangements, as did George Pryme, barrister and Whig MP for Cambridge, and James Scarlett, Campbell's father-in-law. Finally, when Peel came to the rescue of Pollock and explained the genesis of the Bill, he was baited by Hume and O'Connell. Leave was then given to bring in the Bill, which Pollock, Follett, Lushington and Dr John Nicholl were asked to do.\textsuperscript{20}

However, Campbell's opposition to the Bill had been damaging. The shadow Attorney-General welcomed the abolition of the inferior courts but demanded the retention of the diocesan courts, arguing that 'it was possible to centralise too much - to bring proceedings too much to London', and that the Government was being inconsistent in trying to provide local courts for civil causes whilst sweeping away the local ecclesiastical courts. Campbell warned Pollock directly and unequivocally, and in a way which portrayed for the first time in the House the predicament and the strength of the 'pamphleteering gentry', that the Bill as it stood 'would give umbrage to the country solicitors, a very powerful body, who would be sending numerous petitions on the subject to the House, and who would be able to induce many country gentlemen to vote against the Reform altogether'.\textsuperscript{21}

Campbell was hardly consistent in taking up such a position. When he had given evidence to the Ecclesiastical Courts Commission in November 1830, he had wanted to see a single Court of Probate in London, had claimed that improving
communications would obviate the inconvenience of 'bringing people up from distant parts of the country', and had been ready then to limit the diocesan courts to purely spiritual and disciplinary matters; and, as First Commissioner of the Real Property Commission, he had been crucially involved in recommending the centralised registration of deeds and wills respectively. What was different in March 1835 was that Campbell, who was naturally forceful as a politician and ambitious as a lawyer, was feeling his way in opposition, was confronting an inexperienced successor as Attorney-General, and seemed to sense some advantage in championing local hostility to what was being proposed.

When Peel spoke, he attempted to remind the House that the Bill was a non-party issue and that the whole purpose of the present Bill was to 'put an end to these local courts'. His particular response to Campbell's threat of concerted opposition was couched in the language of his private correspondence with Graham, but that language was now being used in public. 'If the local jurisdiction be good, maintain it; if bad, for God's sake, don't let us permit local attorneys, for their private and personal interests, to obstruct the course of Reform. If the country attorneys have any vested rights, any vested interests, in the maintenance of these Courts, let us compensate them; but if it be useful, if it be for the benefit of the country at large, that Central Courts shall be established, and that Local Courts be abolished, what grounds have country solicitors to obstruct the course of Reform? I know that the country solicitors are a powerful body; but if the present measure be right, if centralisation be more advantageous to the country than the continuance of local jurisdiction, I see no earthly reason why the power of the country solicitors should impede the progress of Reform.'

It was this throwing down of the gauntlet by Peel which was reported in Hansard but not elsewhere, and it is a passage which carries conviction. Peel and Graham had already considered the risk of local opposition and the law officers had been consulted; public petitions hostile to the Bill were about to be received in the Commons; and it was those very local 'functionaries', so despised by Peel, who were quick to rally support for their cause.

The Select Committee of the House of Commons on Public Petitions received its first brace of petitions hostile to the Bill on or about 23 March, barely a fortnight after the debate on the motion. Both came from Shepton Mallett in Somerset. One, bearing 188 signatures, was from the inhabitants, and the other, bearing nine
signatures, was from the solicitors of that West Country town. Both were typical of what was to follow. The inhabitants viewed 'with alarm' the prospect of probate business and the custody of original wills being transferred to London and away from the accessible local courts; such a step would infringe their constitutional rights as British subjects. The solicitors, in their turn, claimed to be able to conduct probate business as effectively as in London, but with less inconvenience and expense; wanted to see a testamentary court and registry retained in each county; and asked, much in the manner of the pamphleteers, for an impartial inquiry into local arrangements. Between 25 and 27 March similar petitions were received from forty-three inhabitants of Dursley in Gloucestershire, which shared two identical paragraphs of text with Shepton Mallet but accepted the consolidation of contentious jurisdiction, and from 101 inhabitants of Hitchin in Hertfordshire. Then, at the end of March, seventy-four Norwich solicitors echoed the points made by their colleagues in Shepton Mallett; and the magistrates and others of Norwich relied upon 'statements of undoubted veracity', doubtless supplied to them by Kitson, to show the overwhelmingly local use being made of the Diocesan Registry in Norwich. Finally, the proctors of Norwich argued that there was no evidence to prove that the centralising thrust of the Bill would benefit the community at large. Their counter-proposal was that there should be local courts in each county for non-contentious business, but that country proctors should also be allowed to practice in a metropolitan court dealing with contentious business.²³

The role played by public petitions in opposing the consolidating and centralising of testamentary business will be discussed more fully in Chapter 11 in relation to the 1843 Bill. However, even at this early stage, there are enough indications of repetition of phraseology and argument to suggest some co-ordinated effort on the part of those who opposed Pollock's Bill.

There were signs by the end of March that the Government was in disarray over the Bill, if not retreat. In response to a note of enquiry from Colonel Sibthorp, the colourful but tenacious MP for Lincoln, Pollock wrote to him on 30 March. He said that he hoped to present his Bill for the first reading 'in a few days', but he reassured Sibthorp that he wished 'not to disturb the local registries and not to remove the granting of the probate entirely to London but merely the contested cases above a certain amount to be settled by the House of Commons'. Pollock hoped that these views, when stated publicly by him, would 'remove the existing objection to a
measure not yet before the House and not yet quite understood'. 24 Dr Nicholl's later gloss on this astonishing letter was that Pollock had written 'contested' in mistake for 'non-contested'. 25 That apart, the conciliatory tone of the letter was to prove an embarrassment. Shortly afterwards, Dr Nicholl had written to Sir William Follett, the Solicitor-General and MP for Exeter, about the Government's intentions towards a Bill which both men were charged with bringing in. Follett passed Nicholl's views on to Ralph Barnes, the Exeter Registrar, for the consideration of the country registrars. The result was a strongly-worded 'Heads of a Communication between the Framers of the Bill...and the Country Registrars'. The Government's position at that stage, as interpreted by the registrars, consisted of the abolition of bona notabilia, the local transacting of preliminary business below a limited sum, and the provision locally of copies only of wills. What the registrars wanted were full powers 'in thirty or forty places in the Kingdom' to grant probates and retain the original wills, and then to leave it to the public to take out probate either locally or in London. 26 Alongside the Government's reforming initiative and the opposition to it, there was also a confused and confusing intervention in the Lords from Brougham. He was newly out of office as Lord Chancellor and would never hold office again. That intervention came on 13 March 1835, the day after the debate on the motion in the Commons, and it came for two reasons. Brougham was anxious to recall, and have put on record, his own previous efforts to introduce an Ecclesiastical Courts Bill in July 1833. He was also, by tabling a version of his earlier Bill, providing a form of insurance should anything befall Pollock's Bill. 27 Although Brougham's tactics proved to be irrelevant to what the Government and its opponents were engaged in, they do deserve a brief comment if only because there were surprising and puzzling features about the Bill as it was printed in 1835. First, although it was not specifically acknowledged by Brougham, his measure borrowed heavily from Graham's Bill. A copy annotated later by Dr Nicholl shows that all the non-testamentary clauses in the 1834 Bill, those dealing with criminal jurisdiction, clergy discipline and sequestration, which had been omitted from Pollock's Bill, had been incorporated into Brougham's Bill; although other clauses, dealing with donatives, sequestration and clergy discipline had also been added. 28 In those composite respects Brougham's Bill seemed to be close to what the General Report had recommended.
Secondly, his Bill followed the letter if not the spirit of the General Report in seeking to preserve a provincial court at York, and it also sought to safeguard the sinecurist registrars for their lifetimes. These perverse features of the measure were not referred to in his speech on 13 March 1835, as it was reported. The retaining of the York jurisdiction might have appealed to Brougham's Northern connexions. He had represented Yorkshire constituencies and his country seat was near Penrith. He was aware of the hostility to the abolition of local courts and may have judged that his support for York could be to his advantage. On the other hand, his friend and adviser Lushington was opposed both in private and in public to keeping any testamentary jurisdiction at York.

Thirdly, Brougham proposed to deal separately with wills of real property. He did not explain or develop his plans, although they did appear to involve an unlikely collaboration with Campbell.

However, none of Brougham's scheming was to have any bearing on the progress of reform or on the fortunes of the Government of the day. Peel's administration fell on 18 April 1835. At no point during such a short period had Peel's Ministers been able to control the ordinary business of the House, and the proposed reform of the ecclesiastical courts was only one of many casualties. 'In these circumstances the legislative programme of the ministry from which so much had been expected made singularly little impact.' More specifically, there was evidence, as has been shown above, to suggest that Pollock's Bill had begun to run into difficulties at the earliest possible Parliamentary stage. Those same difficulties were to dog Lord Melbourne as Peel's successor in office.
Notes to Chapter 8.

1. BL, Add.Ms.40318, ff.20-21, 31 Jan.1835, Peel to Graham.


4. See n.1.

5. BL, Add.Ms.40407, ff.204-05, 24 Dec.1834, Nicholl to Peel.


7. MMP, L.91, memorandum by Sir John Nicholl, [April 1835].


9. MMP, L.82/1/(i). A Bill...to consolidate the Jurisdiction of the several Ecclesiastical Courts in England into One Court, and to enlarge the Powers and Authorities of such Court; and to alter and amend the Law in certain Matters Ecclesiastical; and to provide for due Execution and Proof of Wills of Real and Personal Estate, 1834.


11. See n.1. Graham told Stanley about his correspondence with Peel, 'it proves how much he relies on us both for measures and support', see GP, 2 Feb.1835, Graham to Stanley.


15. See n.7.

16. MMP, L.82/1/(ii). A Bill...to consolidate the Jurisdiction of the several Ecclesiastical Courts in England into One Court, and to enlarge the Powers and Authorities of such Court; and to alter and amend the Law in certain Matters Ecclesiastical, 1835.


18. MMP, L.91, 16 March 1835, Jenner to Nicholl.


20. CJ, 90, 1835, p.117.


22. Ibid., c.919.

23. House of Lords Record Office (HLRO), Appendix to Reports of Commons Select Committee on Public Petitions, 1835, pp.92-93, 111-12, 130-31.

24. MMP, L.127, 30 March 1835, Pollock to Sibthorp.

25. MMP, L.91, [March 1842], gloss by Dr Nicholl on copy of letter of 30 March 1835, Pollock to Sibthorp.

26. MMP, L.127, 7 April 1835, 'Heads of a Communication'.

28. P.P.1835 (18) i. A Bill...to consolidate the several Ecclesiastical Jurisdictions in England and Wales, and to enlarge the Powers and Authorities of such consolidated Jurisdictions; and to alter and amend the Law in certain Matters Ecclesiastical, see also MMP, L.82/1/(vi).

Chapter 9: Attempts to reform the ecclesiastical courts, 1835-1841; 'The difficulty is confined...to the manner of dealing with the local courts'.

It has been said of Melbourne's Cabinet, notorious for its slackness of discipline, that its unambitious agenda 'was to deal with the results of what had gone before'. Similarly, Gash has observed that in the legislative programme set out at the end of May 1835 there was no move to interfere with the work being done by Peel's Ecclesiastical Commission or to find new remedies for dealing with Dissenters' grievances.

The same attitude was shown towards the Ecclesiastical Courts Bill. Versions of a Bill appeared within the first few months of Melbourne's ministry, close in content to the measures prepared by Graham and Pollock. There was an unsuccessful reforming attempt in the Lords in 1836 by Melbourne's new Lord Chancellor, Cottenham, which provoked so much local opposition that a Select Committee of the House of Lords recommended the qualified retention of the diocesan registries, and an 'opposition' bill was prepared. There followed years of ministerial inactivity, justified in part because of the difficulties associated with the Church Discipline Bill. Then, in 1841, at the close of Melbourne's administration, Cottenham prepared but never brought forward a modified version of his 1836 Bill.

The remaining months of the 1835 session were punctuated by sharp encounters between Campbell, restored to his former post of Attorney-General, and Sibthorp, 'the embodiment of old-fashioned prejudice' and the dynastic MP for Lincoln where Robert Swan was so active. Campbell told Peel on 5 June that the Government would be bringing in a measure; but on 11 June he was confronted with a demand from Sibthorp for a Select Committee to consider the creating of a local testamentary court in each county. Many of the public petitions were asking for that level of provision and Pollock's injudicious letter to Sibthorp at the end of March had hinted at such a solution. Again Campbell promised a Bill, but without being able to say then whether it would be a revived version of Pollock's Bill or merely a short measure to deal only with tithes.

A printed measure of seventy-six clauses, surviving at Merthyr Mawr and described by Dr Nicholl as 'Lord Melbourne's Bill', is identical in all its essentials with Pollock's earlier Bill, apart from some re-arrangement and re-numbering of clauses. It may well be the Bill which Campbell, who had evidently changed his spots yet
again since his spell in opposition, sought leave to bring in on 22 June. He described it as being Pollock's Bill, but it was not the Bill which was to have its first reading on 8 July, as will be discussed below.

Campbell made two miscalculations in seeking leave bring in any such Bill at such a time. His first miscalculation was to do so at 2.30am in a thin House and after a long debate on the Municipal Corporations Bill. His second miscalculation was to do so when Sibthorp was present. The House was counted and adjourned because of the lateness of the hour, but not before Sibthorp had asked Campbell directly if the Bill would abolish all the local courts, had quoted back at the Attorney-General his own speech on 12 March in favour of the diocesan courts and had warned him that 'I have been requested by many persons to watch this Bill'. When the debate was resumed the next day, leave was given for Campbell, Rolfe and Lushington to bring in the Bill. That happened to be what Sibthorp wanted, in order that he could scrutinise the Bill, but again he took the opportunity to harrass Campbell by suggesting that the measure would be 'a Doctors' Commons job, pressing very heavily on country practitioners and officers, as well as on the poor man who is client or suitor', and that it had been the product of collusion, 'hatched' by one Attorney-General and 'brought to light' by the other. The Bill which was eventually presented for first reading on 8 July was the measure described by Dr Nicholl as 'Dr Lushington, 1835'. It was remarkable in a number of ways. First, Lushington had said in the debate on 12 March that he had an interest in bringing forward a Bill, and Nicholl was well placed to know the extent of Lushington's contribution. Secondly, the copy of Lushington's Bill at Merthyr Mawr is so annotated as to make it clear that it harked back directly to Graham's Bill. Of the eighty-eight clauses which made up Lushington's Bill, almost seventy had appeared originally in Graham's version, and the added clauses dealing with tithe suits and church rates accounted for most of the remainder. Thirdly, Lushington gave prominence to the concentrating of all probate jurisdiction in London, a principle to which he was committed. Fourthly, the Bill was the only such attempt so far to reach the status of an authorised parliamentary paper, and its heads were published by the Legal Observer on 25 July. None of those credentials helped a Bill introduced so late in the session to move forward. There was pressure of other business caused by the Municipal Corporations Bill and the Irish Church Temporalities Bill on the one hand, and pressure from
hostile petitions on the other hand. The intention had been to have the second reading on 14 July, but that stage was delayed eight times before the Bill was dropped on 4 August.\textsuperscript{15}

During that period, Campbell was tackled about the Bill on several occasions. The link between Sibthorp and the organised opposition to the Bill was made plain enough when he accused Campbell of inconveniencing its opponents by keeping 'many individuals of the highest respectability in this country' hanging about in London; and Sibthorp remained distrustful of Campbell, 'I can tell him that I will watch him and his proceedings in reference to this Bill with as much vigilance, night and day, as an old cat watches over a mousehole'. At the end of July, it was being claimed that 166 hostile petitions bearing over 10,000 signatures had been received, and that most of the signatories were 'professional men' who would face serious hardship if the Bill went through as it was. By mid-August, the number of signatories had risen to 11,400, although there were marked similarities between some of the texts submitted. In the Commons on 24 July, eight MPs from constituencies as far flung as Westmorland, Lincoln and Norwich had asked Campbell either to abandon the measure or to reintroduce it next session so that people would have time to consider its provisions.

In all these circumstances it was hardly surprising that by 31 July 1835 Campbell and Sibthorp were agreed on one thing, that nothing more could be achieved in that session.\textsuperscript{16}

Before the start of the next session a move was made by the London proctors. They stood to gain most by the proposed consolidation and concentration of testamentary business, and had been alarmed at the strength of the country opposition. The senior proctors formed a committee of fifteen members, chaired by the King's Proctor, Iltid Nicholl, cousin to Sir John Nicholl, and sent a Memorial to the Government. The proctors were expecting a measure to reappear in the new session and were anxious to make, in good time, three points in their own favour. First, that in respect of testamentary business only Doctors' Commons could offer the public 'uniform and correct practice', by contrast with the 'errors and mistakes of incompetent persons' in the country courts. Secondly, that it was not only efficient but also feasible to have a central registry of wills, since 'travelling to and from the metropolis is now so rapid'. Thirdly, that there needed to be sufficient business at Doctors' Commons to hold together the expertise of civilians in international law. The only unexpected feature
about the Memorial was that it contained a gesture of sorts towards those parties who would suffer as a consequence of centralising reform. The London proctors had addressed their Memorial to the Home Secretary, Lord John Russell, but the man asked by Melbourne to pilot the revived Bill through Parliament was neither Russell nor Campbell but the new Lord Chancellor, Charles Christopher Pepys, Lord Cottenham. There may have been some tactical advantage in choosing the House of Lords because Campbell had had a bruising experience in the Commons in the previous session, and Russell was extremely busy with other matters. Cottenham had emerged from relative obscurity as a Chancery barrister to succeed Campbell as Solicitor-General in February 1834, until made Master of the Rolls that September. He had then had the advantage of serving capably alongside Shadwell and Bosanquet when the Great Seal was in commission, after Melbourne's refusal to tolerate Brougham as Lord Chancellor. Both of Cottenham's attempts, in 1836 and 1841, to bring about the reform of the ecclesiastical courts have been undervalued, partly because they were unsuccessful and partly because he has the reputation of having been a poor performer in Parliament. Cottenham became Lord Chancellor on 17 January 1836; the session began on 4 February without any mention of a Bill; he gave notice of a Bill on 8 February; the 'Ecclesiastical Courts Consolidation Bill' was introduced on 12 February and after a brief debate it was ordered to be printed. Cottenham's Bill was comparatively short, seventy-seven clauses. Just as Lushington's Bill in July 1835 had been modelled upon Graham's Bill, so did Cottenham's Bill follow that of Lushington. Clauses 1-4, abolishing the existing courts, were identical. Clauses 5-23, establishing the new central court, were also identical, apart from the necessary removal of the money clauses. The remaining clauses, which dealt with tithe suits, church rates and sequestrations, were re-numbered but identical. Denman could later, and correctly, describe Cottenham's Bill as 'a mere nonscript' of what had gone before. It also continued to be overtly non-partisan. Lyndhurst traced its genealogy back to the General Report, claimed to have had it mind to introduce such a Bill himself and predicted that it would be well received on both sides of the House of Lords. In the event, Cottenham's consolidating and centralising Bill immediately provoked a far greater variety of responses in 1836 than there had been in 1835. There were familiar elements, but there were also others which were new and shifting.
What was certainly new in 1836 was the level of interest shown in the Bill by the *Legal Observer* and also, but to a lesser extent, by the *Law Magazine* and *The Times*. In the previous July, the *Legal Observer* had published only the heads of Lushington's Bill, but in 1836 it published a 'full abstract' of Cottenham's Bill. Maugham justified that treatment because of the importance of the Bill 'to the members of the profession, both in town and country'. He drew attention approvingly to the proposed new and centralised court of probate, and in a later comment, but drafted before the second reading, he stressed the benefit to the public of reduced costs and delays. The only difficulty Maugham had with the Bill at that stage was that it conditionally allowed the proctors and notaries from the abolished courts to practice in the new court but prevented solicitors and attorneys from doing so. 25 Maugham's early and overall support for the Bill was to evaporate, however, after the proper debate on its contents got under way.

Meanwhile, *The Times* had printed a full report of the speeches of Cottenham and Lyndhurst at first reading, and recommended *Chitty's Practice of the Law*, the volume dealing with the ecclesiastical courts, to those members of both Houses who wished in the interval to understand 'the evils which the Bill proposed to remedy'. 26 The atmosphere changed quite abruptly on 22 February, immediately prior to second reading, when no less than five peers presented a number of public petitions hostile to the Bill. 27 The demands which that crop of petitions had in common with those which were to follow were epitomized in the petition presented on behalf of the registrars, deputy registrars and proctors of 'the Country Ecclesiastical Courts in England and Wales'. That petition asked for an inquiry into the circumstances of the 'Country Ecclesiastical Courts'. The aim was to see if the abolition of the inferior jurisdictions and the consolidation of the diocesan jurisdictions might not lead to 'one Court in each County or other District more convenient to the Public' instead of 'One expensive and unwieldy Establishment in London'. An associated aim was that the public should be able to choose between such a local court and the new court in London when probate was uncontested. However the campaign may have been co-ordinated, those demands appear to have had the backing of the other petitioners, namely, the barristers and solicitors of Norwich, the solicitors of Dursley, Salisbury, Stroud, Cirencester, Brecon, Buckinghamshire, Gloucester, Lewes, Exeter and Worcester, and the inhabitants of most of those towns, as well as the Archdeaconry of Norfolk. 28
Peers, like MPs, might have been no more than conduits for public petitions emanating from areas where they had territorial interests or their country seats, but Ellenborough and certain other peers, then and later, performed a much more active role. When the debate on the Bill itself was under way, Wynford and the Bishop of London, both former Commissioners, supported the view that it would be less expensive to take out probate in London. However, Ellenborough and Devon, whilst neither wanted to hold up the Bill, spoke in favour of the inquiry demanded by the petitioners. Ellenborough had been a member of Wellington's Cabinet when the Ecclesiastical Courts Commission was appointed, but his links with the Law dynasty of Anglican prelates, his belief that the public had a right to local probates, and the weight of the petitions received, are all likely to have influenced his reaction to Cottenham's centralising Bill. What Ellenborough proposed was that the committee stage of the Bill be postponed until a Select Committee of the House had reported on the petitions and had devised 'a proper remedy'. As members of the Committee he suggested, first, those peers who had already served on the Ecclesiastical Courts Commission, namely the Archbishop of Canterbury, the Bishops of London, Lincoln, St Asaph and Bangor, and Lord Wynford. Secondly, he added the names of the Lord Chancellor, the Lord President, Devon, Rosslyn, Eldon, Manners, Lyndhurst, Plunket, Brougham, Abinger, Denman and Langdale. Ellenborough, who sat frequently on committees, was to take the chair himself. Almost all of those named were present in the Lords on the day and were appointed; Radnor and Melbourne were added the following day.

The result was a formidable and heterogeneous Select Committee made up of prelates who had endorsed the centralising thrust of the General Report, landed magnates who had just presented hostile petitions, senior common lawyers with an interest in law reform, and the Prime Minister. There could be no direct civilian influence upon its deliberations because Lord Stowell had died in January 1836, and, besides, his mind had gone some two years before that. In the event, however, the Committee did propose a significant modification to the Government's plans, a modification which seems to have originated behind the scenes with Sir John Nicholl and can thus be interpreted as an indirect attempt by a distinguished civilian to save the Bill. Nicholl's intervention will be discussed below.

Meanwhile, on 22 February, Cottenham had to admit that the Bill had 'excited considerable interest throughout the country', and he did not attempt to oppose the
idea of a Select Committee. Instead, he succeeded in restricting the evidence before it to the General Report and the petitions received, and, for good measure, he questioned the efficiency of preserving 'at least 26 courts, one in each diocese'. In saying that he offered Lincoln as an example of a diocese so large and sprawling that having to deal with a central court in London could only be an improvement. With any other Lord Chancellor that would have been a mischievous remark directed at the heart of the local opposition. Denman, a committed law reformer, also contributed to the debate. His hope seems to have been that the Committee could devise some means to get rid of the inconvenience which had been complained of without affecting the principle of the centralised court.

The *Legal Observer* did not immediately alert its readers to the extent of the hostile campaign in the country and in the Lords, but it was visibly shifting its ground throughout March, when petitions opposed to the Bill were being presented in the Lords almost every other day. In fact the *Legal Observer*'s weekly coverage during that month acts as a barometer of the opposition. In the issue of 5 March, a central court 'whither the communications are so easy and frequent' was still considered to be of general advantage, but, with one eye on the 'legal profession in all parts of the country', the periodical now allowed that it might be convenient to grant probate locally 'in cases of small magnitude'. It also thought that the General Report might not have recommended the wholesale abolition of the local courts if the Commissioners had considered the idea of a reformable court in each county or diocese, and it noted again the 'grievance', as it was now described, of solicitors and attorneys being excluded from practising in the new court. Another related matter which gave concern to the *Legal Observer* was the proposal to give to the new court a jurisdiction to deal with executors and administrators over personal property which would be concurrent with that of the Court of Chancery. Thus, as the Bill was drafted, the monopoly of business guaranteed to the proctors would take away business from the practitioners in the Court of Chancery.

The readers of the *Legal Observer* were similarly responsive to what was happening in Parliament. On 19 March a letter from 'W.F' welcomed the creation of the new court, but suggested, as did many of the petitioners, a 'middle course' whereby probates of small personal estates under £500 in value could be granted locally 'in the Bishops' Courts and be generally valid', with monthly returns made to the new court. That correspondent also referred to the 'many critiques in the provincial
papers' which favoured the retention of the existing system. In the same issue, Maugham noted that a 'multitude of petitions' had been presented against the Bill, and a week later it was claimed that nothing had emerged from the Select Committee and that the Bill would not now be proceeded with until after the Easter recess. In the March Supplement to the Legal Observer, 'J.A.M.', another correspondent who professed to support the new centralised system, nevertheless warned against the extra expense likely to be incurred 'where the executor or administrator is remote from London', and suggested that the London proctors should be prepared to reduce their fees 'in recognition of the benefit of nearly all this immense increase in business'.

What the Legal Observer was now responding to was the fact that, in the interval between the appointment of the Select Committee on 22 February and its report at the end of March, something like 200 hostile petitions were presented in the Lords. These came from solicitors and proctors in market towns and cathedral cities as widely spread as Cornwall, South Wales, Westmorland and Yorkshire, and came also from the inhabitants of remote rural parishes. The Earl of Falmouth spoke about the needs of the 'poorer classes' in isolated communities, and the Duke of Rutland described his inspection of the registry in Leicester, 'a convenient and secure apartment', from which 50,000 wills would have to be transferred to London if the Bill went through, even though most of the searches there were carried out by or for local people. All the petitions received prior to the end of March were referred to the Select Committee, and those received later, because another fifty or so trickled in between April and July 1836, were laid on the table.

It was at this point, in mid-March 1836, that Sir John Nicholl contacted Lyndhurst, the former Lord Chancellor and a member of the Select Committee, with a number of compromise suggestions which seem to have been intended to save the Bill. The most notable were that the diocesan registries should be allowed to handle non-contentious probate business of small value, and that the diocesan registrars themselves should be salaried and appointed by the new judge. Nicholl's suggestions were passed by Lyndhurst to the Lord Chancellor and a meeting took place within days between Cottenham, Lyndhurst, Nicholl and Lushington to discuss and revise them. Cottenham seems to have treated Nicholl, then in his late 70s, with great deference and possibly gratitude, and the compromise suggestions quickly appeared in a recognisable form in the Select Committee's Report.
When the Report was ready, on 29 March 1836, it was printed verbatim in the Lords Journal and in The Times and in summary form with a commentary in the Legal Observer. In those ways it soon became public property.

The Committee had confined itself to considering the expedience of preserving the diocesan courts. That was because the bulk of the petitions received had been about the inconvenience to those in country districts in having to prove wills of small value in London if the diocesan courts were abolished. Relatively few petitions had sought to retain any of the inferior courts. The Committee agreed that there should be a metropolitan court, but proposed 'a modification of the Centralization Plan', as the Legal Observer put it, in order to give the convenience of local access to 'persons residing at a distance from London'. The detail of the modification was that each diocesan registrar would be appointed as an officer and surrogate of the new Court of Probate, with authority to deal with uncontested business under the value of £300, and would be required to forward the papers to the court in London for preparation and perfection after a period of fourteen days for local access and inspection. The diocesan official would then receive back a probate copy of the will for transmission to the party concerned, together with an official registry copy, whilst the original will would be kept in London. The Committee estimated that the cost of providing 'local officers of the London court', as well as the related expenses of the central court, could be met out of fees charged locally, and would still allow a payment of £500 to each diocese to remunerate its registrar, although that payment would have to be linked to a reduced level of compensation where appropriate. It was felt by the Committee that this balancing 'modification' of the Bill should produce an efficient and centralised probate court in London, a safe and centralised registry for original wills in London, and a network of convenient and country registries controlled from London but accessible to 'persons residing in country districts...probably without going further from their own homes than they are under the necessity of doing under the present system'.

It might indeed have been supposed that this cluster of compromises, produced in little more than four weeks and immediately accepted by Cottenham as an amendment to the Bill, would have placated local interests. Instead, the attacks were renewed.

The first thoughts of the Legal Observer had been that the 'gentlemen from the Provincial Ecclesiastical Courts' would be pacified, but that assumption was
challenged in its own pages, on 30 April, by 'A Country Registrar and Solicitor' and then, on 7 May, by the publishing of a petition from the registrars and proctors of the Province of Canterbury. The petition had been presented to the House of Lords on 25 April, but it was given an airing in the *Legal Observer* because 'all branches of the profession are entitled to have their case stated in these pages'. After the familiar complaints about how damaging the Bill would be to the interests of the general public and to local practitioners, the petition demanded a proper inquiry, involving the examination of witnesses, into the remodelling and improvement of the existing local courts. It was argued that those courts were capable of becoming as efficient as Parliament wanted them to be 'by consolidation, with one court in each county, diocese or district'; their registries were at least as secure as those in London; and their retention had been demanded 'by upwards of two hundred petitions'. The registrars also claimed that, apart from one petition from an individual disgruntled with a local court, the only document in favour of the Bill had been the Memorial from the London proctors.  

Maugham's editorial note on 7 May had rightly reminded the country registrars about the authority behind the General Report, but by then other aspects of the Bill had begun to worry him. On 16 April, he had again attacked the privileged position already enjoyed by the proctors at Doctors' Commons. They formed an exclusive profession; there was no established control over what they charged; and their bills were taxed only with their own consent; and yet they were to be given even more business under the Bill. On the other hand, proctors from the abolished courts, who might be reluctant anyway to remove their business to London, would have to apply to be admitted to Doctors' Commons subject to certain conditions; and those solicitors who acted as proctors in the country courts, despite having experience and skill, would continue to be excluded. His second thoughts about the Committee's 'modification' were that the local registrars should be given the power as surrogates to actually grant probate themselves.  

By contrast with Maugham's *Legal Observer* and its need to expand its readership among country solicitors, the *Law Magazine* devoted relatively little space to Cottenham's Bill. In May 1836, it simply noted that the Bill 'is at present in progress through Parliament, and expected to pass'.  

In fact, the opposition towards the centralising thrust of Cottenham's Bill was poised by that time to take a different form.
In the previous November, John Jervis, barrister and MP, had been in touch with Brougham about the need to find an alternative to a Bill based upon the General Report. Jervis represented Chester, where there was the third busiest probate registry, and he had sat on the Commons Select Committee in 1833 in his capacity as Counsel to the Admiralty. He told Brougham that he was not satisfied with legislation which 'proceeds upon centralization' and sent him a plan which preserved the diocesan courts for non-contentious business and required the referral of 'questions of difficulty' to London for determination.38

By June 1836, that plan had transformed itself into a Bill brought into the Commons by Edward Goulburn, MP for Leicester, Edward Stillingfleet Cayley, MP for the North Riding, and Jervis himself. 'Goulburn's Bill', as Dr Nicholl described it, consisted of seventy-two clauses, but at its significant core was the proposed retention of the diocesan courts and their registrars; a special arrangement which gave the Prerogative Court in London a direct jurisdiction in the Home Counties; and the option for parties to obtain probate either where they lived or in London.39 Dr Nicholl later described this Bill as resting on no greater authority than the 'interested representatives of Country Registrars', and its authors were categorised disparagingly. Goulburn represented 'a commissariat town'; Cayley was 'a country gentleman', and Jervis was MP for 'a diocesan town'.40 Nicholl applied a 'public good' test to their proposals and concluded that the Bill sought to 'admit the Diocesan Courts to a large proportion of the business now dispatched by the Superior Court, contentious and voluntary', despite the fact that those local courts had 'no competent Judges, no Bar, no Practitioners educated for the particular branch of law'. Swan explained the significance of Goulburn's Bill directly to Peel, then leader of the Opposition. He linked it to the letters from Pollock to Sibthorp, and from Dr Nicholl to Follett, and pointed out that the measure was entirely consistent with the offer which Pollock would have been willing to make in 1835 had Peel's administration survived, an offer which the country registrars were now willing to accept. The alternative Bill provided a system of courts which would be 'more convenient and satisfactory to the country' because it introduced the option between proving a will either in London or locally, determined by the last place of residence and discarding the bona notabilia rule.41
Neither Goulburn's Bill nor Cottenham's Bill were destined to go any further in their respective Houses.

The second reading of Goulburn's Bill in the Commons was deferred several times during June and July and was still in limbo when the session ended on 20 August. What it did achieve, however, was the expression of local demands in legislative form.

The failure of Cottenham's Bill in the Lords can be attributed to a number of factors. First, as described above, there was the discomfort for Government caused by hostile petitions, as nagging and repetitive as they had been in the Commons in the previous session.

Secondly, the Government had been placed under similar pressure in the Lords when the Church Discipline Bill was being debated in June and July. The argument put forward by the bishops was that the authority and structure of the diocesan courts could not be tampered with in respect of testamentary jurisdiction until the role of those courts in respect of clergy discipline had been debated and defined. That attitude not only held up Cottenham's Bill in 1836 but it also constituted a problem throughout the remainder of Melbourne's administration, as Mathieson has shown. Thirdly, there was much friction throughout that session between the Tory-dominated House of Lords, where Lyndhurst played a prominent wrecking role, and the Whig-dominated House of Commons, and by the end of the session Cottenham's Bill was only one of many resulting casualties.

To add to Melbourne's discomfiture, the relative failure of his legislative programme was attacked in the Lords on 18 August in Lyndhurst's review of the session. The Government was accused of doing nothing about the Consolidation Bill subsequent to the Report of the Lords Select Committee, 'From that time to the present the Bill has been allowed to slumber; not the slightest attempt has been made by the Ministers of the Crown to pursue this important measure'. In reply, and referring to both the Consolidation Bill and the Church Discipline Bill, Melbourne said that 'the lateness of the session, and I candidly admit it, the opposition which sprung up against them at that late period, rendered it impossible to carry [them] through this session'. Nor did he see anything unusual in Ministers having to defer 'a measure which they considered of great importance until a future time'. The epitaph on Cottenham's Consolidation Bill was spoken, fittingly, by Joseph Hume, who had campaigned for the reform of the ecclesiastical courts since the
1820s. On the one hand, he was critical of the ways in which the Lords had mutilated and delayed a number of other reforming measures and thought it a 'monstrous proposition' on the part of Lyndhurst to claim that Ministers alone were to blame. On the other hand, he said that Ministers were 'chargeable with some degree of negligence' for not having done more to press forward with the Bill. Nonetheless, he hoped that they would 'by next session, be prepared to introduce a Bill for the regulation of the ecclesiastical courts, which were so important for the interests of the community'.

In fact, although it could not have been predicted, there was to be no serious sign of movement towards the reform of testamentary jurisdiction until 1841, close to the end of Melbourne's ministry, although debates about church rates and clergy discipline served to keep the ecclesiastical courts under general scrutiny. Instead, between 1837 to 1841, questions were asked at intervals in Parliament about the prospect of a Bill, only to be answered evasively from session to session by Lord John Russell as Leader of the Commons. It became evident that the Government was struggling to secure the agreement of the bishops to the Church Discipline Bill and that the Ecclesiastical Courts Bill was being held in abeyance meanwhile. It was only in August 1840, when the Church Discipline Bill was far advanced in the Commons, that Russell, sensing that the way was about to become clear, announced that the Government was intending to introduce 'the more general measure...in another Session'.

The imminent introduction of a Bill was rumoured at the beginning of the 1841 session. When questions were asked in both Houses, the consistent line taken by Cottenham and Russell was that a general measure would be introduced as early as possible and in the Lords. In fact, the promised Bill was not ready until June 1841, and even then it was not presented and ordered to be printed. Copies were printed for limited circulation only, and one such has survived at Merthyr Mawr, endorsed by Dr Nicholl as 'The Lord Chancellor 1841'. Cottenham himself had explained the genesis of the Bill to Howley on 16 May 1841, describing an enclosed copy as being 'founded upon the former Bill [of 1836] with the alterations proposed by the [Lords] Select Committee'. A short Bill of seventy clauses, it retained the secular description of the new 'Court of Probate', a term preferred by Lushington; because it was a Lords Bill it lacked the money clauses dealing with pensions and the like; at Clause 27 it required that wills of real property be registered with the new court; and
Clauses 28-32 converted the country registrars and their registries into officers and branches of the new metropolitan court, with authority to handle the initial stages of non-contentious probate business under £300 in value. The Bill also dealt with the abolition of criminal jurisdiction, with tithe matters and with church rates.

By that stage in the session, however, Melbourne's administration was exhausted and vulnerable to attack. He chose to dissolve Parliament after a 'no confidence' vote in June, and Peel scored an overwhelming victory in the ensuing General Election.

When Sir James Graham had taunted Russell on 28 May with a litany of failed bills the Ecclesiastical Courts Bill had been on his list. In truth, though, there could never have been a place in such a crowded and confused session for such a Bill. However desirable, it was likely to have been seen by Melbourne's jaded ministers as a vexatious addition to their existing troubles.

By contrast with what had gone before, Peel's second administration was to begin more purposefully.
Notes to Chapter 9.

1. *Mirror of Parliament*, ii, 25 May 1835, pp.1042-43, reporting Brougham in the Lords, 'The difficulty is confined to one point which is of a most embarrassing nature, I mean as to the manner of dealing with the local courts; perhaps the better way to cut the knot would be by passing all the other parts of the Bill'.


4. DNB, lii, p.188; 'I have long been of the opinion that the county of Lincoln is ruled chiefly by agents and attorneys and that in no other county have they such power', see Olney, R.J. *Rural society and county government in nineteenth century Lincolnshire*. Lincoln, Committee for Lincolnshire History and Archaeology, 1979, p.46, quoting Sir Charles Anderson in Hill, Sir Francis, *Victorian Lincoln*, London, Cambridge University Press, 1974, p.182.


7. MMP, L.82/1/(iii).

8. Robert Monsey Rolfe, who was Solicitor-General in Melbourne's administrations, was to grapple with Ecclesiastical Courts Bills in the 1850s when he was Lord Chancellor as Lord Cranworth.


11.P.P.1835 (363) ii. A Bill...to consolidate the Jurisdiction of the several Ecclesiastical Courts in England and Wales into One Court, and to enlarge the Powers and Authorities of such Court, and to alter and amend the Law in certain Matters Ecclesiastical; see also MMP, L.82/1/(v).


13. Pollock's earlier Bill was never ordered to be printed.


15. CJ, 90, 1835, pp.448-516, passim.


17. P.P. 1836 (43) xxv, pp.183-90. Memorial of the Committee appointed at a meeting of the Procurators General exercent in the Ecclesiastical Courts and the High Court of Admiralty...on 10 December 1835, ordered to be printed on 28 March 1836.


22. P.P. 1836 (4) iii. A Bill... to consolidate the jurisdiction of the several Ecclesiastical Courts in England and Wales into One Court, and to enlarge the Powers and Authorities of such Court; and to alter and amend the Law in certain matters ecclesiastical; see also MMP, L. 82/1/(vii).


28. LJ, 18, 1836, pp. 32-33.


30. LJ, 18, 1836, p. 78.


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33. For the exchanges between Nicholl and Cottenham, see MMP, L. 91, 13-19 March 1836; see also Hutton, B.G. 'Sir John Nicholl of Merthyr Mawr: The Reform of the Testamentary Jurisdiction of the Ecclesiastical Courts', Cardiff, Welsh Legal History Society, 2001, i, pp.99-100.

34. LJ, 18, 1836, pp.96-97; The Times, 5 April 1836; LO, xi, 9 April 1836, pp.455-56.

35. LO, xi, 30 April 1836, p.495; xii, 7 May, pp.18-19.

36. Ibid., xi, 16 April 1836, pp.458-60.


38. University College London, Brougham Papers, ms.4374, 18 Nov.1835, Jervis to Brougham.

39. P.P. 1836 (302) iii. A Bill... for amending the Law in Ecclesiastical Matters, and to consolidate and amend the Courts for the Probate of Wills and granting of Letters of Administration throughout England and Wales; see also MMP, L.82/1/(vi).

40. MMP, L.128, Memorandum by Nicholl on Goulburn's Bill, 1843.

41. MMP, L.127, 16 June 1836, Swan to Peel.

42. Lushington said later that Cottenham's Bill had miscarried in 1836 'not because of the opposition of the various interests affected...but because the bishops were of the opinion that such a measure ought to be preceded by a clergy discipline bill', see Mirror of Parliament, i, 21 Feb.1839, pp. 457-58.


44. Hansard, 3d.ser.,xxv, 18 Aug.1836, cc.1285,1308.
45. Ibid., 20 Aug. 1836, c. 1342.


47. MMP, L. 132, 1 Feb. 1841, Nicholl to Howley.


49. MMP, L. 82/1/(ix). A Bill...to consolidate the Ecclesiastical Courts in England, and to amend the Law in certain Matters Ecclesiastical [1841].

50. MMP, L. 133, 16 May 1841, Cottenham to Howley.

Chapter 10: Preparations for the 1843 Ecclesiastical Courts Bill, 1841-1842; 'Bills do not spring like Athene of old, fully fashioned from the head of some ministerial Zeus'.

A consistent feature of Government policy throughout the first three years of Peel's second ministry, measured from late July 1841 to the beginning of July 1844, was its commitment to the reform of the ecclesiastical courts and their testamentary jurisdiction. As a consequence, the Ecclesiastical Courts Bill was an integral part of the Government's agenda of reform, and Chapters 10 to 13 will follow the chequered fortunes of that proposed legislation.

Both Peel and his Home Secretary, Sir James Graham, were involved from time to time in making policy decisions and alterations concerning the Bill, Graham in particular playing a crucial part. But it was Dr John Nicholl, as the junior minister with special responsibility for the Bill, who was required to be heavily committed throughout that three year period in drafting and re-drafting versions of the measure, and in dealing, directly or indirectly, with interested parties. Those versions initially took as their authorities the centralising recommendations of the General Report and the modifying pronouncements of the Select Committees of both Houses, and managed to follow them closely if never comprehensively. It was the centralism of the 1843 Bill which met with opposition in the Commons, prompted by local vested interests, although its progress was also thwarted by more pressing legislative business. Then, in 1844, the Government offered a much altered Bill, intended to placate troublesome local interests and yet achieve some degree of reform. Like its predecessor, that second version of the Bill still proposed to abolish the peculiars, a relatively non-controversial matter; but it also proposed to leave intact the testamentary jurisdiction of the diocesan courts, the opposite of what had been in the 1843 Bill and the opposite of what all the authorities had recommended. That Government exercise in pragmatic gradualism was attacked by those who had supported the previous measure and who thought the 1844 version did not go far enough. The 1844 Bill, although it managed to pass the Lords, was abandoned in the Commons. Once again other pressing business was a factor in causing it to be dropped. Although the administration continued into 1845 it brought forward no further Bill. That task was left to a frustrated Opposition.

The present chapter examines the detailed preparations made by Nicholl, between
October 1841 and July 1842, to draft and bring in a Government Bill. It also examines the early stages of Nicholl's difficult dealings with self-interested practitioners, not only at Doctors' Commons where he had plied his trade as an advocate but also at York; with the equally self-interested country registrars for whom he had little professional regard; and, finally, with the bench of bishops, some of whom treated him either as an officer of the Archbishop of Canterbury or as a mere junior minister. Nicholl's central problem, as it emerged, was that of finding a formula which would divide the non-contentious testamentary business between London and the country in a way which was acceptable to both sides, but he was also hampered by the hybrid nature of the Bill.

Like the other chapters dealing with Peel's second administration, this chapter draws heavily upon the rich and unique archive of the Nicholl family at Merthyr Mawr. It is rich in the sense of being plentiful. It is unique because it shows how a sensitive piece of law reform could be opposed before it was even presented to Parliament and whilst its contents were still confidential to a degree.

Gash suggests that Peel had begun to consider the composition of his Cabinet as early as June 1841, and that he had probably reached an understanding with those who would fill the more senior posts well in advance of 30 August, when he kissed hands. Graham, the new Home Secretary, was quick to give advice on appointments and policy. On 27 July, he urged Peel to appoint Follett and Thomas Pemberton, MP for Ripon, as Attorney-General and Solicitor-General respectively, and to ask the latter to introduce a measure 'for the amendment of the Ecclesiastical and Equity Tribunals'. What Peel did instead was to recall Pollock and Follett to the posts they had held in his first administration, although neither was to serve a full term under him. As to the reviving and revising of the Ecclesiastical Courts Bill, Peel began to act as quickly as he had done in 1834, but he seems to have done so in response to voices other than that of Sir James Graham, and, moreover, he gave the immediate responsibility for the Bill not to a senior law officer but to Dr John Nicholl, MP for Cardiff.

The Bill's dramatis personae on the Government side were to include, at various times and to varying degrees over the next three or four years, Peel himself, Graham as Home Secretary, Lyndhurst as Lord Chancellor and Follett as Solicitor-General, but the person who was the constant factor at the centre of events throughout that period was Nicholl. His career to date, his credentials and his connexions deserve
some description, therefore.

John Iltid Nicholl was in his early 40s when he was asked to work on the Ecclesiastical Courts Bill, although his health was not good. He was the only surviving son of Sir John Nicholl and had succeeded to his father's estate at Merthyr Mawr near Bridgend when Sir John died in August 1838. His legal connexions were extensive. Nicholl had followed his father as a civilian lawyer and was admitted advocate in 1826. He practised at Doctors' Commons at a time when his father was Judge of the Prerogative Court, when his uncle, Sir Herbert Jenner, was King's Advocate, and when his cousin, Henry Iltid Nicholl, was King's Proctor, precisely the kind of incestuous links to which Manchester has drawn attention. John Nicholl also had a considerable professional regard for Stephen Lushington, despite the differences in age and political allegiance.

Nicholl's Anglican connexions were similarly extensive. His father was descended from a line of minor gentry and parsons in the Vale of Glamorgan. A sister had married the Dean of St Asaph. During their lifetimes his parents had been on friendly terms with the Howley family and Nicholl had succeeded his father as Vicar General and legal adviser to the Archbishop in 1838.

Finally, as a politician, Nicholl had been returned as MP for Cardiff in the Reformed Parliament with the support of the Marquess of Bute, and he held that seat until 1852, despite worsening health. He had served with Lushington on the Commons Select Committee in 1833, and had taken a harsher line than some over protests against church rates. He had also served previously under Peel, although only for a matter of weeks. Early in 1835, a junior Lordship of the Treasury had fallen vacant when W.E. Gladstone was promoted to the Under-Secretaryship of the Colonies, and Peel offered Nicholl the opportunity to serve with the other bright young men who made up the Treasury team. After some characteristically diffident hesitation over the risk involved in giving up a professional career for a political one, and after consulting both his father and Lord Granville Somerset, Peel's senior party adviser, Nicholl first declined the offer and then accepted it. As it turned out, he served only from 19 March to 20 April 1835, at which point the 'Hundred Days' came to an end. Then, in September 1841, when Peel came to fill the junior posts in his second administration, Nicholl was asked to become Judge Advocate General, principal legal adviser to the Commander-in-Chief of the Army, but not an onerous task. He agreed to do so only after consulting Somerset again; he also secured a
promise of continuing advice from Viscount Canterbury, Charles Manners-Sutton, the former Speaker of the House of Commons, who had himself been Judge Advocate General earlier in his career.11

Nicholl was already a junior member of Peel's administration, therefore, when it was decided to revive the Ecclesiastical Courts Bill and when he was asked to busy himself with it. He has provided a revealing and detailed account of related events up to March 1842, and his involvement in them. According to Nicholl's memorandum,12 Howley and Blomfield referred to the need to revive the Bill at a meeting of the Ecclesiastical Commission, probably at the beginning of October 1841 and shortly after Peel became Prime Minister. They spoke in the presence of Jenner and Nicholl, and Nicholl was asked to mention the matter to Peel in the Commons, which he did. A formal meeting was arranged between Peel, Graham and Nicholl just after 7 October, when the session ended, and it was at that meeting that Nicholl was instructed to prepare a 'scheme of a bill', to liaise with Jenner and to work under the direction of Graham.

Both Graham and Jenner had been heavily involved in the preparation of the 1834 version of the Bill, and Nicholl too brought certain advantages to his task. Quite apart from being a civilian, he was as informed as anyone could be about the Bill's genesis and chequered history to date. As his father's son he had in his possession a quantity of papers created or received by Sir John Nicholl as an Ecclesiastical Courts Commissioner, and also a complete set of bills prepared by successive governments or individuals throughout the 1830s. Nicholl knew exactly what bills he had because he itemised them in a note to Drinkwater Bethune, counsel to the Home Office, in December 1842,13 and because he was to compare and annotate them himself. Another advantage of a sort was that, as Howley's Vicar General, he had seen Cottenham's Bill in 1841 and had advised the Archbishop about it.14 However, he did not feel 'at liberty to show it to the present Government' after he became a junior minister because it had been sent to him as adviser to the Archbishop.15

Without providing dates, Nicholl's memorandum records a sequence of meetings between October and Christmas 1841. After '2 or 3 interviews' with the Home Secretary, Nicholl's scheme was ready and was shown by Graham to Follett. Then, in the course of a long meeting between Graham, Jenner and Nicholl, some modifications were made, and a further meeting was arranged between Jenner, Sir John Dodson, the King's Advocate, Nicholl and Follett, which Follett could not
attend. Nicholl met him separately to discuss the purely legal details in the proposed Bill, as distinct from points of general policy, and recorded Follett's praise for his work. Nicholl secured Graham's approval of the Bill and arranged for it to be printed and copies 'sent round to the different members of the Cabinet'. It was then close to Christmas. Somewhat later, Francis Barlow went through the Bill with Nicholl and Francis Rogers, and was generally approving. Barlow, a barrister, was personally close to Lyndhurst as well as being on his staff, and was watching over the Bill on behalf of the Lord Chancellor. Francis Newman Rogers, also a barrister, and author of works on ecclesiastical law and election law, had been Nicholl's own choice as Deputy Judge Advocate and had been helping him with the detailed drafting of the Bill.

The importance of keeping the senior prelates in the picture was not lost on Peel's administration. By 22 January 1842, Nicholl had been authorised to send copies of the Bill to Howley and to Blomfield, but he was required to ask them to treat the matter in confidence because 'the opinion of the members of the Cabinet has not yet been taken on the details of the measure tho' the draft has been circulated amongst them'. It seems that Graham had planned to have these copies sent out somewhat earlier but that Nicholl had suggested to him that 'the Bill could be sent in a more perfect shape' if the opinion of the Cabinet was known. The only outcome of Nicholl's caution was an unproductive delay.

The Queen's Speech intervened at this point. It was announced on 3 February 1842 that a measure would be introduced 'for the improvement of the Jurisdiction exercised by the Ecclesiastical Courts in England and Wales', and on the following day Peel explained in the Commons that that statement was 'exclusively confined to the amendment of the ecclesiastical courts' as recommended by the General Report.

Self-interested parties would have known no other details at that stage. After those announcements had been made in Parliament, a meeting was arranged with Howley and Blomfield at the Home Office on 11 February, which Jenner and Nicholl attended. Graham could not be present, but he had asked Lyndhurst for a note of any alterations he wished to have made to the Bill 'so that we can consider them and obtain the Episcopal Benediction on the introduction of our measure'. Howley and Blomfield asked that copies of the Bill, as soon as it had been reprinted, should be sent to Howley to be forwarded in confidence to all the prelates and to the Chancellor of the York Courts.
It is not easy to say with precision what Nicholl's Bill would have contained early in February 1842, because the several surviving drafts are undated and not always complete. However, there can be no doubt about its pedigree and its main contents. The Bill was descended from the General Report, favouring centralisation and professionalism, and the 1842 draft was the first to mention the General Report in its title and the first to summarise the Report's recommendations in its preamble. Nicholl was intensely loyal to his father's memory and to the part played by Sir John Nicholl in the work of the Commission, and he was to answer later criticisms of the Bill by citing the spiritual and professional authority of the Commissioners.

As to the arrangement of its main contents, the original 1842 draft was strongly influenced, as Nicholl's annotations show, by Graham's 1834 draft. In a Bill of 135 clauses, it was proposed to create a metropolitan court and registry to handle both contentious and non-contentious testamentary business, and staffed by qualified and salaried specialists who would perform their duties in person. However, Nicholl made two distinctive changes to the Bill which were to leave it even more vulnerable to attack from different quarters. Those changes were, first, his modification of the arrangements for branch probate registries, and, secondly, his attempts to accommodate provisions which were thought to impinge upon the spiritual jurisdiction of the bishops.

Cottenham had been willing in 1836, and again in 1841, to take on board the recommendations of the Lords Select Committee that the local registries should be preserved as branch registries and given the preparatory probate business where the assets were below £300 in value. Cottenham's aim had been to use those branch registries as little more than a conduit to and from the metropolitan court, so that the authority to grant probate and to retain the original wills would still rest in London. No bill had been before Parliament in that form; the contents of the 1841 draft had remained confidential, although known to Nicholl; and no such proposal had been seen by the self-interested parties. However, in response to the events of 23 February, and in order to ease the passage of the Bill, Nicholl offered to go further, although it will be shown that he did not go far enough for the country registrars. In a comparison made by him between his Bill and Cottenham's Bill, he stated, 'I leave power of proving in Country up to £300...Originals proved in Country in Country - Copies to London or vice-versa'. In other words, and still within the overall control of the metropolitan court, he was proposing to give the branch registries...
responsibility for small probates and to let them retain the original wills. That also happened to be the compromise suggestion put by his father to Cottenham in March 1836.

The other additions made by Nicholl to the Bill, and which took up approximately half the clauses, had nothing to do with testamentary business, although some of the issues had been considered by the Ecclesiastical Courts Commission. The Bill was used as a vehicle to introduce not only reforms affecting tithes and sequestrations but also a number of amendments to the Church Discipline Act of 1840. Brougham had warned in 1835 that legislators could risk 'the success of the general measure by objections which might exist as to some particular part only'.

Nicholl and his masters did not heed that warning and it was to cost them dearly, as will be shown below. Things began to go wrong as soon as the Queen's Speech had made known the Government's general intentions.

The several groupings which now ranged themselves against the promised Bill, and with whom Nicholl was required to deal, were, first, the country registrars, anxious to secure a viable share of the business; secondly, the London proctors, equally anxious to profit from an exclusive metropolitan court; thirdly, the more forceful bishops, resentful at any erosion of their diocesan authority; and, fourthly, but less visibly, some 'influential' MPs who were united only in their opposition to a centralising Bill. Nor could Nicholl be sure of the resolute support of colleagues in Government.

Lyndhurst and Follett had given an early warning of opposition from the country registrars, according to Nicholl's memorandum. Nicholl had also seen a long and hostile complaint, sent to Gladstone in December 1841, from Henry Raikes, the Chester Registrar, who had got wind of the Government's intentions. 'We were startled a few days ago by a rumour that a most sweeping project of centralisation with regard to the Ecclesiastical Courts was contemplated by the Administration'.

Raikes wrote again, on 8 February 1842, direct to Nicholl, offering himself as an example of 'the class of person who will be ruined by the proposed measure'. Nicholl's draft reply took Raikes to task for his excessive income and for his opposition to a measure based on public duty and impeccable authorities.

Then, on 23 February 1842, a deputation on behalf of the country registrars, and accompanied by 'several very influential Members of Parliament', met the Home Secretary. Swan was present, as were Charles Turner, one of the Exeter Registrars,
and John Burder, the London-based legal representative of most of the dioceses. Swan put forward a plan for local probate arrangements as 'best adapted to the public utility'; the plan seems to have involved the option of obtaining probate either locally or centrally, each being 'valid and effectual'. Swan also produced the compromising letter sent by Pollock to Sibthorp on 30 March 1835, the letter which had seemed to promise to the country registrars a share in the contentious testamentary business also. According to Nicholl's memorandum, Peel's immediate reaction was to summon Lyndhurst, Stanley, Graham, the unfortunate Pollock, and Nicholl to a meeting at his house, where 'the matter was talked over'. Nicholl was authorised to try, with the assistance of Barlow, to make an adjustment 'by fixing a line above which all wills should be proved in London'. The aim, it seems, was to allocate an acceptable volume of testamentary business to the London proctors and to leave an equally acceptable volume of business with the country registrars.

Nicholl, now clutching a poisoned chalice, asked Iltid Nicholl and Burder to send representatives of the London proctors and the country registrars respectively to meet him. The London proctors co-operated readily enough, but Swan did not. He first complained to Burder that what was really needed was a 'full and thorough investigation' of the local courts, and he then refused to communicate or meet with Nicholl, suggesting that the meeting should be with a more senior representative of the Government, such as Follett, or someone who was unconnected with Doctors' Commons and thus 'free from prejudice or prepossession against the retention of the local courts'. These exploitative jibes, made to Burder but copied to Nicholl, are indicative of the serious disadvantages associated with Nicholl's position and reputation.

Meanwhile, Nicholl had been preparing his 'basis' for agreement between the interested parties, a document regarded as important enough to be approved by Graham, Jenner, possibly Lyndhurst, and then Peel. Because of the difficulty in getting Swan to the table, Peel also approved the draft of a letter in which Nicholl told Swan that if he did not co-operate the Bill would be 'perfected as best it may from other sources' and that the Government would not be to blame 'should the interests of the Country Registrars and Practitioners be inadequately provided for'. Swan agreed immediately to meet Nicholl and 12 March was fixed as the date. Nicholl's next problem was what he should communicate to the interested parties at that meeting. He had told the London proctors, Fox and Iggulden, as well as Swan,
that 'I will place in your hands a statement of the basis on which...it is proposed to attempt an equitable adjustment of conflicting interests', but the document he had prepared was a digest of the intended Bill, with one imprecise modification. Whereas Nicholl's Bill, as originally drafted, had retained the diocesan courts to perform only a preparatory function in respect of small probates, his new 'basis' offered to let those courts handle 'the whole grant of small probates and to retain the original wills. He did not specify any value limit, but he seems at that time to have had £300 in mind as a figure which would leave both Doctors' Commons and the diocesan courts with the same amount of common form business as at present. Nicholl's offer, as he put it in another memorandum, was 'framed in consequence of the representations made by the Country Registrars...with the view of meeting some of their objections and if possible of reconciling them to the measure'. He also saw that from a presentational point of view the offer could be shown to promote local access. Barlow told Nicholl that tabling such a document, and doing so in discussion with 'dissatisfied parties, which both seem to be', would reveal too much about the Government's intentions in a sensitive area. He even questioned the need for having a meeting at all since 'the sum above which Grants should not be made in the Country...must be the result of figures and returns'.

Despite this questioning of what he was intending to do, Nicholl asked Barlow to confirm that Lyndhurst agreed with the document. That support was necessary because the Home Secretary had specifically instructed him to put the document to the proposed meeting as 'the basis on which the Government proposes to legislate'. Barlow reported to Nicholl that Lyndhurst 'could not be considered as adopting a measure as a Govt.measure by having it once read over to him in his room at the House of Lords' and that he would be speaking separately to Graham. Apart from that de haut en bas display, Lyndhurst's ambivalence over the details of the Bill is illustrated by a note he had sent to Graham on the day before the deputation to the Home Secretary, 'You must consider well the taking away entirely of probate from the Consistory...the Bishop of Exeter spoke to me about it in the H.of Lds.yesterday. My Secretary, Mr Barlow, mentioned it to Mr Nicholl'.

Although caught between the wishes of the Home Secretary and the opinion of the Lord Chancellor, Nicholl went ahead with the meeting on 12 March. Swan and Kitson attended on behalf of the country registrars, as did Fox and Iggulden for the London proctors, and Barlow may have been present. The meeting was a disaster.
According to his memorandum, Nicholl read out but did not table the Government's intentions, and was then subjected to a series of demands made by Swan on behalf of the country registrars. They wanted a share of contentious business, which Nicholl described as 'inadmissible'; they rejected any limit upon non-contentious business and sought instead concurrency of jurisdiction between the diocesan courts and the London court, which Nicholl thought would 'annihilate' Doctors' Commons; and they felt that the concept of branch registries supervised from London was a slur on their professional ability. It was, however, the demand for concurrency of jurisdiction which brought the country registrars and the London proctors most obviously into conflict. Fox and Iggulden argued that parties would thus 'be excluded from resorting to that which was the higher and better tribunal', a prospect ruinous for themselves. Thus, instead of bringing about a settlement, the meeting on 12 March drew the battle-lines not only between the country registrars and the Government but also between the country registrars and their London counterparts.

The country registrars kept up their pressure at a well-attended meeting in London on 15 March. Barnes was in the chair and all but one of the seventeen officers present, Raikes of Chester, were from the Province of Canterbury. Their conditions for accepting the Bill covered the same ground as the demands put to Nicholl, and they decided to form a small standing Committee which included Barnes, Swan, Kitson and Raikes.35

Whilst parleying with representatives of the Province of Canterbury, Nicholl had not been neglecting the Province of York. Again, the distribution of business and local resistance to reforms were the themes of the exchanges. On 12 March, Nicholl wrote to Joseph Buckle in York to describe to him the responsibility he had been given for preparing the Bill and to ask him to come to London for a meeting. Nicholl's purpose was not to consult but to gather information about the extent of the business at York. Buckle had been Deputy Registrar of the York Courts since 1819, had served a regular clerkship there to qualify as a proctor and had a son who was training as a proctor. He had made a return to the Ecclesiastical Courts Commission in which he had mentioned the complement of three advocates and eight proctors who practised in the York Courts. In supplying Nicholl with the required information for the previous year, Buckle deplored the proposed 'doing away' with *bona notabilia* and the loss of its benefit to York, and suggested to Nicholl that in addition to the anticipated transfer to York of the business of the abolished courts in
that Province, he should be compensated by receiving also some business from adjacent jurisdictions, including part of Chester. Despite being sworn to secrecy by Nicholl, Buckle had talked to his fellow-proctors and he informed Nicholl that all were agreed 'that the Bill is a very sweeping measure...and will meet with considerable opposition in this County'.

When Nicholl turned again to the London proctors on 18 April, he dealt with them exclusively, inviting their considered comments on three alternative and 'hastily prepared' schemes of reform. The first scheme followed the draft Bill, giving the diocesan courts jurisdiction only over the preparatory stages of small probates, which he already knew was opposed by the country registrars. The second scheme seems to have been what was put to the joint meeting on 12 March, with the value limit so adjusted as to create a fair division of non-contentious business, an arrangement which Nicholl himself favoured even though it was far from perfect. The third scheme kept the diocesan and central non-contentious jurisdictions as they were, including bona notabilia, but provided for confirmation of any doubtful diocesan probates by the higher court. Nicholl made it clear that he disliked that option because it preserved the rule of bona notabilia and because it departed so radically from what the General Report had recommended.

On 4 May, the London proctors chose the third option. It gave them the double benefit of a new metropolitan court and the retention of bona notabilia. Moreover, they couched their self-interested choice in language which was most dismissive of the competence of the country practitioners.

About the time that his overture to the London proctors was going badly for Nicholl, he was also working with Charles Bowdler, an experienced London proctor, on an unofficial approach to the country registrars. The aim seems to have been to arrive at some sort of compromise over bona notabilia between the London proctors and the country registrars. However, Swan did not trust Bowdler; Nicholl was always apprehensive that his part in the proceedings would become known; and Bowdler finally became discouraged and withdrew from the commitment in June.

Although these negotiations came to nothing, they did prompt what was to be a significant exchange between Graham and Nicholl. Nicholl had felt the need to consult Graham about the negotiations and Graham, who was then preoccupied with the Irish Corporations Bill, had given a strong hint that he was prepared to be more flexible than Nicholl in order to 'conciliate the support of the Country
Meanwhile, the friction between Nicholl and the country registrars continued and developed as a consequence of the meeting in March and the abortive contacts with Bowdler. The protests of Swan and his fellows were concentrated now upon two issues, the perceived intention of the Government to strip the diocesan courts of their contentious jurisdiction, and a belief that the Government would allow the continuance of *bona notabilia* to the benefit of the London proctors. Swan warned Bishop Kaye that the loss of the contentious jurisdiction would be followed inevitably by the loss of the non-contentious business; and, during May, Nicholl received complaints about both issues from several diocesan registrars, Kitson of Norwich, Barnes of Exeter and Thomas Holt of Gloucester. By the end of May, a weary Nicholl was admitting to Barnes and Kitson that the attempt to find a compromise 'has failed in its principal object', but he did suggest that the Government had at least shown itself to be not unfriendly towards the diocesan courts and their registrars, even though it was first and foremost engaged in 'a great measure of improvement'.

That conciliatory tone was not reciprocated by Swan, who had been shown Nicholl's letter. On 1 June, he threatened Nicholl with further opposition to the Bill, not only from the country registrars but also from their bishops, if the destruction of the consistory courts was in contemplation, 'I shall use my utmost endeavours to avert so lamentable an event; but I am confident it cannot be effected, for not one of the Bishops, with the exception of the Bishop of London, has given his consent to it'. Nicholl had to remind Swan that Parliament itself was the proper forum in which the bishops would come to an agreed position.  

Ironically, however, the bishops were themselves about to present Nicholl with further difficulties of a different kind, not in obvious collaboration with their registrars and yet outside Parliament. As indicated above, the Bill was intended to deal with matters other than testamentary jurisdiction, such as the abolition of the criminal jurisdiction of the ecclesiastical courts and the redefinition of the appeal procedures introduced by the Church Discipline Act 1840. Because of those additional clauses, the Bill became even more vulnerable to attack.

Nicholl's predicament can be briefly illustrated. In late June 1842, he was instructed to invite the comments of the bishops on a further draft of the Bill, and by early July he had seen and carefully analysed at least thirteen replies. There is no evidence that...
the bishops met to compare their responses to the Bill, in the way that their registrars had done, nor would there have been time to do so since they were asked to reply to the Home Secretary by 12 July. Instead, what Nicholl received, directly or indirectly, were the hurried opinions of a number of strong-minded individuals. The bishops were not always well-informed and not always in agreement one with the other, and they were not necessarily addressing the testamentary content of the Bill. However, between them they mustered enough reservations about the Bill to bring about its postponement.

For example, Henry Phillpotts, Bishop of Exeter, in an intense exchange of letters with Nicholl between late June and early July 1842, used language reminiscent of his opposition to the Church Discipline Bill. He criticised Parliament, 'no longer an Assembly of Churchmen', for presuming to take away from bishops 'the right to inflict spiritual censures on persons guilty of sins which are also crimes', and he said that he expected the Bill to be postponed so that there would be time to consider it. The Bishops of Gloucester and Winchester thought the Bill would discredit what would be left of the diocesan courts and would threaten the union of Church and State. The Bishop of Salisbury wanted to give parties the option to prove wills without limit in the branch registries. The Bishop of Durham, aware of Swan's views, thought that one effect of the Bill would be that 'Professional men in the country will have less stimulus for acquiring a knowledge of Ecclesiastical Law'. The most telling opposition, however, came from John Kaye, Bishop of Lincoln. Influenced or not by Swan, he had changed his mind since serving as a Commissioner and could no longer support the idea of a centralised court. The question he asked was, 'Why should not the Party be allowed to take out Probate in the Registry most convenient to himself ?', and his request was that the Bill be postponed.45

In the face of these objections, Howley intervened and sent Nicholl an undated note, but probably written on 11 July 1842, to suggest the 'inexpediency of laying the Ecclesiastical Jurisdiction Bill [sic] before Parliament this Session', and to ask him to put that suggestion before Sir James Graham. In fact, Howley met the Home Secretary on the evening of 14 July, 'learned from him that he had determined to withhold the bill till the commencement of the next Session' and promptly informed the bishops of that decision.46 For the moment, therefore, Nicholl's Bill rested in limbo.
As it happens, the only kind of pressure to which Nicholl had not been exposed during that session was the pressure normally associated with the passage of a bill through Parliament, and that was because his Bill had never been presented. Only general statements had been made about it at the beginning of the session; Lyndhurst had had to deal with no more than a single question about the proposed measure, from Campbell; there had been no surge of public petitions; and the 'pamphleteering gentry' had been almost silent.

All that was to change for the worse in the next session.
Notes to Chapter 10.


3. Thomas Pemberton, or Pemberton Leigh as he became known, retired from public life in 1843 in unusual circumstances, see H.E.L., xvi, pp.159-64.


5. GP, 30 July 1841, Peel to Graham. 'Pollock stands very high as a lawyer and had but a short turn as Attorney-General'.

6. For references to Nicholl's health whilst an MP, see Cannadine, David, ed. *Patricians, power and politics in nineteenth century towns*. Leicester, Leicester University Press, 1982, pp.42,47.


9.BL,Add Ms.40413, ff.97-99, 158, 246, 3-6 Feb.1835, correspondence between Peel and Nicholl.


11.BL, Add Ms.40487, ff.255-57, 4-5 Sept. 1841, Nicholl to Peel.
12. MMP, L.127, memorandum by Nicholl, [March 1842].

13. Ibid., L.93, Dec.1842, Nicholl to Bethune.


15. See n.13.

16. Lee, Dennis. Lord Lyndhurst: the Flexible Tory. Niwot Colorado, University Press of Colorado, 1994, pp.212, 216. In an undated note in Lyndhurst's hand, probably written close to Christmas 1841 and intended for Sir James Graham, the assistance of Francis Barlow was offered. 'The gentleman in question is Mr Barlow, one of my secretaries, a barrister of considerable standing. I will desire him to call upon Nicholl', see MMP, L.93. The Lyndhurst Papers in the Glamorgan Record Office, D/D Ly., provide ample evidence of the close and friendly relationship between Lyndhurst and Barlow.


18. MMP, L.92, 22 Jan.1842, Nicholl to Blomfield.

19. Hansard, 3d.ser.,lx, 3 Feb.1842, c.4; 4 Feb., c.70.


21. MMP, L.83/(i)-(vii); L.84/(i)-(vi).

22. Ibid., L.128, 'Lord Cottenham's Bill - compared with that of Dr Nicholl',[1842].


25. Ibid., L. 91, 8 Feb. 1842, Raikes to Nicholl; Nicholl to Raikes.


28. A copy of Pollock's letter of 30 March 1835 to Sibthorp, the letter in which he seemed ready to allow the local courts to handle contested cases, bears an undated gloss by Nicholl suggesting that Pollock may have made a careless but crucial mistake, 'q. should not this be uncontested', see MMP, L. 91.

29. MMP, L. 91, 26 Feb.-4 March 1842, correspondence between Nicholl, IItd Nicholl, Burder and Swan.

30. Ibid., L. 91, 6 March 1842, Nicholl to Fox, Iggulden and Swan.

31. Ibid., L. 101, 'Basis' prepared by Nicholl, [March 1842].

32. Ibid., L. 91, memorandum prepared by Nicholl for submission to the London proctors, [April 1842].

33. Ibid., L. 91, 5-10 March 1842, correspondence between Nicholl and Barlow.

34. GP, 22 Feb. 1842, Lyndhurst to Graham.

35. MMP, L. 91, 15 March 1842, Resolution of meeting of country registrars.

36. Ibid., L. 91, March 1842, correspondence between Nicholl and Buckle.

37. Ibid., L. 91, April-May 1842, correspondence between Nicholl and IItd Nicholl; see also n. 32.
38. Ibid., L.91, March-June 1842, correspondence between Nicholl and Bowdler.

39. Ibid., L.91, 9 May 1842, memorandum by Graham.

40. Lincolnshire Archives, correspondence of Bishop Kaye, COR.B/5/10/22, 5 April 1842, Swan to Kaye.

41. MMP, L.91, May 1842, correspondence between Nicholl, Kitson, Barnes and Holt.

42. Ibid., L.91, 27 May 1842, Nicholl to Barnes and Kitson.

43. Ibid., L.91, 1 June 1842, Swan to Nicholl.

44. Ibid., L.91, 4 June 1842, Nicholl to Swan.

45. Ibid., L.92, June-July 1842, correspondence between Nicholl and the bishops.

46. Ibid., L.93,[11 July 1842], Howley to Nicholl; 15 July 1842, Howley to Nicholl.

47. Hansard, 3d.ser., lxi, 7 March 1842, cc.120-21.

48. *Ecclesiastical Courts, Observations on proposed reforms.* [March] 1842; an anonymous pamphlet written in support of the local probate proposals put forward by the country registrars, see MMP, L.109. Another copy is in the British Library.
Chapter 11: The 1843 Ecclesiastical Courts Bill, prior to its second reading; 'the tremendous clamor & opposition which is I fear increasing towards the Bill'.

The 1843 session contained all the ingredients which were to be become associated with attempts to reform the testamentary jurisdiction by legislative means. There was a busy government distracted by other priorities but committed to bringing in a non-partisan and centralising measure for the public good, if the occasion and the resolve could be found. There was a measure founded upon the authority of a Royal Commission and the pronouncements of Select Committees of both Houses, but which was also a vehicle for provisions unconnected with testamentary jurisdiction. There was a close and critical interest taken in the measure by the press and the legal periodicals. And, finally, there was remorseless pressure from interested but dissatisfied parties, most visibly from the country registrars who expressed their hostility to a centralising measure in the form of memorials, pamphlets and petitions to Parliament.

The combined effect of that pressure, as well as the pressure created by other business, caused the Bill to be dropped by Peel. By the time that it was reintroduced in the following session it had undergone a radical change.

In brief, what was presented in 1843 was a revised version of what had been drafted but not presented in the previous session. In a Bill of 140 clauses, it was intended to create a new probate court and registry in London with the hybrid title of 'Her Majesty's Court of Arches', presided over by a salaried judge appointed by the Crown, and from which appeals would lie to the Privy Council (Clauses 4-6 and 60). The existing Deputy Registrars of the Prerogative Court would transfer to the new court (Clause 13), and the advocates and proctors at Doctors' Commons would have the right to practise there (Clauses 23-27). In a practical sense the status quo in London would be unchanged. It was a different matter for the diocesan registries. With the exception of special arrangements proposed for the Home Counties, the diocesan registries would become branch registries of the London court and would be under its control, with salaried judges and registrars performing their duties in person. The branch registries would be limited to granting probates under £300 in value (Clauses 62-71), but would be allowed to keep the original wills, provided there was 'good and careful custody'. Where parties had chosen to have wills under £300 in value proved in London full copies would be sent to the appropriate branch,
but only abstracts of wills of higher value would be sent. Wills and other testamentary papers held by the inferior courts, which were to be abolished, were to be transferred to the central registry in London (Clause 72). Those country practitioners who were qualified proctors would be given the opportunity to practice at Doctors' Commons or remain in the country, but would be required to practice only as proctors (Clause 26). Finally, as regards the purely testamentary content of the Bill, the substitution of salaries for fees was to be funded from a general court fee fund (Clauses 115-124).²

These provisions were faithful to the General Report by centralising testamentary jurisdiction in London and by securing the position of the officers and practitioners at Doctors' Commons. Where the Bill departed from the General Report, as a response to complaints about local access to justice, was in permitting local arrangements for the granting of small probates and for the custody of original wills, albeit under the close control of the central court. It was this attempt to create an acceptable balance between central and local provision which was to be tested during 1843 and in subsequent sessions.

There is such a wealth of hitherto neglected primary sources for what happened in 1843 that the following account of the fortunes of the Bill has had to be greatly compressed. Even so, the session will be divided into two parts. Chapter 11 deals with the period prior to second reading and Chapter 12 will deal with the remainder of the session.

The 1843 session was no more propitious a time for the introduction of the Ecclesiastical Courts Bill than the previous session had been. The severe unemployment and distress in manufacturing districts, and the unrest and rioting which followed, continued to place a strain upon certain members of the Cabinet. Graham had remained at his post in Whitehall throughout August 1842, and Peel himself was pre-occupied during that Autumn with 'the dangers of a spawning, impoverished and disorderly society'.³ After such an exhausting year as 1842 had been, and with the continuance of revenue problems and of distress in the North, the Queen's Speech on 2 February 1843 offered no more than a relatively modest set of legislative proposals. Nonetheless, the Ecclesiastical Courts Bill had survived, albeit subsumed in the phrase, 'measures connected with the improvement of the law'.⁴

Dr Nicholl's postbag from November 1842 to January 1843 hints at the preparations for the new session. Graham and Nicholl were in touch in November and December
1842, principally it seems about the "Episcopal Objections', and Nicholl was consulting Murray, by then Secretary to the Ecclesiastical Commission, and Jenner. Nicholl was authorised to send a further draft of the Bill to the bishops, offering to safeguard their spiritual jurisdiction over clergy and church discipline, but otherwise telling them firmly that 'This is the draft Bill which, as at present advised, Her Majys. Govt. intend to bring in at the meeting of Parliament'.

At the end of December, Nicholl asked Jenner, his uncle, if 'during the Vacation you will put on your best & most critical spectacles & detect every flaw - & consider what are the weak points.' That letter to a close relative and fellow civilian reveals Nicholl's worry at that time about being required to bring in such an omnium gatherum of a Bill. He also saw, because of his closeness to Doctors' Commons and to the bench of bishops, that there was the risk of having to make barristers as well as advocates eligible to be judges in the branch registries in the interests of professional standards, something which would be 'a very inconvenient suggestion as to the London Offices - besides some of the Bishops have, or pretend they have, scruples as to laymen'. Nicholl also consulted Drinkwater Bethune about this time, passing to him 'a very large parcel [of] all those unlaunched bills, as well as my papers of proposed amendments', and asking him to condense them over the vacation.

By the middle of January, about a fortnight before the session began, there were signs that the two opposing groups of interested practitioners, the London proctors and the country registrars, were each seeking information about the Bill. The Committee of London Proctors asked Nicholl to 'state the general nature of the proposed bill' and reported the rumour that some country registrars already knew and were satisfied with its 'general purport'. Nicholl refused that request, suggesting that if the country registrars did have information it could only be as result of a misunderstanding on the part of those to whom he had 'confidentially communicated' copies of the Bill. By that he must have meant an indiscreet bishop. Iltid Nicholl, writing as Queen's Proctor and Chairman of the Committee of London Proctors, then put a direct request to Graham for an advance copy of the Bill, reminding him of their preference for the 'minimum of change' scheme put to them by Nicholl in May 1842. Iltid Nicholl was told by the Home Office that Graham 'must decline furnishing you with a copy of a Bill which is not yet introduced into Parliament'.

The country registrars were similarly active about this time. Swan had produced his own alternative Bill, and, although no identifiable text seems to have survived, it is
likely to have embodied, as the price of co-operation, both the retention of contentious jurisdiction by the diocesan courts and the abolition of *bona notabilia*. Howley passed a copy of this Bill to Nicholl, and Graham, writing to Nicholl on 16 January, said that 'Mr Swan's proposed Bill is quite preposterous. I had much rather that things should remain as they are. I cannot believe that such a measure will receive any general support'.

Also in January 1843, an anonymous country registrar, 'A.B.', brought out a pamphlet which dealt bluntly with the issues which most divided the country practitioners from their London counterparts, 'the practitioners of Doctors' Commons...being convinced that they can transact the business of the country more correctly than we can and that the the profits of that business would be more conveniently put into their pockets than into ours'.

With these predictable difficulties reappearing on both flanks, Nicholl officially accepted responsibility on 19 January for bringing in the Bill, as both Peel and Graham wanted him to do. However, he wrote prudently the following day to seek reassurances from Graham that the Bill was a Cabinet measure and that it would be supported by the Government in both Houses. Those assurances were given, but the fact that Nicholl felt the need to seek them was an indication of his early unease about the priority to be given to the measure. It was in character that he should also have referred to his own inadequacy for the task, to his 'subordinate situation in the Government' and to 'my connexion with D[octors'] C[ommons]' as being possible causes of embarrassment. He was instructed to send copies of the Bill to Pollock and Follett, which he did on 21 January. Then, on 31 January, Nicholl contacted Lyndhurst, who had been sent a copy of the Bill by Graham some time before, in order to mention the timetable for the motion to bring it in and to invite his observations. Lyndhurst replied the same day to say that, 'I have read the Bill & approve generally of its contents but cannot venture, without some further consideration, to pronounce respecting its details. I have told Sir J Graham that I think it ought to be proceeded with as soon as it can conveniently be done.'

Nicholl was not without support in the days leading up to his speech on the motion. He had been consulting trusted acquaintances at Doctors' Commons about the Bill, furnishing them with details and receiving advice and encouragement in return. In late January, Peel's former Under-Secretary and continuing confidant, Henry Hobhouse, reassured Nicholl that 'as to the main scope of the Bill, I am convinced
that it is desirable that it shd. pass. For Hobhouse, the problem lay with the diocesan courts, 'I am persuaded that the original Report is right as to Probates and Administrations not being granted in the Country. No advantage can arise from Branch Registries except to the Functionaries to the extent of their Fees which are quite as high, if not higher, than at Doctors' Commons'.Nicholl passed Hobhouse's letter to Graham on 2 February, inviting the Home Secretary to note that 'his opinion of the incapacity of the Country Courts for the dispatch of common form business is in accordance with my father's, Sir Herbert Jenner Fust's & Lushington's'.Nicholl gave notice of the Bill on 2 February, but before the motion on 9 February his existing difficulties with the country registrars and London proctors were further and swiftly exacerbated. The concentrated exchanges which illustrate the problem are contained in Nicholl's correspondence during early February 1843.

By Saturday 4 February, the members of the Committee of Registrars had hurried to London for a meeting that day, which had to be resumed on Monday 6 February. Nicholl's statement about the motion would have brought them to London anyway, but they also had to consider an overture made to them by Charles Bowdler and Richard Townsend, both London proctors, who were ostensibly acting on behalf of their fellows in seeking to arrive at 'a mutual understanding'. The substance of the proposal, which seems to have been close to what Bowdler had been offering in 1842, was that the London proctors would be willing to concede some degree of contentious jurisdiction to the diocesan courts in return for the continuance of the *bona nolabilia* rule. Swan's record of the meetings on 4 and 6 February shows that the country registrars recited all the authorities against keeping the rule, including 'the general opinion of the Country and of professional men', rejected the proposal from Bowdler and Townsend and resolved to pursue their own plans instead.

It would have been distracting enough on the eve of his 'great speech' for Nicholl to have been informed about these negotiations by the participants. In fact, he was told by Follett, a Government colleague, who now appeared ready to contemplate compromise. On 8 February, Charles Turner, one of the Exeter Registrars and a member of the Committee, had passed a copy of Swan's record of the meeting to Follett, who was also MP for Exeter. Turner had extolled the principled and consistent attitude of the country registrars towards *bona nolabilia* and had assumed Follett's approval for the stand they were taking. Follett passed the papers to Nicholl and urged him to find a way of avoiding conflict in the Commons the following day.
Nicholl received the papers after 9 o'clock in the evening of 8 February and by 11 o'clock that evening he had drafted a reply to Follett. On 9 February, the day of his speech, he forwarded the papers to Graham, secured Graham's supportive approval for his letter to Follett and sent his letter.

The line taken by Nicholl in these exchanges with the Home Secretary and the Solicitor-General captures the predicament in which the Government found itself, and illustrates Nicholl's determination not to compromise. He told Follett that the Bill contained the best system for reform, one that most benefited the public and one 'pronounced by far higher authorities than either Bowdler & Co or Swan & Co'; that the two London proctors had no mandate to negotiate, quite apart from the fact that the interests at Doctors' Commons went wider than those of the proctors, an evident reference to his own profession of advocate; and that 'the registrars' resolutions are but a precis of Mr Swan's Bill', a document already seen and ridiculed by Graham. Nicholl ended with his own firm view of what the Government should do, 'I for one am not disposed to enter into any negotiation which is only a pretext to gain time and thus defeat the Bill now ready to be laid on the table of the House. Of course Sir Robert Peel and Sir James Graham will do what they think right but if my voice is heard they will steadily and firmly go on with the measure which has been framed on, I trust, far higher principles than an attempt to avoid a contest in the House by a surrender at discretion to the clamour of interested parties'.

Graham's response to Nicholl, when approving the letter to Follett, seemed to provide an equally firm statement of what the Government should do. 'We have exhausted every endeavour to bring these Parties to a fair settlement on reasonable terms and nothing but the authority of Parliament must now prevail. I would avoid all private negotiations. Let us try to carry the measure, yielding to fair objections openly stated in the House but not flinching from any opposition of continued interests'.

On 9 February 1843, bolstered by Graham's support, Nicholl spoke at length to the motion for leave to bring in the Bill. As well as outlining its contents, he justified its centralising features by reference to the professional standards at Doctors' Commons, both in the court and in the registry, where most testamentary and matrimonial causes were already decided. By contrast, the diocesan courts were riddled with sinecurists, the safe custody of wills had been neglected, and the criminal causes decided in those courts had attracted much public criticism. He also took pains to
ground the measure, as he consistently did in private and in public, upon the authority of the Ecclesiastical Courts Commission, reciting a litany of those who had served on the Commission and quoting from its Minutes. However, his speech suggested that he felt vulnerable in two respects, the York Courts and his position as Vicar General to the Archbishop of Canterbury. As to the first, Nicholl combined the implied assessment in the General Report with the recommendation of the Commons Select Committee in order to justify the ending of the York jurisdiction. As to the second, he addressed rather than avoided the fact that under the Bill his own office of Vicar General would have increased powers and salary; and, with a view to disarming personal criticism, he stated that he intended to place the office at Howley's disposal. 19

Leave was given for Nicholl, Graham and Pollock to bring in the Bill; it was ordered to be printed; the second reading was fixed for 24 February; 20 and so the Government's reforming intentions became public property for the first time in that administration.

It can safely be said that the Bill attracted many more active enemies than friends. From early February onwards, those whose interests might be adversely affected by the measure became visible and vocal. At the core of the opposition were the country practitioners, threatened with a loss of business, associated income and local standing. Some bishops resented any encroachment upon the spiritual status and presumed learning of the diocesan courts, and many of the lesser clergy had jurisdictional rights or perquisites which would be swept away with the inferior courts. The press and the legal periodicals proved to be opposed to the Bill, not to the idea of reforming the courts but to the shape taken by the proposed changes. Local interests, overwhelmingly hostile to the Bill, manifested themselves in the form of 170 public petitions bearing 20,000 signatures. And, finally, the opposition to the Bill in the Commons managed to bring together, to quote Peel, 'Gentlemen who maintain...extremely discordant opinions'. 21 Some MPs were simply doing their duty when they presented public petitions; some were overt supporters of the country registrars in their constituencies; some were opposed to the menace of centralisation and the loss of accessible justice for the poor; some were quick to point out the inconsistency of promoting a system of county courts, as was being done, whilst proposing to abolish the lesser ecclesiastical courts; and some thought the Bill did nothing for Dissenters.

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The first attack upon Nicholl's Bill in the forum of the House of Commons, where Graham and Nicholl preferred criticisms to be voiced, came as soon as Nicholl had finished his speech on 9 February. The opposition of John Jervis to the 'principle of centralisation' had revealed itself in the alternative Bill which he had helped to prepare in the previous session. The debate on the motion gave him the opportunity to explain that he was happy with the abolition of the inferior courts and the concentration of contentious causes in London, but, at a time when county courts were in prospect, he wanted to see the proper provision of local probate arrangements and he disputed the arbitrary limit of £300 on smaller probates. His considered view of what Nicholl had just said was that centralisation would make justice inaccessible, would 'throw the fees into the hands of the officers of the central courts', would either ruin local proctors or place them in 'a doubtful rivalry' with those already established in London, and would inhibit the development of legal skills by local practitioners by removing any incentive to acquire those skills.22

Jervis was followed by Sir Robert Harry Inglis, MP for Oxford University and a vigorous High Churchman. He too pursued the themes of centralisation and inconsistency, claiming that 'one great vice in our present system of legislation was a desire to centralise every thing', and asking, with reference to the prospect of county courts, 'Why should the principle avowed by the Government be that the one class of cases should be disposed of on the spot but that the other should be removed to the metropolis'. However, Inglis went much further than Jervis. He defended the integrity of clerical judges and accused Nicholl, rather as Nicholl had feared would happen, of being the representative of the London practitioners, men who 'would naturally wish to bring as much practice as they could to their own particular courts in London, just as those in the country would desire to prevent them'.23 And Colonel Sibthorp, the scourge of John Campbell in 1836, protested against the Bill simply because it was 'a measure of what was called "Reform" ... a thing which he detested as he detested the devil'.24

Nicholl did have some supporters in the House. As well as brief but favourable comments from Protheroe and from George Pechell, MP for Brighton, he found an outspoken ally in Dr Howard Elphinstone, a fellow advocate and barrister, who was MP for Lewes. Elphinstone welcomed the Bill unreservedly. His simple test of public need was that 'the property of a Testator should be distributed to those who were entitled to it with as little delay and expense as possible'. As a civilian, he was
scathing about the inefficiencies of the diocesan courts, more so than Nicholl had been and more so than Lushington ever was in public. Most diocesan chancellors were 'unfit for their duties'; the principal registrars were relatives of 'deceased bishops' and ignorant of their duties; and the deputy registrars made 'the most extraordinary and ludicrous mistakes' which were only discovered when cases came to London.25

The other more neutral contributions to the debate came from Hume, who was still demanding a reduction in the fees charged by proctors, and from William Dougal Christie, MP for Weymouth and a barrister on the Western Circuit. Christie saw the opening of the metropolitan court to country proctors as some kind of precedent for admitting Dissenters also, and he was to press Peel on this matter in the following year.26

There was also much activity among commentators and interested parties in the brief period leading up to the Bill's intended second reading on 24 February. The Legal Observer, which had been silent in 1842, published much of the detail of the Bill in the issues of 18 and 25 February. Later, on 4 March, it drew the attention of its readers not only to the business opportunities for solicitors created by the testing of the validity of wills by a jury at nisi prius, but also to the need to curtail the intermediary role of proctors in those circumstances. However, the leading article in the Legal Observer on 18 February pointed out, much as Jervis and Inglis had done in the Commons, that the Government was being inconsistent in contemplating both a decentralising 'Local Courts Bill' and a centralising 'Ecclesiastical Courts Bill'. It was even suggested, mockingly, that Nicholl's speech on 9 February, which was extensively quoted in the article, would be 'ready made to his hand for any opponent of the Local Courts Bill'.27

The Times had anticipated the Bill by offering, on 28 December 1842 and 30 January 1843, editorial comments about the need to reform such anomalous courts. It had also published a number of letters from lawyers who used the registries in which they complained about high charges and poor access to information. Then, on 9 February, The Times published a sharply-worded letter from 'BETA' in Doctors Commons, probably the work of Charles Bowdler. The letter accused the country registrars of having rejected a compromise put to them by the London proctors, and also accused 'a gentleman filling the office of registrar of an extensive diocese in the north' of being obstructive, a likely reference to Swan.
Several pamphlets in support of local testamentary courts appeared about this time and were collected together by Nicholl under the general heading of 'Country Objections to the Ecclesiastical Courts Bill'. An anonymous pamphlet proposed some consolidation of the diocesan courts and a remodelling of their practice to produce 'a reasonable number of Country Courts'. Similarly, Edward Steward, a Deputy Registrar and proctor at Norwich, addressed a pamphlet to Sir James Graham on 23 February in which he called for the better regulating of the local testamentary courts instead of 'another advance in the grand march of "centralization" - a scheme which threatens to satiate the metropolis and to impoverish the provinces'. Another partisan pamphleteer was Henry Raikes of Chester, a member of the Committee of Registrars. His Observations on the Ecclesiastical Courts Bill brought in this Session was preoccupied with his own likely loss of income, but he also complained that 'the measure has been prepared without the advice or concurrence, it is believed, of a single functionary of the numerous class conversant with the working of the present system, or affected by its change'. Raikes later sought a private meeting with Nicholl on the strength of a claimed friendship with Nicholl's brother-in-law, the Dean of St Asaph, C.S.Luxmoore, but Nicholl made enquiries about Raikes and was cool towards him.

In these various ways, the unedifying rivalries between the competing practitioners were being exposed to the public at the same time as the contents of the Bill were being outlined in Parliament.

Nicholl's overriding concern in these crowded few days was to adhere to the Bill's timetable, but its progress was now directly threatened by the country registrars acting on two fronts, seeking to influence, first, the back-benchers and, secondly, the bishops.

It was the concerted lobbying in the Commons by the country registrars which posed the more immediate difficulty for Nicholl. By 15 February, he was drafting a report to Graham about 'casually heard conversations in the House of Commons' which involved Charles Wood, MP for Halifax, Edward Buller, MP for Stafford and Sir John Buller, MP for Devonshire. These were 'men actuated by the dread of offending their country supporters' as The Times later put it, and the substance of Nicholl's information was that 'the Country Registrars are canvassing to get up an opposition to the 2d reading of the bill'. Nicholl's other informant to the same effect, and at exactly the same time, was Lord Francis Egerton, MP for Lancashire South, an
influential back-bencher and one of Peel's lieutenants. Raikes wrote to Egerton on 15 February to seek his vote at the second reading of what he called the 'Ecclesiastical Courts Abolition Bill'. The letter was passed to Nicholl. Raikes complained, as he always did, about his own circumstances, but his comment to Egerton about the debate of 9 February was that 'you will see the measure endured the panegyrics of Hume, Pechell and Elphinstone and was condemned by Sir Robert Inglis and Mr Jervis on grounds of law and principle'. Nicholl reminded Egerton of the impeccable credentials of the Bill's authorities, and suggested that Raikes had not studied it properly. 31

The country registrars sought to influence the bishops as well. They put their case in the form of a carefully-timed Memorial, dated 16 February 1843, addressed to both Archbishops and their bishops; it was unusual in being a combined approach from the registrars of both Provinces. The Memorial appealed to the prelates to set aside the various reforming proposals made by Royal Commissions and Select Committees and to hold to the tradition of local courts, as approved by the 'sacred sanction of time'. The argument expressed or implied a number of beliefs. It was the duty of the bishops to maintain effective diocesan courts connected with 'the interests of the Population around you'; it was important that there should be accessible local justice, both ecclesiastical and common law; and it was the strength of the public 'through their representatives in Parliament' which had already shown how to thwart the centralising plans of successive governments.

The Memorial went on to offer the bishops an alternative scheme of reform, so like the heads of a bill and produced so conveniently that it may well have been what Swan had already drafted and touted around. What the registrars wanted was the abolition of the inferior courts, apart from a handful of exceptions on grounds of accessibility; the retention by the diocesan courts of both non-contentious and contentious testamentary business, with an option for parties to go to the Prerogative Court if they wished; the circumvention of the rule of bona notabilia by determining jurisdiction according to the 'last usual place of residence' and by making diocesan grants of probate generally valid; and the appointment by the Archbishops themselves of commissioners to make regulations, fix court fees and determine any compensation. Finally, the Memorial argued that the country registrars were perfectly competent, that the proctors at Doctors' Commons would still be left with sufficient business, and that all other recent legislation, apart from the present Bill,
had endorsed 'the Principles of bringing justice to every man's door'.

Nicholl read those sweeping demands and exhortations and hurriedly circulated an abridged version of the Memorial among those to whom he turned for advice. Lushington replied with comments about the irregularities and lack of qualifications which he associated with the country registrars and the diocesan courts; and Wadeson, a senior proctor at Doctors' Commons, briefed Nicholl with a paper which showed in detail how the memorialists had ignored or distorted the work of the Ecclesiastical Courts Commission and of the two Select Committees.

As well as these difficulties created by the country registrars, Nicholl's postbag in the second and third weeks of February 1843, was full of complaints, queries and suggestions from many other directions.

For example, his colleagues, the officers of the courts at Doctors' Commons, were disgruntled with their salaries as provided by a schedule to the Bill. Many requests from middle-ranking and parish clergy also reached Nicholl about this time. The Dean of Salisbury had asked Graham for preferential treatment for the many peculiars within that diocese, a letter which Graham considerately withheld from Nicholl for several days, mentioned to him on the day of his speech but did not show to him until later. The Archdeacon of Norfolk, a member of the ruling Bathurst family, asked for compensation for his impending loss of patronage.

There were several suggestions that surrogates be appointed to handle testamentary business at a district level. A number of parish clergy enjoying minor sinecures were confused about the likely impact of the Bill and asked to be sent copies. It was even proposed that the Bill should become the vehicle for other improvements, such as facilitating the returns of parish registers. And ancient proctors in counties far from London asked Nicholl what they were to do if their livelihood was taken away. The mood of Nicholl's correspondence at this difficult time was lightened only by bantering letters from his brother-in-law, the Dean of St Asaph, to whom he had sent a copy of the Bill. Luxmoore, who disagreed with the Bill, praised the speech to the motion but told Nicholl, 'I am glad you are not a reformer in all things, for Heavens what a radical you would be'.

If anything, the tempo of queries and complaints reaching Nicholl increased in the week commencing 20 February, as a miscellany of self-interested correspondents sought to protect themselves. By then, however, Nicholl had his eye fixed upon the intended second reading on 24 February. His draft letter to Graham on 15 February
had stressed the importance of securing precedence for the Bill on the night, so that it
could be brought 'as early as possible into the House of Lords'. His plan, as he told
Edward Buller on 14 February, and as he confirmed later in writing, was to move the
second reading of the Bill on 24 February and then to go into committee 'on as early
a day as a due regard to the important subject matter of the Bill will permit'. In that
way, all the stages of the Bill could be completed in that session. Nicholl forecast,
with what turned out to be a misplaced confidence, that 'the discussion cannot be
protracted' because the substance of the Bill had been before the public since 1832
and the Commons would sanction its principle.

Nor did it assist Nicholl to have to engage in correspondence with a ministerial
colleague, Gladstone, and distracting close to the time of the intended second
reading. Gladstone's concern, which he had almost certainly discussed with his close
friend, James Hope, and had reinforced by reading the Reports of the Ecclesiastical
Courts Commission, was not with the minutiae of the Bill. Instead he saw a danger,
as had the bishops, that the Bill would leave the ecclesiastical courts in a 'state of
hopeless and, to the world at large, most scandalous confusion'. Nicholl conceded to
Gladstone 'in strict personal confidence' that determining what was spiritual
jurisdiction and what was not presented a problem 'replete with difficulties & it is
not one of the least of these that they, if mooted, must be discussed in the bear
garden of the House of Commons'. He took time to brief Gladstone fully on his
contacts with the bishops and especially on his exchanges with the Bishop of
Exeter.

In the event, Nicholl's plans met with a number of Parliamentary setbacks caused by
other business and by the cunctatory tactics of several MPs. The second reading of
the Bill was crowded out by other business on 24 February, deferred to 3 March,
defered again to 10 March and then deferred yet again to 10 April. That stark
chronology of an interval of some six weeks between the date originally fixed for the
second reading, 24 February, and the date when the debate on the second reading
actually began, 10 April, serves to illustrate the difficulties faced by a junior minister
entrusted with a measure so sensitive and unwieldy that it needed a sufficient share
of Parliamentary time.

On 24 February the sitting was dominated by debates on the Estimates, and on 3
March the Estimates again took priority. Then, with the second reading fixed for 10
March, three MPs asked on 7 March for the Bill to be postponed. Bickham Escott,
MP for Winchester wanted a postponement until after Easter 'because of the general feeling excited against some of its principal enactments'. Escott had had, or was to have, some dealings behind the scenes with Swan and Bishop Kaye. Escott's proposal, which was endorsed by Redhead Yorke, MP for the City of York, because the measure presented some 'complication and difficulty' for his constituents, would have put the Bill seriously at risk for that session. For Charles Buller, barrister and MP for Liskeard, the reason for postponement was that 'all the legal members of both sides of the House' would be on circuit on the revised date for second reading. In a prickly response, Nicholl refused to alter the Bill's timetable. More emolliently, Graham stressed the importance of having the principle of the Bill adopted so that the details could be considered in committee.46

The second setback, on 9 March, was caused by the prodigiously long debate on Ellenborough's conduct of the Afghan campaign, dubbed the 'Gates of the Temple of Somnauch'.47 As a consequence, business was cancelled for 10 March. On the following day, Saturday 11 March, there was a short 'discussion', lasting no more than ¼ of an hour, in the place of the second reading debate. In that short space of time, Graham had to face a miscellany of protests from Jervis, Charles Buller, Sibthorp, Escott, Yorke and Ferrand, another Yorkshire MP, about the abrupt cancellation of the debate, the need for barristers to be present, and the 'objectionable nature' of the Bill itself. Sibthorp described it as 'a greedy, dirty, Doctors' Commons job' and so timed as to 'take the country entirely by suprise'. Again Nicholl insisted upon the agreed timetable, but on this occasion Graham overruled him and agreed to defer the second reading until 10 April. That was to be after the Spring Circuit and three days later than Jervis had suggested.48

Jervis himself seems to have been treated with some care by both Graham and Nicholl. As well as having been involved with an alternative Bill in the previous session, Jervis had, as MP for Chester, already presented two remarkably similar hostile petitions from twenty-nine Chester solicitors and from almost 1700 Chester inhabitants, both of which called for the retention of the diocesan courts.49 As a barrister, he may also have feared the contraction of business on the Circuits and have seen some advantage in amending Nicholl's Bill in order to open up Doctors' Commons to his profession. The Legal Observer had speculated on 28 January 1843 upon the likely reform of the Northern Circuit,50 and on 23 February The Times had published a letter which protested against the continued exclusion of barristers
from practising in the proposed new court and likened the 'quaint usages' of the civilians to those of soothsayers. Indeed, it was the need to argue the case for keeping the College of Advocates closed to barristers which was to prompt Robert Phillimore's defensive pamphlet early in 1843. When Graham had opened the short 'discussion' on 11 March, it was to the inconvenience caused to Jervis that he had first referred and at the close he had specifically acknowledged the postponement proposal made by Jervis. Earlier, on 4 March, Nicholl had taken the trouble to write to Jervis to warn him that the second reading had been deferred because so little progress was being made with the Estimates. And, having been told that his measure would be the first to be proceeded with after the Estimates, Nicholl promised to keep Jervis informed 'of the actual day on which the second reading will be brought under discussion'. It was that careful arrangement which was disrupted by the 'Gates of Somnauch' debate.

As well as the direct pressure exerted upon Nicholl in the Commons by the interventions of Jervis and others, he had to contend with the hostile petitions presented by MPs. Over the session as a whole, they attracted more than 18,000 signatures, and they were always presented in order to coincide with the Bill's arrival, or intended arrival, at a particular Parliamentary stage. For example, on 24 February, when there should have been the second reading, there were similar petitions from forty-five Herefordshire solicitors and twenty-eight Hereford solicitors, protesting that the Bill denied justice to the less wealthy; the Dean and Chapter of York and the proctors of Bath and Wells sought compensation on various grounds; and Jervis and his Norwich counterpart presented petitions opposed to the transfer of business to London. A similar pattern repeated itself at intervals throughout March 1843. Jupp's assessment of the petitioning campaigns during Wellington's administration is that 'it is difficult to tell whether it was a case of MPs enlisting public opinion in their support or the other way round'. But in 1843 the hostile petitions do seem to have been whipped up by country proctors and solicitors fearful of losing business to their rivals in London. The Lincolnshire Chronicle wanted solicitors to make known their views about the Bill 'to the several members of the county and the boroughs' and exhorted each parish 'to bestir itself and send a petition'. There were many references in the Commons debate on 28 April, when it came, to the formidable and self-interested pressure exerted upon MPs by country solicitors. A country vicar in
Hertfordshire told Nicholl about a conversation over dinner with two Baldock solicitors, 'on talking over the merits of your Bill they both spoke highly of it & said they had refused to sign a petition against it, sent to them by the Bishop’s proctor for this part of the Diocese. They also told me whenever they had probates to take out, they always took them out in Town as the cheapest and most expeditious way for their clients. From all I hear the chief opposition raised to the Bill is from interested parties'.58 And Bellenden Ker, writing close to the time of Nicholl’s Bill, had no doubt that law reform in general was being retarded by such influences, 'each member worked upon by any silly or selfish constituent - some attorney or surveyor - is sure to raise some difficulty, and every good measure is either strangled or so scotched as to be nearly useless'.59

A hint of goodwill reached the Government early in March in the form of a pamphlet, signed by 'VERAX', which was supportive of the Bill and the text of which later appeared in The Times.60 Otherwise, Nicholl was drawn into continuing and vexatious exchanges with a variety of frightened or angry correspondents prior to the intended second reading date of 10 March, and then prior to the revised date of 10 April. He had to deal with persistent claims for compensation from the handful of York advocates;61 with the problem of the seniority of those York proctors who might be admitted to Doctors’ Commons;62 with the taunts of the Bishop of Exeter over what he believed to be Nicholl’s lukewarm attitude to certain parts of the Bill;63 and with legal claims on behalf of the sinecurist registrars at Doctors’ Commons.64

The combined effect of these forms of pressure upon Nicholl prompted a remarkable *cri de coeur* to Peel on 8 March. He contrasted the ‘mode in which the opposition to the Bill is getting up’ with what he estimated to be the dwindling number of the Bill’s natural allies in Parliament, reminding Peel that many of the signatories of the General Report, the authorities upon whom Nicholl relied, were now dead or had left Parliament or were ill. His only reservation about the content of the Bill at that time seems to have been the concession to the diocesan courts of non-contentious business below £300, included in the Bill to secure support at the Lords stage. However, he warned Peel that it would be fatal to delay the Bill because, without ‘the full strength of Government’ and a contribution from Peel himself, it could be lost at second reading.65 Peel promised to help, albeit somewhat stiffly,66 but he did not speak in support of the Bill until the adjourned second reading debate on 28 April. He then gave a spirited performance, described by
Roebuck as 'forcible and ingenious'.

The further deferment of the second reading to 10 April simply provided critics of the Bill with more time to pen complaints and to propose amendments. Some were sent direct to Nicholl and some alerted an MP to the likely consequences of the Bill in his constituency and were passed to Nicholl.

The effect upon professional rivalry was also visible. The *Legal Observer* was now so anxious to secure a guaranteed share of the business for its solicitor readers that it told them, 'if the profession only bestirs itself the Bill could be postponed until after Easter and perhaps until the next Session'.

An Exeter solicitor poured scorn on the alleged expertise of proctors, 'There is neither Magic or Science required to prove a will or obtain letters of administration'. By the end of March, a substantial number of variously hostile petitions had been presented on behalf of solicitors in diocesan and market towns, and on behalf of law societies such as Worcester, Liverpool, Manchester, York and Lincolnshire. The weightiest petition came from the Incorporated Law Society, an almost complete version of which had appeared beforehand in the *Legal Observer*. It demanded a return to the recommendations contained in the General Report, notably the removal of the distinction between wills of real and personal property and the concentration of all original wills in London, but it captured the mood of the profession by calling for an end to the monopoly of practice enjoyed by the London proctors. In addition to printing the text supportively on 25 March, the *Legal Observer* itself criticized the greed of the proctors in an editorial on 8 April.

With the second reading again looming on 10 April, the London proctors made another attempt, late in March, to arrive at an *entente* with the country registrars. A scheme was circulating between Francis Bonham, one of Peel's party managers, Graham and Nicholl, but Nicholl dismissed it as being no more than had been previously rejected. Just as he had addressed Peel, so he urged Graham to stand firm, without 'any appearance of faltering', on what were now the core features of the Bill. He itemised these as being the new court and registry in London, the network of branch registries with limited powers, and the introduction of salaried posts with duties performed in person. Nicholl probably overstepped the mark in also suggesting to Graham that there should be a prohibition on any law officer being party to a plan other than the Bill itself, an unmistakable reference to Follett's wavering. Graham did not act on that piece of advice. Indeed, from what he told
Bonham, Graham seemed to have made up his mind about the Bill. It 'has been long and carefully considered; and no new scheme can now be submitted to Arbiters whose award shall fetter the discretion of the Government. The measure rests on the highest authority and the sense of Parliament must be taken upon it. For one I had rather the Bill was rejected, than that its efficiency should be frittered away by compromises in private'.

After all those protestations of some resolve on the part of Government, it is a paradox to note that both Nicholl and Graham could also think otherwise. First, whilst Nicholl was preaching such a rigid approach he was still not ruling out some compromise facilitated by distinguished supporters of the country registrars 'in & out of Parliament'. He specifically named Lord Courtenay, Sir John Buller and James Hope, Gladstone's friend. Secondly, Graham, for all his apparent firmness, was to change his mind soon afterwards about the centralising thrust of the Bill and was to do so for precisely the pragmatic reasons he was presently rejecting.

However, as both Graham and Nicholl had many times indicated, Parliament was the forum where the fate of the Bill was to be settled and that stage was reached decisively in April 1843.
Notes to Chapter 11.

1. GP, 24 March 1843, Bonham to Graham.


5. MMP, L.93, 21 Nov.-12 Dec.1842, correspondence between Nicholl and Graham.

6. MMP, L.93, 28 Dec.1842, Nicholl to Jenner.

7. MMP, L.93, Dec.1842, Nicholl to Bethune.

8. MMP, L.94, 14-17 Jan.1843, correspondence between Nicholl and Fox.

9. MMP, L.94, 21-23 Jan.1843, correspondence between Nicholl, Iltid Nicholl and Home Office; see also MMP, L.89, 2 Feb.1843, Dorney Harding at Doctors' Commons to Nicholl, 'Iggulden came in suddenly and, seeing the back of the papers, asked if it was the Bill. I said "no, but a Bill it certainly was". He seemed to suspect, tho I was cautious. I mention this in case you hear any reports'.

10. MMP, L.93, 14 Jan.1843, Howley to Nicholl; 16 Jan., Graham to Nicholl.

11. MMP, L.109, Jan.1843, *A letter from A.B.*

12. MMP, L.93, 20 Jan.1843, Nicholl to Graham.

14. MMP, L.93, 31 Jan.1843, correspondence between Nicholl and Lyndhurst; see also MMP, L. 93, 7 Jan.1843, Graham to Nicholl.

15. MMP, L.89, Feb.1843, correspondence between Nicholl and Harding.

16. MMP, L.93, 24 Jan.- 9 March 1843, correspondence between Nicholl and Hobhouse.

17. MMP, L.93, 2 Feb.1843, Nicholl to Graham.

18. MMP, L.91, 4-9 Feb. 1843, correspondence between Nicholl, Graham and Follett.

19. See n.2. Nicholl's speech occupied thirteen columns of *Hansard* and he had copies printed.


22. Ibid., lxvi, 9 Feb.1843, cc.325-29.

23. Ibid., cc.330-32.

24. Ibid., c.335.

25. Ibid., cc.333-34.

26. Ibid., c.334.


29. MMP, L.90, 3 March 1843, Nicholl to Raikes, 'I cannot discuss your 'observations'. They are an able but of course one-sided argument on the measure and in part evince, as it seems to me, not a very accurate understanding of the bill or of the existing law and practice'.

30. MMP, L.94, 15 Feb.1843, Nicholl to Graham; The Times, 24 July 1843.

31. MMP, L.90, 15 Feb.1843, Raikes to Egerton; Nicholl to Egerton.

32. MMP, L.109, 16 Feb.1843, Memorial from country registrars.

33. MMP, L.88, 16 Feb.1843, proposal of registrars for reform of ecclesiastical courts; see also MMP, L.117, Feb. 1843, Lushington and Wadeson to Nicholl.

34. MMP, L.94, 13 Feb.1843, Dyke to Nicholl; 14 Feb., Nicholl to Graham; 15 Feb., Nicholl to Jenner.

35. MMP, L.90, 2 Feb.1843, Dean of Salisbury to Graham.

36. MMP, L.88, 11 Feb.1843, Archdeacon of Norfolk to Nicholl.

37. MMP, L.88, 14 Feb.1843, Gidley to Francis Rogers; 17 Feb., Burmester to Nicholl.

38. MMP, L.88, 20 Feb.1843, Bradley to Nicholl.

39. MMP, L.88, 18 Feb.1843, Rogers to Mr Serjeant Goulburn.
40. MMP, L.90, 16 Feb.1843, John Williams at Camarthen to Nicholl, 'my door will become a stranger to clients, my office cobwebbed, my library a lumber, my precedents and experience useless & myself at the age of 70 years with empty pockets'.

41. MMP, L.89, 15 Feb.1843, Luxmoore to Nicholl.

42. MMP, L.94, 15 Feb.1843, Nicholl to Graham.

43. MMP, L.88, 18 Feb.1843, Nicholl to Edward Buller.


45. CJ, 98, 1843, pp.56,75.

46. Hansard, 3d.ser., lxvii, 7 March 1843, cc.351-52.

47. Ibid., 9 March 1843, cc.581-706. Francis Rogers commiserated with Nicholl over the deferment, 'You must be heartily tired of the Gates of Somnauch by this time', see MMP, L.90, 14 March 1843, Rogers to Nicholl.

48. Ibid., 11 March 1843, cc.707-12; see LO, xxv, 4 Feb.1843, p.282, for the 'Circuits of the Judges'.

49. HLRO, Appendix to Reports of Commons Select Committee on Public Petitions, 1843, pp.46-47, 79.


52. MMP, L.89, 4 March 1843, Nicholl to Jervis.


54. Ibid., 1843, pp.68-145, passim.


56. The Times, 6 March 1843, reprinting an article in the Lincolnshire Chronicle.

57. See, for example, Hansard, 3d.ser., lxviii, 28 April 1843, c.1052.

58. MMP, L.88, 29 March 1843, Vicar of Weston to Nicholl.

59. University College London, Brougham Papers, ms.14514, [c.1843], Notes by Bellenden Ker 'on the progress and prospects of Law Reform in England'.

60. MMP, L.109, Letter to the Right Honourable Sir James Graham. 2 March 1843; see also The Times, 10 March 1843.

61. MMP, L.88, 2-5 March 1843, correspondence between Nicholl and Blanshard; MMP, L.93, 3-5 March, correspondence between Nicholl and Graham.

62. MMP, L.94, 4-6 March 1843, correspondence between Nicholl and Iltid Nicholl.

63. MMP, L.92, 1-13 March 1843, correspondence between Nicholl and Bishop of Exeter.

64. MMP, L.89, 8 March 1843, Lambert to Nicholl.

65. BL,Add.Ms.40525, ff.387-88, 8 March 1843, Nicholl to Peel. Ironically, it was Sir John Nicholl who had originally suggested the conceding of smaller probates, see MMP, L.91, March 1836, Nicholl to Lyndhurst.
66. Ibid., f.389, 9 March 1843, Peel to Nicholl.


68. LO, xxv, 18 March 1843, p.388.

69. MMP, L.88, 11 March 1843, Pitts to Divett.


71. HLRO, op.cit., 1843, p.458.

72. MMP, L.93, 24 March 1843, Bonham to Graham; 25 March 1843, correspondence between Bonham, Graham and Nicholl.

73. MMP, L.93,[c.25 March 1843], Nicholl to Graham.

74. GP, 25 March 1843, Graham to Bonham.

75. See n.73. Sir John Yarde Buller and Lord Courtenay were the two Conservative MPs for Devonshire South. Buller, 'a solid country gentleman', was one of the 'hard knot of revengeful Tory members' which helped to unseat Peel in 1846, see Gash, op.cit., pp.241, 602. James Robert Hope, a parliamentary barrister and Chancellor of Salisbury since 1840, was an intimate of Gladstone, see DNB, ix, pp.1224-26, and Foot and Matthew, op.cit., iii, pp.259-62.
Chapter 12: The second reading of the 1843 Ecclesiastical Courts Bill and its aftermath; 'concessions have been made to the spirit of prejudice and monopoly, which will render the enactment of a just and comprehensive measure most difficult hereafter'.

This chapter will examine the fortunes of the Ecclesiastical Courts Bill during and subsequent to its second reading in April 1843.

Nicholl's centralising measure was defeated, effectively, at its second reading on 10 and 28 April 1843. He was later instructed to modify it by offering more to the diocesan courts and to the York Court, concessions to local interests which merely provoked demands for still further concessions. Nicholl, for his part, felt that the authority of the General Report was being betrayed and weakened, and it was certainly true that after 1843 no government, whatever its persuasion, could contemplate adhering to the concept of a wholly centralised testamentary jurisdiction.

With the second reading due on 10 April, Graham summoned Nicholl to a meeting at the Home Office on 8 April. Nicholl evidently left that meeting with the feeling that Graham might be about to give ground to local interests. On the following day, Nicholl drafted an anxious letter to the Home Secretary. He argued that 'any reference, however slight, to the possible adoption by Government of some other scheme' could only strengthen the Bill's opponents and would 'create doubt and cause defection' among those otherwise disposed to support it. Nicholl's view was that the only honourable course for Ministers, whatever the outcome, was to show in Parliament 'the sincerity of purpose with which the bill had been brought forward & is supported'. His anxiety is likely to have been reinforced by the knowledge that he was not to be allowed to take any part in the debate on 10 April, or in the adjourned debate on 28 April, although he was present in the Commons on both occasions.

Three matters immediately preceded the second reading debate on 10 April. First, the Government took the unusual step of issuing MPs with a reprint of the General Report, doubtless to drive home the authority upon which the Bill largely rested. When Inglis spoke in the House that evening he complained that he had had only ten hours to study the reprint, adding that 'a man can hardly yet handle its damp pages without the danger of rheumatism'. Secondly, it was recorded that thirty-two public petitions were presented at the
beginning of the sitting, all praying that the Bill 'may not pass into law'. Several of the presenting MPs were known opponents of the Bill, namely Inglis, Sibthorp, Escott and the newly-elected Charles Newdegate, but the petitions varied in detail. The Liverpool Law Society wanted a contentious jurisdiction in London and a non-contentious jurisdiction locally, whereas the Dean and Chapter of Norwich Cathedral inveighed generally against 'that great evil of metropolitan centralisation'.

And, thirdly, on 10 April there was a prolonged debate on the third reading of the Registration of Voters Bill, some thirty columns in Hansard which delayed the start of the debate on Nicholl's measure.

When the time came for Graham to move the reading, it was Inglis who took the lead in opposing the Bill. His speech, long and discursive and peppered with references to his preparatory reading, was a compendium of what the Bill was to face in the Commons. The fact that it appeared in a corrected form in Hansard suggests that he and his supporters attached particular importance to its accurate dissemination. Much of what Inglis had to say in presenting criticisms of the Bill would have been familiar to Nicholl from his postbag and from his own monitoring of the public petitions.

Inglis drew attention to the fact that the hostile petitions just presented came from a variety of sources, not merely the Home Secretary's 'ordinary opponents but the attached friends of his administration'. He went on to describe unnecessary change as an evil, and especially so where it would destroy the main functions of ancient institutions. Although Inglis spoke at much greater length than anyone else on 10 April, what his contribution had in common with those made by Jervis and Sibthorp was that all three MPs attacked the Bill for favouring Doctors' Commons and all three wanted it to be withdrawn. Inglis may have been selective in the way in which he drew upon the General Report and upon authorities as varied as Bowdler, Phillimore and Archdeacon Wilberforce, but he was on safe and familiar ground in deploring in the same breath the monopoly at Doctors' Commons and his own party's centralising policy. Other and disparate critics of the Bill were to echo those same themes throughout the session. For Inglis, 'the real object of the friends of centralisation is to take all the business from the country, and to bring it all to London: the real object is not centralisation as such, but their own metropolis - not one court, but that one court in Doctors' Commons'. What he advocated instead was the remedying of defects where they existed, 'but, there is little wisdom in making
such rare cases the ground of so wide a measure of abolition'. In support of that
argument, he described a number of secure, efficient and local registries where
testamentary business was handled conveniently and economically and which he had
either seen himself or been informed about. Nor was Inglis persuaded that a central
registry necessarily offered a more secure alternative to local arrangements at a time
when London had recently experienced major fires at the Tower of London,
Westminster Abbey, the Royal Exchange and Parliament itself. For good measure,
he also criticised Howley for having agreed to surrender the patronage of his
archiepiscopal office, thus allowing the creation of a secular testamentary court,
'another wedge driven in to sever the Church from the State, the ecclesiastical from
the civil polity of the realm'.

When Graham rose to reply to Inglis, he acknowledged, and said that he had
anticipated, the strength of the opposition to the Bill. With Hansard in his hand, he
recalled Campbell's warning in 1836 that such a measure 'would give umbrage to
the country solicitors, a very powerful body, who would send numerous petitions to
the House, and would be able to induce many members to vote against this salutary
reform'. However, Graham immediately sought the moral high ground as he had been encouraged to do by Nicholl. The Bill had been in preparation over many years;
it derived from the 'highest ecclesiastical and legal authorities and had been
sanctioned by two Parliamentary Committees'; it had the 'authority of two or three
ex-Chancellors, and of the present Lord Chancellor of England, in its favour'. It was,
moreover, his public duty to submit this Government Bill to Parliament despite 'the
character of the opposition it would encounter out of doors'. Nor did he accept that
the Bill was inconsistent with the proposed county courts legislation since both
measures proposed that 'sums of small amount' should be dealt with by local courts.
In brief, Graham felt that the time had come to put the simple principle of the
measure before the House, namely 'the concentration, under a judge appointed by the
Crown, of the supreme jurisdiction in matters testamentary'.

At that point Graham either misjudged or ignored the mood of many MPs by
refusing to submit the Bill to further scrutiny by a Select Committee, and he gave
offence by claiming that any rejection of the measure would convince him that
'private interests have prevailed over public consideration'. Peel had wanted to
press matters to a division that evening. However, because the start of the debate on
the Bill had already been delayed until 9.30 pm, because it was then as late as 12.45
am, and because there were signs that the opponents of the Bill had a wrecking amendment in mind, Peel agreed to an adjournment. The House then voted by 136 votes to fifty-one in favour of an adjournment until 28 April.\textsuperscript{13}

The fledgling Law Times contented itself with noting that there had been an 'angry debate',\textsuperscript{14} but for both The Times\textsuperscript{15} and the Legal Observer\textsuperscript{16} the significance of that adjournment was that the Bill had been virtually defeated. The Times had found it 'oppressive and impolitic' and full of potential for ministerial patronage in the place of ecclesiastical patronage, a view shared by the Edinburgh Review.\textsuperscript{17} What was really needed, according to The Times, was a measure which was not 'clogged...with a scheme of centralisation' and which made a clearer distinction between the temporal courts dealing with testamentary business and the ecclesiastical courts dealing with spiritual matters. The Legal Observer certainly regarded the Bill as 'abandoned for the session, probably for ever', claimed some credit for its own campaign on behalf of the profession and against the Bill as framed, and turned instead to its preference for transferring the jurisdiction to the Court of Chancery, as the Real Property Commission had recommended.

Nicholl was left in an awkward position at this time as the seemingly reluctant framer of a Bill which was also going badly in the hands of colleagues. When one of his correspondents, the Archdeacon of Middlesex, A.H. Hale, commiserated with him over the setback of 10 April, 'surrounded as you are by antagonist parties', Nicholl's revealing reply, on 24 April, admitted that 'my task, as you seem to be aware, is not an easy or enviable one & was not sought by me'.\textsuperscript{18}

When the adjourned debate was resumed on 28 April, it lasted for four hours from 8.30 pm to 12.30 am, as noted by Gladstone, and was described in the Law Times as 'an angry and almost violent discussion, in which language was used such as is rarely heard in the senate'.\textsuperscript{19} Even the greatly experienced Peel could not recall hearing in the House such 'discordant opinions' as those voiced by the Bill's opponents.\textsuperscript{20}

What might otherwise have been Nicholl's role that evening was played by the Attorney-General. Pollock argued that the proposed centralising of the testamentary jurisdiction and the custody of wills brought it into line with the centralised equity and common law jurisdictions, and would sweep away all the uncertainty associated with the multitude of peculiaris.\textsuperscript{21} Nonetheless, it was to Graham that most contributors addressed themselves and what they said was either reasoned or
In the first camp was Sir George Grey, who had been prevented from speaking by the closure on 10 April and who now led for the Whig Opposition. Grey supported the Bill in principle but only on condition that a Select Committee would be appointed to scrutinise its 'technical and professional details'. For example, he regretted the failure of the Government to introduce a single court for the trial of wills of both real and personal property; to superimpose consistent district divisions upon the variety of jurisdictions being introduced or reformed, such as bankruptcy, local courts and probate; and to throw open Doctors' Commons to barristers. More characteristic of an instinctive hostility to the Bill were the speeches made by Lord Robert Grosvenor, Whig MP for Chester, Captain Robert Fitzroy, Conservative MP for Durham City, William Rickford Collett, Conservative MP for Lincoln, Bickham Escott, Conservative MP for Winchester, and Charles Newdegate, MP for North Warwickshire. What Grosvenor, Fitzroy, Collett and Escott had in common, regardless of party affiliations, was, first, their instinctive opposition to centralisation and to the professional monopolies at Doctors' Commons; and, secondly, their resentment at Graham's manner towards them and his refusal to alter or withdraw the Bill. How they differed in detail was that Grosvenor acknowledged the formidable influence upon the Commons of the country solicitors; Fitzroy claimed to be his own man; and Collett did no more than plod through a routine defence of local interests. Much more interestingly and dangerously, Escott, who had been in touch with both Swan and Kaye, felt confident enough to question and undermine the current authority of the General Report. He told the House that three of its prelate signatories now opposed the Bill's 'objectionable clauses'.

Elphinstone was prepared to vote for the Bill 'even in its present imperfect state, [because] it would confer great benefit on all classes of the community'. Uncomfortably for Nicholl, that support in principle from Elphinstone was offset by his disagreement over such matters of detail as the concession of smaller probates to the diocesan courts; the Bill's failure to deal with wills of real property; the missed opportunity to divide the judicial labour at Doctors' Commons between two judges; and, finally, and just as Nicholl feared would happen, the expansion of Nicholl's post of legal adviser to the Archbishop of Canterbury. Elphinstone also warned, as Brougham had done before and for the same reason, that the measure should have been divided into four smaller Bills, with only 'one bill for wills and
administrations'.

Chancellor Vernon steered an ambiguous course, seeming to support the Bill and yet calling for a York court which would be equivalent to the new court in London, as did the Manchester Law Society. A number of other MPs preferred to speak rather than give 'a silent vote.' Labouchere, Hume, Roebuck and Gladstone's immediately older brother, Captain John Gladstone, all declared their preparedness to vote for the Bill in order that it could be scrutinised in committee, but there were strong hints here and there that they would vote the other way at a later stage if it was not materially altered in committee. The unease of that loose grouping of MPs was perhaps best summarised by Roebuck in the final contribution to the debate, 'he supported the bill as far as it pulled down, but he totally disagreed with it as far as it attempted to build up.'

However, the most striking of all the contributions to the debate, whether for or against the Bill, came from Peel himself. He was evidently vexed to find that the measure had become a perverse battlefield, with natural enemies like Sibthorp and Thomas Slingsby Duncombe both prepared to oppose it. Sibthorp was convinced that the unity of Church and State was at risk, whilst at the other extreme Duncombe felt that the Bill did not go far enough to meet the grievances of Dissenters.

However, what Peel argued was that the Bill should be allowed to proceed because remedies were needed and because the Government was acting out of 'conscientious conviction' and would continue to do so whatever the risk from 'powerful and widespread' interests might be. His speech was remarkable in two ways. First, the choice of language in which he contrasted his own lack of self-interest with the implied motives of others, 'so help me God, I for my own part am influenced in my course by no sinister, corrupt or dishonest motives.' Secondly, despite his disclaimers about lacking legal knowledge, he cited a number of examples of irregular proceedings in diocesan courts and among the peculiars, detailed information which is likely to have been provided by Nicholl. Peel had at last defended the Bill as he had told Nicholl he would, but the Government carried the day by only 186 votes to 104. A number of dissident Conservatives voted with the Opposition, others wanted to alter the Bill in committee, and no date had been fixed for the next stage.

The Bill may have survived, technically speaking, but there was no respite for Nicholl in May 1843.
He was subjected immediately to pressures from four different directions, pressures which both reflected and reinforced the misgivings of MPs. First, there were continuing complaints from individuals likely to be affected by the Bill as it stood. Secondly, there was further tension between the London proctors and the country registrars over *bona notabilia*. Thirdly, there were serious efforts to retain a provincial court at York. And, fourthly, the Bishop of Exeter exhibited his hostility towards the Bill in the forum of the House of Lords. As a consequence of these pressures, Nicholl found himself having to contemplate for the first time how the measure might have to be altered significantly in order to ensure its further progress.

First, and typical of the self-interest of individuals at this time, were the requests for interviews made by J. S. Hardy, Registrar of the Archdeaconry of Leicester, and by Lord Courtenay and Follett on behalf of one of the Exeter Registrars, described by Follett as 'my friend Mr Sanders'. These requests were dated 29 April and came hard on the heels of the second reading of the Bill in the early hours of that day.

Secondly, and much more troublesome for Nicholl, were the concerted efforts of the country registrars to hold on to the jurisdiction of the diocesan courts and to bring about the abolition of *bona notabilia*. Thomas Clarke of Clarke, Fynmore and Fladgate, a firm of London solicitors, had been appointed as agent for the registrars, but Nicholl had refused to accept the submission of any proposed modifications to the Bill prior to second reading. Then, on 30 April he extended to Clarke an invitation to do so. The next step was that some ten registrars met at Clarke's office on 3 May. Swan and Raikes were present; the meeting was chaired by William Frederick Beadon, Registrar of Bath and Wells; and a number of resolutions were framed. These resolutions asked that the peculiars should be abolished; that the diocesan courts should be preserved; that about ten archdeaconry courts should also be kept in order to further facilitate the public; that these local courts should be given legally qualified judges and a testamentary jurisdiction concurrent with the new court in London; that the local jurisdiction should be determined by abode at the time of death, which would thus set aside the *bona notabilia* rule, but that any party should have the option to apply directly to the new court; that copies of wills should be exchanged between the local and central registries; and that there should be a more just approach to compensation. Graham's reaction to these demands, a week or so later, was that 'They ask for more than they are willing to accept'.
Nicholl's subsequent contacts with Clarke were marked by nervousness, obstinacy and confusion on all sides. Nicholl was unwilling to be seen to be negotiating with any of the interested parties, and yet he wanted 'as equitable an arrangement between conflicting interests as circumstances will permit'. He thus seemed to be pressing upon Clarke the idea of renewed contacts between the registrars and the London proctors. 36 On his side, Clarke expected Nicholl to put the resolutions to the Government as they stood. And the registrars refused to reopen discussions with the London proctors because 'these Gentlemen always insisted upon the retention in a greater or lesser degree of...bona notabilia and the Registrars were not aware that their views had suffered any alteration'. 37

Nicholl reported that impasse to Graham on 11 May, or thereabouts, and he did so in a memorandum which not only counselled the rejection of the demands made by the registrars but also reflected his disdain for the rank and file of the country practitioners. 38 His reasons for rejection were that to retain the diocesan courts intact would be to abandon a basic feature of the Bill and would bring about a reprieve for the York Court. He welcomed the idea of legally qualified Chancellors but, as to the demand for concurrent jurisdiction, he calculated that there would still be insufficient disputed business at diocesan level either to attract judges of any standing or to support a bar. There could also be damaging consequences for the London Court which, even as the Bill stood, would be only 'adequately though not overpoweringly employed'. Nicholl's fear that the demands of the registrars would perpetuate all the worst and most unprofessional features of local practice, and his questioning of the argument about making justice available locally, were both disclosed to Graham in the final paragraph of the memorandum. 'But is the resort of persons to the Diocesan Courts their own spontaneous act? Is it not the result of local influence and the disgraceful canvassing for business by the most hungry and least respectable of the practitioners, unchecked by the authority and eye of a Judge or the tone given by the practice and presence of respectable Proctors congregated together? ...The notorious result [sic] of this hunting after business are allowances to those who bring clients and consequent increase of charge to the public'.

Nicholl's memorandum failed to persuade Graham to hold the line, and it was the Home Secretary's decision, in this crucial interval between the second reading and the committee stages of the 1843 Bill which was to lead to an irreversible volte-face on the part of the Government.
On 12 May, Graham advised Nicholl to ignore the unproductive exchanges with Clarke and to concentrate instead on what might be achieved by negotiation in advance of the committee stage. The pragmatic view taken by an overworked Minister was that 'if we abandon the plan of a Central Court of exclusive jurisdiction and consent to the maintenance of Diocesan Courts, I am disposed to think that this Proposition presents an opening which might be improved into a Settlement'.

The importance of Graham's letter cannot be exaggerated. Manchester has referred to Nicholl having 'watered down' the 1843 Bill by the time that he moved the second reading of the 1844 version of the Bill. The reality was that the shift of emphasis began before the committee stage in May 1843, that it was prompted not by Nicholl but by Graham, and that it was to lead in 1857 to a reform of the testamentary jurisdiction quite unlike anything envisaged either by the Ecclesiastical Courts Commission or by Ministers at the start of Peel's second administration.

As soon as Nicholl knew that Graham wished him to 'negotiate', he contacted Clarke, and the resolutions of the country registrars were presented to Fox and Iggulden at Doctors' Commons. At the same time Nicholl felt obliged to tell his uncle, Jenner-Fust, that he could not engage in any unofficial talks 'with you or with others interested in the London Courts'. In the event, these renewed contacts between the rival groups of practitioners were no more successful that they had been on earlier occasions. On 25 May, Clarke reported to Nicholl that the overture to Fox and Iggulden had failed. 'We fear that any understanding with the Proctors is hopeless, as from communications that have taken place it does not appear that those gentlemen are prepared...to give up the doctrine of bona notabilia, the existence of which in any shape the Registrars consider detrimental to the interest of the Public'.

That statement did not fully represent the position of the London proctors. During May, Nicholl was sent counter-proposals prepared by Fox and Iggulden which envisaged a new Bill dealing only with testamentary jurisdiction. The scheme seemed to go some way to meeting the registrars in respect of the powers of the diocesan courts, and even the York Court, but the London Court was to retain control 'over the whole system' and was to deal with any infringement of the bona notabilia rule. It was that effective retention of the rule which caused the negotiations to founder in May 1843.

The third pressure Nicholl was placed under during May was to allow the retention of an effective provincial court at York. That pressure took two forms, public
petitions and direct approaches from practitioners.

In the debate on 28 April, Chancellor Vernon had mentioned the petition from the Manchester Law Society in support of a competent court at York, but that was only one of many such petitions from Northern solicitors. For example, at the end of March the Wakefield solicitors had wanted to retain the York Court in an altered and improved form because 'centralisation is injurious'. On 28 April, the attorneys and solicitors of Kingston upon Hull had asked for a court at York, equivalent to the new court proposed for London, which would serve all the Northern counties, together with Cheshire, Derbyshire, Lincolnshire and Nottinghamshire. Their counterparts in Bolton had submitted an identical petition. By 6 May, the Law Times was carrying the text of a petition from the Yorkshire Law Society which registered the opposition of its members to the centralising policy of the Bill, and asked that the York Court and the diocesan courts be retained in an 'altered and improved' form. In the same issue of the Law Times a letter from the Secretary of the Yorkshire Law Society claimed that Petitions of a similar character...had been sent from nearly all the towns of importance in the County of York.

Whilst these petitions were accumulating, a joint deputation of York practitioners, three proctors and two advocates, came to London on 10 May to try to see Nicholl. J.H. Lowther, one of the York MPs, contacted Nicholl about his constituents and about alterations to the Bill. The meeting took place on 12 May and Nicholl heard at first-hand the arguments for retaining the York jurisdiction, although the waters were subsequently muddied by the private preoccupation of the two advocates with the need to be compensated. In fact, only four days before that deputation was received, Graham had been considering what to do about the York Court if it was to be reprieved. He asked Nicholl how Chancellor Vernon might be replaced; how to arrive at a salary for his successor; how to admit common lawyers at York whilst still maintaining 'an exclusive bar of civilians at Doctors' Commons'; and, finally, how to deal with the practitioners in the diocesan courts in the Northern Province who were likely to object 'almost as much to the transfer of their business to York as to London'. In fact, Graham seemed by this time to be just as ready to contemplate the retention of a reformed York Court as a counterpoise to the proposed new court in London as he was to contemplate the retention of the diocesan courts, and for the same pragmatic reason. What he said to Nicholl was that 'when we consider the critical position in which our measure stands...an honourable escape
from our embarrassment is most desirable'. The fourth factor contributing to Nicholl's disappointment and discomfiture in May 1843 was the bravura performance in the Lords on 22 May of Henry Phillpotts, Bishop of Exeter. On that occasion his behaviour fully matched Wellington's description of him as 'the most unmanageable gentleman in the House of Lords'. Phillpotts took the floor ostensibly to speak in support of petitions calling for the retention of the diocesan courts in a reformed condition. However, although he ran foul of the Lord Chancellor for mentioning a Bill which was still in the Commons, he did succeed in registering his displeasure over a Bill which could not command unanimity as it then stood and which could not reach the Lords in time to be properly considered. He also succeeded, or so it seemed at the time, in securing an undertaking from Lyndhurst that the Government would not press forward with the Bill that session if it came late to the Lords. This apparent pledge was to embarrass the Government in 1845. As a consequence of all these pressures, but more particularly because of Graham's instructions as to how best to save the Bill, Nicholl began work in May 1843 on the substantial remodelling of what had been presented and printed in February 1843. A quantity of surviving drafts show the concessions he was prepared to make, or had been instructed to make, in order to try to get the measure through the committee stage. The substance of what he was now proposing affected, first, the York interests and, secondly, the interests of the country registrars. The modifications involved the consolidation of each provincial court so as create a single Arches Court under the Dean of the Arches and a single Chancery Court of York under the Chancellor of York, giving to each court the power of granting probates and administrations and of exercising contentious jurisdiction within its own Province. Appeals were to go to the Privy Council and there were to be salaried judges appointed by the Archbishops. In other words, in order to satisfy the York interests, the Government was no longer committed to observing either the spirit of what the General Report had said in 1832 or the letter of what the Commons Select Committee had said in 1833. However, where there was personal property in both provinces the grant would issue from the London Court, and that Court would also have exclusive testamentary jurisdiction in London and in a number of named Home Counties. Similarly, the diocesan courts would be preserved and given a concurrent jurisdiction.
over the wills of persons dying and leaving property solely within the diocese, although either party could move to have the cause heard in the appropriate provincial court. The judges of the diocesan courts were required to be advocates, serjeants or barristers of seven years' standing, and the diocesan registrars were required to be advocates, barristers, proctors or attorneys of five years' standing. Both categories would receive only modest salaries for the performance of their duties in person. All other courts claiming a testamentary jurisdiction would be abolished, except for three strategically placed archdeaconry courts at Bodmin, Canterbury and Leicester. Otherwise, the archdeaconry courts would be retained only for visitation purposes. In other words, the Government was now abandoning not only the recommendation of the General Report that the entire testamentary jurisdiction of the diocesan and inferior courts be abolished but also the recommendation of the Lords Select Committee that branch registries with limited powers would be an adequate substitute. It was remarkable not only how much was altered but also how quickly it was done. Barely four weeks elapsed between the Bill passing the second reading stage on 28 April and Howley's acknowledgement of his copy of the altered Bill on 26 May. That essential breathing space was created in part by the inevitable pressure of other Parliamentary business, but more calculatedly by the committee stage being deferred on three separate occasions during May. It was about this time that the Law Times heard 'from private sources, that it is probable that Ministers will accede to the strongly expressed feelings of the profession, so far as to preserve the diocesan registries of wills, abolishing the peculiars which were the main grievance the bill was framed to remedy'. Then, on 26 May, replying to a question from Redhead Yorke, Nicholl said that he was about to introduce an altered Bill in committee pro forma in order to allow it to be printed, but that the committee stage proper would be delayed until after the Whitsun recess so that interested parties could study the Bill. He also claimed that the alterations 'would tend to remove a very large proportion of the objections brought against the Bill'. It has to be said that Nicholl's timetable, representing as it did a delay until about 12 June, was dangerously late for a controversial measure in an already crowded session. What he did manage to say about the altered Bill came after midnight on 29 May, after debates on the Corn Laws and the Irish Arms Bill; and his remarks were delivered 'in a low voice across the table'. The Law Times attributed Nicholl's remodelling of the Bill to the 'energetic efforts of the Yorkshire
deputation', but felt that his statement 'throws little or no light on the new scheme'. In the House itself his outline of the alterations was greeted with derision by some MPs and with more moderation by Russell, but Benjamin Hawes, a seasoned campaigner for the reform of the ecclesiastical courts, complained that the revised measure would no longer be implementing the General Report, a comment which must have been especially hurtful to Nicholl in the circumstances. Nonetheless, the Bill was ordered to be reprinted as amended by him, and 12 June was fixed for the committee stage.

When the Bill was available in print, each of the opposition groupings attacked aspects of the alterations, and they were, if anything, emboldened to do so by the concessions already offered. Although the Bill had been trimmed from 140 clauses to 109, Nicholl had introduced two new clauses, Clause 15 which dealt with matrimonial suits, and Clause 45 which implicitly subscribed to the *bona notabilia* rule. It was these clauses which caused most resentment. The attacks came, more or less in sequence, from the Yorkshire Law Society, from the proctors at York, from the Committee of the Country Registrars, from the Bishop of Exeter, from the supporters of certain archdeaconry courts and from a miscellany of petitioners to Parliament.

First, the Yorkshire Law Society, which was convened specially on 6 June, welcomed the retention of the provincial court at York and the diocesan courts generally, but wanted to amend Clause 45. As drafted, that new clause still limited the testamentary jurisdiction of the retained courts to 'the effects of any person dying within such diocese and not possessed of effects in any other diocese within England and Wales', and to the 'effects of any person dying within such province and not possessed of effects within the province of Canterbury'. It was argued that the practical consequences of the new clause would be even worse than the conventional *bona notabilia* rule. The most graphic example of how business would be attracted to London was that the clause had been tested 'in one of the principal streets in the City of York, and it is found that there is not a single Tradesman in that street whose will could...be proved at York, but in every instance the will must go to Canterbury'. It was resolved to press upon MPs the need to amend Clause 45 and to publicise the Society's concern about it in the *Law Times*. That publicity was provided.

Nicholl prepared a detailed briefing paper, presumably for Graham, in which he suggested that the new clause would benefit the York Court itself at the expense of
the Northern diocesan courts, and that there would always be a greater confidence in probate granted in London. However, the general drift of his paper was that local interests had been offered so much in the altered Bill that they ought now abandon their complaints.  

In the event, a deputation from York, accompanied by its two MPs, Lowther and Yorke, met Graham on 22 June to discuss the offending clause. Nicholl was present at the meeting, but it was Graham's reaction which was reported in the Law Times. 'He ultimately intimated that many of the points raised had considerable weight and that the clause should be reconsidered. There seems to be no doubt that the clause will be amended'.  

Secondly, the proctors at York were also dissatisfied with the altered Bill, and they met on 7 June 1843 to prepare a Memorial for submission to Nicholl. After emphasising their own abstention, hitherto, from 'the agitation which prevailed in the City and the County of York upon the subject of the proposed centralization', they registered their objections not only to Clause 45, for the same reasons as the Yorkshire Law Society, but also to Clause 15. That clause seemed not only to threaten the York Court's matrimonial jurisdiction but also to allow any person cited in a diocesan court in any other matter to have the suit sent to the provincial court. The proctors resolved to redraft those clauses so that the two provincial courts were placed on an equal footing. It was also resolved to send a deputation to 'confer' with Graham, Chancellor Vernon and other MPs; to liaise with the 'Northern Law Societies'; and to encourage the preparation of petitions to both Houses. The subsequent contacts between Nicholl and George Lawton, spokesman for the York proctors, were strained and confused. Lawton hinted that any failure to fall in with his demands would cause the public to 'press for a strictly Diocesan arrangement throughout the Kingdom', whilst Nicholl in return questioned the comparative competence of the York Court. Then, after Nicholl had received the deputation on 13 June and had accepted its amended copy of the Bill, Lawton claimed that Nicholl had promised to make the desired amendments and to continue to communicate directly with him. Eventually, Nicholl, standing on his dignity, had to tell Lawton that his decision would be announced 'in my place in Parliament'.  

The country registrars formed the third group remaining hostile to the Bill, even as altered. Their Committee, still meeting at the agent's office in London, produced its 'Observations' on 15 June, which took the form of an appeal to 'the friends of Local
Jurisdiction, in and out of Parliament'. Having succeeded in retaining the diocesan courts, the registrars were now demanding that since those courts were to be made more efficient, with qualified judges and officers, they should also be given the same 'powers and facilities' as the Bill was giving to the two provincial courts. There was resentment over the limitations imposed upon the diocesan courts by Clauses 15 and 45, and dissatisfaction over the way in which the salaries of diocesan officers would be calculated. Finally, it was proposed that 'large towns' such as Lancaster and Nottingham should be added to the schedule of retained archdeaconry courts.\textsuperscript{64}

Shortly after these 'Observations' appeared in print, Ralph Barnes, the Exeter Registrar, contacted Follett directly. His case for having effective diocesan courts rested on the principle 'that the Court of the Diocese is to be as good for the Diocese as the Arches is to be for those who resort to it'. Follett passed the letter to Nicholl, and was told in return that it was 'a good commentary on the folly of making concessions to mere clamour, and a strong proof how self-interest and prejudice can pervert the judgement of a clear-sighted man'.\textsuperscript{65}

Fourthly, Nicholl displeased the Bishop of Exeter again, not a difficult thing to do. Nicholl had obtained Graham's permission to send a copy of the altered Bill to the Archbishop of Canterbury, asking that it be communicated to the bishops generally. That seems to have been done after the Bishop of Exeter's performance in the Lords on 22 May, and before 26 May when Howley acknowledged its receipt. Nicholl's aim, as he much later explained to Lyndhurst, was to convince the prelates of his preparedness to make changes, 'provided the Bishops are ready to withdraw all opposition and waive all objections as to time, and support the Bill in and out of Parliament'. Howley quickly convened a meeting of the Bounty Board, attended by the Bishop of Exeter, at which Nicholl read a paper setting out the details of his alterations. Having gained the impression from the bishops that 'the scheme would not meet with much opposition', Nicholl had gone ahead with his statement in the Commons on 29 May, and had sent a copy of the reprinted Bill to the Bishop of Exeter.\textsuperscript{66} He admitted to Lushington on 5 June that the remodelling of the Bill was 'not entirely to my liking [and] I cannot venture to hope it will receive your full approbation, but I believe it to be as good a measure as the present temper of the High Church would permit'.\textsuperscript{67} That proved to be a premature assessment because the Bishop of Exeter had a different recollection of the meeting of the Bounty Board. On receipt of his copy of the altered Bill, he took Nicholl to task in forceful
language for introducing so 'degrading' a clause, Clause 15, which permitted parties to bypass the jurisdiction of the diocesan courts. 68

The fifth group of critics of the altered Bill consisted of those who wanted to add to the number of archdeaconry courts allowed to grant probates. Nicholl had proposed to give that status only to Bodmin, Canterbury and Leicester, but the registrars had earlier asked for something like ten such registries and had named Lancaster and Nottingham in their 'Observations'. Nicholl's correspondence with George Wilkins, Archdeacon of Nottingham, illustrates the kind of problem he faced. The Bishop of Lincoln had already associated himself with the demand for a court at Nottingham, which was in his diocese. Then, on 10 June, Wilkins warned Nicholl about the efforts in London of 'influential persons to effect the same object', and that his Bishop would exercise 'powerful intercession, & the most active measures will be resorted to...in every stage of the further progress of this Bill through both Houses of Parliament'. All Nicholl could do in the face of those threats was to remind Wilkins that the previous reports and bills had been concerned with the consolidation of the registries rather than their retention. Nottingham was subsequently added to the schedule. 69

The sixth and final instrument of opinion still hostile to the Bill was the public petition. The flow of petitions, which had begun in February 1843 with the printing of the first version of the Bill, continued after the printing of the altered Bill. By the time that the last petition had been received, on 11 July, there was a total of 152 petitions and over 18,000 signatures against the Bill, with twelve petitions seeking alterations only, six seeking compensation and only one in favour. 70

In the event, whatever the collective weight of this continuing hostility to the Bill there was no opportunity, and probably no desire on the part of the Government, for a further contest in Parliament that session. The committee stage was several times deferred, 71 and on three separate occasions, 26 June, 7 July and 17 July, Graham was asked what was happening about the Bill. Each time he persisted in claiming that he was still anxious to proceed with the Bill, but that there were 'other measures of great importance' which had priority, such as the Corn Laws, the Irish Arms Bill and the Irish Poor Law Bill. 72 Indeed, as early as 10 June, the Law Times had reported a rumour that 'even the mangled Ecclesiastical Courts Bill' would be postponed because of 'the immediate business of the country and the state of Ireland'. 73

Then, on 20 July, when Peel announced his shortlist of bills which would be given
legislative priority in what remained of the session, Nicholl's Bill was not on that list.\textsuperscript{74} As reported in \textit{The Times}, Peel had decided that the Bill should be 'postponed to a future session' since it had not been possible to give 'adequate attention' to it in a crowded session.\textsuperscript{75} That was precisely what the \textit{Legal Observer} had counselled, albeit its advice had been overtaken by Peel's announcement.\textsuperscript{76}

Towards the end of that session, and after its close, the Bill's critics in Parliament and in the press were merciless about the measure itself and about the Government's handling of it. On 28 July, there was an unedifying spat in the Lords in which Campbell told Lyndhurst that that House was where the Bill should have been introduced.\textsuperscript{77} On the same day in the Commons, during the 'State of the Nation' debate, the Government was taunted by the Whigs for having managed the business of Parliament so clumsily, for having produced such an unacceptable Bill in the first place and for then having yielded to 'opposition out of the House - not opposition in the House', as Palmerston's comments were reported.\textsuperscript{78} \textit{The Times} thought the Bill had been handicapped from the start by its 'scheme of centralization' and had then been mutilated by the concession of its most important clauses' at the behest of those with a 'direct pecuniary interest'.\textsuperscript{79} From its position close to the Whig leadership, the \textit{Edinburgh Review} blamed the episcopal objections, 'the crosier and the mitre were raised in defence of the diocesan courts. The array was irresistible. The most important provisions were consequently abandoned; what remained was wholly worthless in the estimation of the public and was finally withdrawn'.\textsuperscript{80} And, finally, \textit{Fraser's Magazine}, despite its 'Conservative leanings' at this time, charged Peel and his Ministers with having bungled the management of the Bill. 'They take no person not in the cabinet, or officially connected with the cabinet, into their confidence...The Bishop of Exeter is not quietly remonstrated with. Sir Robert Inglis is never consulted: but down comes the minister with a bill ready cut and dry, and behold! he is unable to pass it. The minister is hurt; the Whigs triumph; and the great Conservative party are annoyed; and all this for the lack of a trifling degree of management - in the shape of confidential meetings, now and then, between the cabinet and their supporters'.\textsuperscript{81}

After that setback, Peel's administration chose to place the Bill in the hands of Lyndhurst in the next session and introduce it in the House of Lords, a forum it had never reached in 1843. There it would fall under the proper scrutiny of such experienced and involved Opposition lawyers as Campbell, Cottenham and
Brougham. It may also have been felt that the Bill would be more protected in the Lords, initially at least, from the influence of the 'vast private and individual interests...that would be much damaged by the passing of such a bill.'
Notes to Chapter 12.


2. MMP, L.93, 8 April 1843, Graham to Nicholl.

3. MMP, L.95, 9 April 1843, Nicholl to Graham.

4. The reprinting of the General and Special Reports, and of the Commons Select Committee Report of 1833, was ordered on 24 March 1843, see *Law Times* (LT), i, 15 April 1843, p.27. The *Law Times* was launched in 1843 as a 'practical publication' aimed at those 'engaged in the making and administration of the law', see LT, i, 8 April 1843, p.3.

5. *Hansard*, 3d. ser., lxviii, 10 April 1843, c.786.

6. CJ, 98, 1843, pp.193-94; HLRO, Appendix to Reports of Commons Select Committee on Public Petitions, 1843, pp.177-80.

7. MMP, L.94, [c.April 1843], Nicholl's 'analysis' of public petitions received by early April 1843 was arranged by diocese, category of petitioners and number of signatures.

8. An anonymous pamphlet of 1843, critical of the Bill and attributed by Inglis to Charles Bowdler, has not been identified.

9. See Chapter 11, n.51.

10. Robert Isaac Wilberforce, Archdeacon of the East Riding, published his substantial pamphlet, *Church Courts and Church Discipline*, early in 1843, between the first and second readings of Nicholl's Bill on internal evidence. He was uneasy about the Bill's centralising tendencies but supported the removal of the 'evil' of the peculiars. His greater concerns at the time were with the status of the archdeaconries and the restoration of Convocation. See also Pugh, R.K., ed. *The Letter-Books of*
11. *Hansard*, 3d. ser., lxviii, 10 April 1843, cc.784-805. Inglis' speech, which was subsequently published, has been described as carrying 'some influence among those who were determined to cling to the "rights" of the church at all costs', see Manchester, A.H. 'The Reform of the Ecclesiastical Courts', AJLH, 10, (1966), p.73.

12. *Hansard*, 3d. ser., lxviii, 10 April 1843, cc.805-11. Donajgrodzki has described Graham's handling of the Commons, when he was Home Secretary, as 'tactless, self-righteous, inclined to be pompous and dictatorial', and so much so that his unpopularity strengthened the vested interests against whom he was trying to act, see Donajgrodzki, A.P. 'The Home Office, 1822-48' (D.Phil. thesis, University of Oxford, 1973), p.134.


14. LT, i, 15 April 1843, pp.27-29.


17. See n.1.

18. MMP, L.89, 19 April 1843, Archdeacon Hale to Nicholl; 24 April, Nicholl to Hale.


21. Ibid., cc.1040-47.

22. Ibid., cc.1031-40.

23. Ibid., cc.1047-57; Lincolnshire Archives, Kaye Papers, COR. B5/10/22, 25 April 1843, Escott to Kaye, 'I am told it was not your Lordship's intention to sanction the measure. I think I ought to add that my informant is Mr Swan of Lincoln. Your Lordship's opinion...might influence my vote and many others in the House of Commons'.


25. Ibid., cc.1068-76, 1087-89. For the text of the Manchester Law Society's petition see LT, i, 6 May 1843, pp.113-14.


27. Ibid., cc.1080-87.

28. One comment on Peel's speech was that he 'fairly threw himself and his character into the scale', see LO, xxvi, 6 May 1843, p.2.

29. BL, Add. Ms. 40527, ff.191-92, 10 April 1843, Nicholl to Peel.


31. MMP, L.89, 29 April 1843, Hardy to Nicholl.

32. MMP, L.89,[29 April 1843], Courtenay to Nicholl; 29 April, Follett to Nicholl.

33. MMP, L.88, 30 April 1843, Nicholl to Clarke.

34. MMP, L.88, 3 May 1843, 'Resolutions' of country registrars.
35. MMP, L.93, 12 May 1843, Graham to Nicholl.

36. MMP, L.88, 15 May 1843, Nicholl to Clarke.

37. MMP, L.88, 11 May 1843, Clarke to Nicholl; 15 May, Clarke to Nicholl.

38. MMP, L.88, [15 May 1843], Nicholl's memorandum on 'Resolutions' of country registrars.

39. See n.35.

40. Manchester, op. cit., p.72.

41. MMP, L.93, 15 May 1843, Nicholl to Jenner.

42. MMP, L.88, 25 May 1843, Clarke to Nicholl.

43. MMP, L.88, [May 1843], 'Proposed Scheme for a Bill', prepared by Fox and Iggulden.

44. HLRO, op. cit., pp.133, 225-26, 422-23.

45. LT, i, 6 May 1843, pp.114-15, 128.

46. MMP, L.89, 10 May 1843, Lowther to Nicholl.

47. MMP, L.88, 13 May 1843, Blanshard to Nicholl; 15 May, Nicholl to Blanshard.

48. MMP, L.93, 8 May 1843, Graham to Nicholl.

50. *Hansard*, 3d.ser., lxix, 22 May 1843, cc.666-73; see also *LT*, i, 27 May 1843, pp.210-11.

51. MMP, L.114, [May 1843], Nicholl's 'remodelling' of the 1843 Bill.

52. MMP, L.114, 26 May 1843, Howley to Nicholl.

53. CJ, 98, 1843, pp.249,290,309.

54. LT, i, 27 May 1843, p.208.

55. Ibid., 3 June 1843, pp.236, 238. The exchanges on 26 and 29 May were not reported in *Hansard*.

56. CJ, 98, 1843, p.342.

57. P.P. 1843 (288) ii. Nicholl's Bill 'As Amended by the Committee [29 May 1843]'.

58. MMP, L.90, 6 June 1843, 'Meeting of the Yorkshire Law Society'.

59. LT, i, 10 June 1843, p.278.

60. MMP, L.90, [June 1843], Nicholl's 'answers' to the Yorkshire Law Society.


62. MMP, L.89, 7 June 1843, 'Memorial of the York Proctors'.

63. MMP, L.89, 8-13 June 1843, 21-23 June, correspondence between Nicholl and Lawton.

65. MMP, L.88, 19 June 1843, Barnes to Follett; 1 July, Nicholl to Follett.

66. MMP, L.114,[June 1845], Nicholl to Lyndhurst.

67. MMP, L.89, 5 June 1843, Nicholl to Lushington.

68. MMP, L.114, 10-19 June 1843, correspondence between Nicholl and Bishop of Exeter.

69. MMP, L.90, 8-12 June 1843, correspondence between Nicholl and Archdeacon Wilkins. George Wilkins wrote several novels which defended High Church orthodoxy and attacked evangelicalism, see Knight, Frances. *The Nineteenth Century Church and English Society*, Cambridge, Cambridge University Press, 1995, p.175.

70. HLRO, op.cit., 1843, pp.481-82.

71. CJ, 98, 1843, pp.380,411,429.

72. LT, i, 1 July 1843, p.341, reporting the debate on 26 June; ibid., 15 July, p.392, reporting the debate on 7 July; *Hansard*, 3d.ser., lxx, 17 July, cc.1215-23.

73. LT, i, 10 June 1843, pp.273, 275-76.


75. *The Times*, 21 July 1843.

76. LO, xxvi, 22 July 1843, pp.243-44.

77. *Hansard*, 3d.ser., lxx, cc.1383-89.

78. Ibid., cc.1389-1493; *The Times*, 29 July 1843.


82. The Times, 29 July 1843, reporting Lord Stanley's speech in the Commons on 28 July.
Chapter 13: The 1844 Ecclesiastical Courts Bill; ‘In this year they proceeded in a
totally different direction. Why was this?’

There were several significant facts connected with the Ecclesiastical Courts Bill as it was presented in the 1844 session.

First, by contrast with the time constraints which had marked the previous session, and even though Irish affairs were again dominant, the Bill was allocated a considerable amount of Parliamentary time in both Houses, Lords then Commons, between February and July. Secondly, the debates in both Houses provided repeated opportunities not only for the Government to try to justify its volte-face in retaining the diocesan courts as a means of salvaging something from the Bill, but also for opponents of the mutilated Bill to find fault with it. Thirdly, the Bill became a party issue for the first time, with Cottenham, Campbell and Sir George Grey acting as persistent spokesmen for the Opposition. Fourthly, the Bill once again failed to reach the statute book, despite or because of so much exposure, and despite the apparent supremacy of the Government in both Houses. And, fifthly, the successive stages of the Bill were regularly reported to the general public and to a professional readership by *Hansard*, by *The Times* and by the *Law Times* in a way that had not happened so consistently in 1843.

Although Lyndhurst was in charge of its presentation in the Lords, the preparatory work on the Bill was again in the hands of Graham and Nicholl. The Home Secretary seems to have been in a remarkably resilient mood despite the 'long, harassing and largely unproductive Session' of 1843. In the middle of October, Graham sent one of his regular reports to Peel to inform the Prime Minister that he had begun work on a programme of legislation for the next session. 'I have seen the Attorney-General today and have made arrangements for preparing immediately, to be submitted to you, a scheme of our operations with regard to the County Courts Bill, Charitable Trusts, Ecclesiastical Courts'.

There was less preparatory work for Nicholl to do because the 1844 Bill was substantially what had been printed at the *pro forma* Commons committee stage in 1843. However, it was not correct to suggest, as Lyndhurst did at second reading on 21 March, that he was bringing forward a wholly identical Bill in 1844. It is true that many features had been retained, such as the clauses dealing with modes of proof, process and appeals to the Privy Council; and with the consolidation and
staffing of both the London and York Courts. But, in the interval, acting 'according to the instructions of Sir James Graham', Nicholl had had to drop the highly controversial Clauses 15 and 45. In their place he had added a new Clause 16 which recognised that each diocesan court could 'exercise in and throughout the Diocese all such Jurisdiction, contentious and voluntary, as ordinarily belongs to a Diocesan Court'. Nicholl's working papers at the time of this revision of the Bill include a miscellany of headings and notes on clauses. One such heading for the new Clause 16 has been interlined in the draft text of the Bill and in what was to be its final position when the Bill was printed. All the indications are that it was a later and a special addition. To balance that clause, Nicholl also introduced a new Clause 18 which, as he expressed it in summary form, 'enables judges of Diocesan Courts to send causes to [the] Provincial Court of their own motion or on the application of either party'. A further concession in response to pressure was an adaptation of Clause 8 and Schedule C in order to add a Suffolk archdeaconry to the list of those inferior registries which could grant probates but not exercise contentious jurisdiction. Nicholl was in a position to send the 'corrected' Bill to the Queen's Printer on 30 January 1844 with instructions that '24 copies will be struck off without delay & 16 sent to the Home Office, Cabinet & Law Officers of the Crown'; but by the time that the Bill was printed at first reading on 12 February it had been reduced by stages to 101 clauses. Most notably, the short title carried over from the 1843 Bill had been altered to reflect the fact that the Bill was now intended to comprehend the retention of the diocesan courts conditional upon their improved efficiency. Instead of it being 'An Act to consolidate the Jurisdiction of the Ecclesiastical Courts', it had become 'An Act to consolidate the Jurisdiction and improve the practice of the Ecclesiastical Courts'.

Despite those preparations and their timing, there was no mention of the Bill in the Queen's Speech on 1 February 1844. When Campbell complained about that in the Lords, Lyndhurst announced his intention to introduce 'in a few days...the revival of the measure as to Ecclesiastical Jurisdiction'; Graham said much the same in response to a question in the Commons on 10 February; and the first reading in the Lords, with the order to print the Bill, followed on 12 February.

There were a number of unfavourable reactions from a variety of directions as soon as the contents of the Bill became known.

The February issue of Fraser's Magazine, in a gloomy review of 'The State and
Prospects of the Government', harked back briefly but savagely to the abandoning of
the Ecclesiastical Courts Bill and the Registration of Deeds Bill in the previous
session. The periodical attributed the fate of those Bills to 'the unworkmanlike
manner in which they were put together [which] convicted the understrappers of
great ignorance in the details of their craft and the chiefs of something like haste in
the exercise of those powers of supervision with which they are intrusted'. That
evident reference to the past performances of Nicholl and Graham, at least, conveyed
much pessimism about what the same administration might achieve in the new
session.12

Nor could the country registrars, despite the substantial concessions made to them,
remain silent in respect of a perceived threat to their own profits. Early in March, the
Bishop of Lincoln, despite having no objection to 'the principle of this Bill',
forwarded to Lyndhurst a paper prepared by Swan. The substance of Swan's
argument was that the proposed creation of a fee fund into which court fees were to
be paid was fair only in the context of Doctors' Commons where the duties of
officers and proctors were separable. In the diocesan courts, however, where the
majority of registrars also acted as proctors, their private profits might well be
adversely affected by such a provision. Since the matter had never been considered
by the Ecclesiastical Courts Commission, Swan called for that to be done and done
impartially. Lyndhurst promised that the complaint 'shall receive proper
consideration in a later stage of the Bill' and passed the papers to Nicholl.13

Public petitions to the Lords about the Bill did not appear until early March, and then
they were a trickle rather than a flood. For the most part they sought further
alterations to the Bill and many of them were to be repeated when the Bill reached
the Commons.14

In its initial reaction, Maugham's Legal Observer did no more than note that the two
provincial courts, the diocesan courts and a handful of archidiaconal registries were
now to be retained. However, by 9 March he was ready with a number of swingeing
criticisms of the altered Bill. In its emasculated form it was helping to perpetuate the
ecclesiastical courts when many would argue that they should be allowed 'quietly to
die away'. The Bill did not address the anomalous distinction between wills of
personal and real property whereas the Legal Observer wanted to see implemented
the recommendation of the Real Property Commission. The Bill did not deal with
the evils of bona notabilia and double probate when a simple provision 'that probate
taken in any one court shall be valid anywhere' would have sufficed. And, finally, the editorial returned to the familiar complaint that the public should be spared the excessive cost of employing a 'class of exclusive practitioners who now alone practice in the Ecclesiastical Courts', and to the familiar cry of 'throwing open this business to the whole profession'.

It may not have been coincidental that Maugham's critical editorial appeared on Saturday 9 March and that Campbell pursued the progress of the Bill and some of its identified shortcomings in the Lords on Tuesday 12 March. Campbell had been closely involved for many years with the reform of testamentary jurisdiction, both as the First Commissioner of the Real Property Commission and as a former Attorney-General. However, as reported in The Times at least, he was now concerned less with the delay since first reading and more with the fact that 'many persons were deeply interested in the subject'. Lyndhurst reassured him that the second reading would be on 15 March, but in fact it had to be postponed twice until 21 March.

Hansard and The Times were agreed in their reporting of the rest of the exchanges on 12 March. Campbell asked if the Bill would do anything to eliminate the evils of bona notabilia and double probate, and was chided by Lyndhurst for asking a question to which he knew the answer since he had read the Bill and was more than capable of construing it. However, the interest in what Lyndhurst had to say lay not in his bickering with Campbell but in his frank admission about the Government's calculated attitude towards the Bill. Because of the succession of failed bills, this present version 'had been framed with great care and attention to the interests of different parties. It had been framed to pass'. Lyndhurst's stated fear was that any tinkering with the Bill, at the behest of Campbell or others, even if desirable, would condemn it to the same fate as the previous bills. Not surprisingly, this display of pragmatism on the part of the Government won the support of Brougham. He argued that because of the 'infinite difficulty of carrying any Bill at all on the subject ...they must be content with what they could get'.

Whatever belief, or hope, existed in the minds of Ministers that the altered Bill would provide a via media towards the statute book was significantly tested in the second reading debate when it eventually came on 21 March. In presenting the Bill, Lyndhurst continued to display the pragmatism of which Brougham had approved by claiming that the 'system recommended by this Bill was the only one that was practicable'. He concentrated on the three main features of the 1844 Bill, the
abolition of the peculiars, over which there was no dissent; the consolidation of the courts in London and York respectively, intended to placate the York interests; and the retention of the diocesan courts, intended to placate the bishops and their registrars. Lyndhurst did his best to defend what he knew to be the weakest point of the Bill, the retention in 1844 of the very diocesan courts which Peel's administration had been trying in 1843 to convert into branch registries with only limited powers. His tactic, borrowed from the Bill's opponents in 1843, was to argue that the diocesan courts should now be allowed to retain both their non-contentious and contentious jurisdictions, but suitably reformed. Lyndhurst could do no other than acknowledge that this proposal departed from the authority of the General Report, but he argued that this was justified by the history of failed bills. Holdsworth has described Lyndhurst as 'an effective advocate of the reforms of which he approved', but, on an occasion when he cannot have approved of the line he was having to take, his skills as an advocate were not in evidence. What he contrived to offer as alternative 'authorities' were improbable choices. The first was Stowell's aborted measure in 1813 to abolish the peculiars but retain the diocesan courts; and the second was Campbell's championing of the diocesan courts when he was in Opposition.

Unfortunately for the Government and for the cause of even limited reform, neither Cottenham nor the flexible Campbell were impressed by the altered Bill and Lyndhurst's advocacy of it. In fact, both men did what they could, then and subsequently, to defeat it on behalf of the Opposition. The consistent line taken by Cottenham, in a long and detailed speech, was that the Government, despite its 'Parliamentary power' in both Houses, had performed an unexplained volte-face over the diocesan courts and had done so in the face of all the authorities upon which he preferred to rely. He said that merely to remodel those courts 'raised a barrier against future improvement', when what was really needed was a single and centralised tribunal to deal with wills of both personal and real property.

If Lyndhurst could be charged with inconsistency in this debate, as he was, so too could Campbell. He easily shrugged off Lyndhurst's calculatingly flattering references to his earlier support for the diocesan courts, and he now aligned himself with Cottenham's preference for a centralised court, castigating the diocesan courts for making the 'grossest blunders', for their lack of experience and for their inability to attract competent judges.
As an onlooker of sorts, Nicholl noted that both Cottenham and Campbell 'bitterly attacked the Bill', but the real discomfort of his position was that the system of centralised testamentary jurisdiction now being advocated by the Opposition was what both he and his father had wanted to see, what he had previously drafted and what he had since been instructed to alter.

It was left to Brougham and the Bishop of London to offer some degree of support for the Bill in the Lords, albeit in their different ways.

Brougham's pragmatic assessment was like that of Lyndhurst but he spoke more bluntly about the alliances and pressures within the House of Commons. According to Brougham, what the Lords needed to send down to the Commons was a Bill which, whatever its imperfections, was acceptable enough to pass there, given the existence of an hostile interest consisting of 'the country practitioners, the landed Gentry and those under their influence, who formed themselves into a kind of league to support the practice of the Local Courts, and to prevent any enlarged measures of reform'. Like Brougham, the Bishop of London 'thought it the best Bill which the Legislature was in a condition to pass', but his journey to that point had been a complicated one. He revealed that as a member of the Ecclesiastical Courts Commission he had wanted to have testamentary jurisdiction transferred to the common law courts, but had bowed to the contrary wishes of the common lawyers themselves. But, as matters now stood, he understood the need of every bishop to have an effective diocesan court, and was aware of the current sentiments 'not only of the country practitioners but of other practitioners also, and...the feelings of a large body of the clergy of the country on the subject'.

An Opposition motion to postpone the Bill was defeated; it was read a second time; the committee stage was fixed for 26 March, and when that point was reached a detailed scrutiny of the Bill was begun.

Agreement was reached easily over those clauses not directly related to testamentary jurisdiction and over the striking out of the money clauses. Instead, Cottenham and Campbell chose to concentrate their fire upon the crucial Clause 8 which provided for the retention of the diocesan courts, and there were exchanges with Lyndhurst which were much along the lines of the second reading debate. Nicholl was in the House of Lords that evening, 'on the steps of the throne', and has provided an account of the occasion. He was consulted by Lyndhurst, using Lord Redesdale as a runner, when Clause 8 came under attack. Nicholl's 'individual opinion', transmitted
to Lyndhurst, was that the abandoning of Clause 8 'would be an improvement but I feared it might endanger the Bill'.

Lyndhurst duly continued to resist the criticism of Clause 8, the committee divided and it was retained by forty-seven votes to twenty. Among those who voted to retain the clause were the Archbishop of Canterbury and the seven other Bishops present (Bangor, Exeter, Hereford, Lichfield, Llandaff, London and Peterborough), together with Brougham. Cottenham also took the opportunity to attack the monopoly enjoyed by the advocates and proctors at Doctors' Commons, suggesting in temperate enough language that those courts should be 'opened to other practitioners'. His comments provoked, first, an immediate and lengthy response from Lyndhurst, deploying the civilians' argument that the country needed 'masters of learning' to deal with matters of international law in time of war; and, secondly, a day or two later, an angry letter to The Times from 'BETA' of Doctors' Commons which accused Cottenham of having described the London proctors as 'an ignorant and incompetent set of men'.

At the report stage on 28 March, the Marquess of Normanby registered his opposition to a Bill which was being presented on such discreditable grounds, namely 'that a better Bill could not be brought forward, because it would be opposed by the country practitioners.' Nonetheless, it was ordered to be read a third time on 1 April.

When that stage was reached, Cottenham and Campbell were again assiduous in their opposition. Cottenham repeated his earlier arguments about the inconsistency of the Government's position and about Ministers having yielded to the clamour of self-interested parties, 'an authority not within the walls but without the walls of Parliament'.

However, another distinguished Whig lawyer did vote for the third reading. Like Cottenham and Campbell, Thomas Denman, Chief Justice of the King's Bench, deplored the continued survival of the diocesan courts, 'whose abolition had been recommended for fourteen years'; but, like Brougham and the Bishop of London, he was convinced that the Government could not carry the 'wider measure' of 1843. In fact, Cottenham and Campbell failed with amendments to delete Clause 8 and to give an overriding testamentary jurisdiction to the Arches Court, and the Bill passed the Lords on 1 April.

Thus, as matters stood in April 1844, a reforming Bill, reduced to eighty-three clauses but still preserving the full testamentary jurisdiction of the diocesan courts at Clause 8, had now gone further in Parliament than any of its predecessors. In that
sense, the Government's pragmatic initiative was proceeding according to plan, but it was the retention or modification of the diocesan jurisdiction which was to preoccupy both the supporters and the opponents of those courts throughout the Commons' stages of the Bill.

With the first reading in the Commons on 1 April, the order to print, and the second reading fixed for 22 April, Nicholl once again became directly involved with the Bill's detail, its management and its introduction at second reading. Nicholl was then in his late 40s, was currently handicapped by the 'alarming illness' of Francis Rogers, his chosen deputy as Judge Advocate General, was not in good health himself and was now being saddled with an unsolicited responsibility for a Bill he did not agree with.

There were indications, as early as the last week in March and extending to about the time of the second reading in the Commons, that the London proctors and their supporters were contriving to lessen the practical impact of Clause 8 upon the business at Doctors' Commons. Those efforts came at precisely the time when it looked as if the diocesan practitioners were likely to benefit from the altered Bill, and Nicholl, who was always too close to Doctors' Commons, became caught up in those efforts.

What he was contemplating was how best to preserve the 'division of business which has hitherto subsisted between London and the Country'. Immediately after the second reading of the Bill in the Lords, a deputation of London proctors had asked to see him, and, on the day following the committee stage in the Lords, Nicholl had drafted a form of words which tried to preserve that division. Although the document has not been traced, later comments by Follett suggest that what Nicholl was trying to offer was something for both sides, a balance between a secure and effective grant of probate provided by the London Court and the raising of the bona notabilia ceiling to £100 to benefit local interests. Nicholl himself recognised that the introduction of any such formula in the Commons would need the consent of Peel, Graham and Follett, as well as that of the Lord Chancellor. In the event, Lyndhurst refused to give any hint of possible alterations whilst the Bill was still going through its final stages in the Lords, but Nicholl persisted in asking Follett to consider some alterations to the Bill when it reached the Commons. Follett, at that time convalescing in Tunbridge Wells, was not unsympathetic, but he told Nicholl that those proposals should have been built into the Bill when it was first introduced in

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the Lords, and that to do so later, in the Commons, 'without due notice to the Diocesan parties', would look like 'a breach of faith'.

Nicholl also concerned himself with the practical consequences of the transfer of testamentary business away from the miscellany of abolished London peculiars to the London Consistory Court. What he now proposed instead, having consulted both the Bishop of London and Lushington, as the Judge of that Court, was that the Bill should be so adjusted as to transfer that business to the Arches Court. 'It will be a great advantage to the public as a security against fraud to have only one registry in London'.

A similar concern about the allocation of business was being expressed, and at much the same time, by Jenner-Fust, and by Dyke and Wadeson, senior proctors at Doctors' Commons. Jenner-Fust contacted Follett shortly before second reading in the Commons to complain that under the altered Bill the abolition of the peculiars generally would result in the transfer of nearly 4000 grants of probate to the retained diocesan courts, 'an unfair preponderance of business'. What he suggested was that 'the most appropriate remedy seems to be to give parties the opportunity of applying to the Superior Court in any case in which they think it proper so to do'. Dyke and Wadeson went to brief Follett at Tunbridge Wells, and Follett kept Nicholl informed of that initiative and of the fact that both proctors, accompanied by Lushington, were planning to see Graham on the day of the second reading, 22 April.

About this time, Nicholl was also being kept aware of how local vested interests regarded the Bill. For example, George Martin, the Chancellor of Exeter, suggested to Nicholl, amiably enough, that if the Government was no longer going to transfer all contentious jurisdiction to London, then it ought to be strengthening the diocesan courts and attracting qualified practitioners to them. Nicholl also knew at this time, because he was monitoring them, that public petitions addressed to the Commons were already being received. Some petitions sought alterations to the Bill, such as the preserving of a registry at Taunton, and some sought compensation for loss of profits.

When the Bill finally reached second reading in the Commons on 22 April 1844, the general pattern of the debate was very like the equivalent stage in the Lords. The immediately responsible Ministers did their best to justify the retention of the diocesan courts, whilst the leading spokesman for the Opposition expressed his puzzlement at such a volte-face and busied himself with trying to kill off the Bill. In
detail, however, the altered Bill was also opposed by independently-minded law reformers and by variously dissident Conservatives. Although an Opposition motion to postpone the Bill was defeated and the committee stage fixed for 29 April, the vote to continue, 158 to eighty-nine, was too close for comfort.44

Nicholl, whose duty it was to explain and defend the altered form of the Bill, adopted the tactic of claiming that all its predecessors had included some testamentary role for the diocesan registries and that the present Bill, however limited, would at least sweep away the peculiars. He was supported, first, by a dispirited Graham, who swore that if the altered measure was allowed to pass the Commons 'he was not likely to meddle with this thorny subject during the remainder of his life';45 and, secondly, by Peel, who, despite his preference for the 1843 Bill, now thought it would be worth securing 'a minor and less complete reform', given the mood of the House and the variety of interests ranged against the abolition of the diocesan courts.46

For the Opposition, Sir George Grey, who was soon to serve as Home Secretary under Lord John Russell, was able to bait the Government for having succumbed to 'powerful interests out of doors' and for having grounded the Bill upon 'a totally opposite principle' to that of the previous year. His wholly destructive motion to postpone the Bill received idiosyncratic support, for a variety of reasons, from Inglis and Sibthorp, and from Lord Robert Grosvenor, the Whig MP for Chester. The lack of party unanimity on both sides of the House was a characteristic of that session. For example, a number of Conservative MPs, including Egerton and Inglis, had helped to carry a crucial Whig amendment to Graham's Factory Bill in March 1844, and the opposition of Conservative MPs to the Government's proposed sugar duties would almost topple Peel's administration in June.47

A quite different kind of support for postponement came from Thomas Duncombe, the radical MP for Finsbury, who, as he was to explain at greater length in committee, wanted to bring about the entire abolition of the diocesan courts. But the most forceful speech in favour of postponing the Bill was made by a convinced reformer, Dr Howard Elphinstone. His position, close to that held in private by Nicholl, was that the Bill in its present form sought to 'evade and mutilate all the really useful suggestions of the [Ecclesiastical Courts] Commission'. Charles Buller too, another reformer, found the Bill to be 'a miserable Measure which grappled with none of the evils ... of the Ecclesiastical Courts'. The Times was to declare itself
similarly disappointed in a Bill which was 'a very expurgated edition of the old one ...[and] of a wondrously negative character' when there was so much that could have been done to reform the testamentary jurisdiction. Although otherwise anxious to spare a sick colleague the journey to London, Graham told Follett that 'We shall want you when we go into Committee on...the Ecclesiastical Courts Bill'. In fact, that stage was subsequently deferred until 3 May. In the interval, Nicholl was asked by Duncombe in the House on 24 April to say when he would be proceeding with the Bill, and Peter Borthwick, Conservative MP for Evesham, gave notice that he would be moving to postpone the committee stage. The response from Nicholl, as it had been in 1843, was that he would be seeking the committal of the Bill pro forma 'in order (as we understood) to introduce some additional clauses'.

It was the early hours of 4 May before the pro forma committee stage was reached. Then, although Borthwick did initially oppose Nicholl's motion to go into committee, the amendments were introduced, the Bill was ordered to be printed as amended and was formally committed to a committee of the whole House on 13 May.

What the text of the Bill 'as amended' made clear, when printed, was that Nicholl was not doing much more than restoring the money clauses dropped in the Lords. To a Bill consisting of eighty-three clauses, Nicholl had added a further twenty-two clauses. Clauses 84-101 dealt with the minutiae of salaries, pensions and allowances for judges and registrars, and with compensation for offices or sinecures abolished by the measure. All that was new was the transfer of jurisdiction from the diocese of Canterbury to the Arches Court, the addition to Schedule C of an archidiaconal registry at Canterbury and, for the first time, an indication of how much the diocesan judges were to be paid. In all other respects, the measure which the Government intended to go forward for scrutiny at the committee stage proper was the April version of the Bill. However, that stage was deferred on four separate occasions, an ominous sign, and it was not reached until 31 May.

Mixed reactions to the Bill bubbled away during the interval of a wasted month. The Law Magazine regretted that it was 'materially different' from its immediate predecessor; predicted that there would have been an 'army of martyrs' ready to defeat the abolition of the diocesan courts; and praised Elphinstone for his performance in the Commons. Harvey Gem complained in his pamphlet that the
‘real improvement’ in testamentary business promised by the 1843 Bill was now being abandoned, and the *Legal Observer* subsequently drew the attention of its readers to Gem's other comments on the inconvenient location of several of the retained diocesan courts and on the monopoly which was still to be enjoyed by the proctors there.\(^{55}\) Conversely, Redhead Yorke presented a petition from the York solicitors on 6 May which approved of those same courts being preserved,\(^{56}\) and, in anticipation of the committee stage being reached, there was another surge of complaining petitions which were variously concerned with local arrangements.\(^{57}\) Meanwhile, Nicholl himself was being pestered directly by a number of self-interested correspondents who wanted him to make special concessions to them at the committee stage. These requests included adding to the number of probate registries;\(^{58}\) providing compensation for any loss of business;\(^{59}\) arranging for the registrarship at Lincoln to be held jointly by Swan and another;\(^{60}\) and delaying the date by which the Act would come into force.\(^{61}\)

There were also hints during this interval that Nicholl may have been beginning the process of disentangling himself from the Bill, as was later to happen. He had had to wrestle with several versions of the measure since the beginning of Peel's second administration, and during that time had suffered not only legislative setbacks but also attacks upon his competence and loyalties. Early in May 1844, he offered Howley his resignation as Vicar General to avoid what might seem to be a conflict of interest;\(^{62}\) and later that month he gave priority to his duties as Chairman of Glamorgan Quarter Sessions whilst waiting for Graham to fix a date for the committee stage of the Bill.\(^{63}\)

Nor can Nicholl have been in any way encouraged when that stage was eventually reached on 31 May, the first order day after the Whitsun recess. Preceded by more hostile petitions, from Brighton solicitors and the Manchester Law Association, the stage went as badly as it could have done for the Government and for Nicholl personally. By the end of that sitting, as Peel was to put it later, ‘the bill had not yet gone before the first clause’.\(^{64}\)

The problems began for Ministers after Nicholl had moved to go into committee. Duncombe in turn moved an instruction to the committee that it had powers to provide in the Bill for the abolition of the ecclesiastical courts and the transfer of their jurisdiction to civil tribunals. That in itself was no more than he had stated at second reading, but in the filibustering speech which followed, taking up some
twelve columns of *Hansard* and entertaining many, Duncombe ignored matters to do with testamentary jurisdiction and concentrated instead upon the jurisdiction of the ecclesiastical courts over church rates and moral behaviour. Both Nicholl and Graham found some common ground in pointing out the irrelevance of Duncombe's argument, since the principle of retaining the diocesan courts had already been agreed by a majority of the House at second reading, but Duncombe's motion was defeated by no more than 115 votes to seventy. Progress was further hampered by Borthwick's renewed motion to postpone the Bill. Like Duncombe's link with the campaign to exempt Dissenters from church rates, Borthwick's main preoccupation was the restoration of Convocation to govern the affairs of the Church of England, but on this occasion he chose simply to argue that Nicholl's Bill was lacking in consistent principle. After that motion was defeated, Grey moved a succession of perverse but tactical amendments to Clause 1, none of which was connected with the central issue of testamentary jurisdiction and all of which sought to remove the remnants of criminal jurisdiction from the cognizance of the ecclesiastical courts. The three divisions on these amendments, although all were defeated, occupied a further dozen or so columns of *Hansard* and thus took up valuable time.

It was only then that testamentary matters were debated, but only briefly. Charles Buller proposed an amendment to transfer the testamentary jurisdiction of the ecclesiastical courts either to 'the Common Law Courts or the Court of Chancery' so that one tribunal would deal with wills of both real and personal property. The amendment took Nicholl by surprise and he floundered so badly in his reply that he seemed to be suggesting that the diocesan courts, which his Bill was seeking to make more effective, were already generally satisfactory. Buller's motion was duly defeated by 121 votes to fifty-eight, but in the early hours of 1 June the sitting petered out with two further divisions brought about by the Opposition. Peel observed, caustically, that there were still 'three or four lines' of Clause 1 'to be got through', and then the rest of the Bill to consider, but Nicholl conceded 'that it was useless of him to persist' on that occasion. The committee was given leave to sit again on the following Monday, although that date was deferred on five separate occasions between 3 June and 1 July.

However, as matters stood at the beginning of June, various interested parties within and outwith Parliament had not quite recognised or accepted as inevitable that the Bill would go no further.
On 10 June, Grey, Buller and Yorke each asked at different times when the Government would be bringing forward the Bill. The initial reaction of Peel was that the Government had not been encouraged, either by the events of the committee stage or by the prospect of further objections, to try to give the Bill priority over other important measures; but he later added, and in so doing might have been thought to have been holding out some prospect of progress, that a Bill which had already passed the Lords 'could afford delay better, and with less risk than other measures'.

There had also been some discernible activity outwith Parliament in anticipation of the Bill going forward.

On 1 June, Ralph Barnes again sought the support of Follett, who was by then Attorney-General. What prompted that approach was Barnes' awareness that Elphinstone and Inglis, despite the gulf between them in other respects, had each prepared separate but similar amendments which threatened the position of the country registrars. What those amendments had in common was that they sought to give to parties in every probate case the option of going directly to a superior court instead of using the appropriate diocesan court. The text of the clauses which Elphinstone intended to move had been 'drawn to the attention of the profession' in the *Legal Observer* on 18 May, and all five clauses sought to give precedence to the expertise present in the Arches Court.

Similarly, Inglis, had had printed an addition or amendment to Clause 18 of the Bill, accompanied by his 'Observations'. Clause 18, as it had been numbered prior to the reprinting of the Bill on 3 May, allowed a diocesan judge to refer a suit either to London or to York 'of his own mere motion or on the application of any party'. Inglis' addition to that clause would have allowed any party to choose to bypass the diocesan court which had jurisdiction and to go direct to the appropriate provincial court. In his 'Observations' he argued that such a provision would do no more than convert existing practice into law and that the diocesan courts, which stood to gain a 'great increase in business' and a 'clear territorial jurisdiction', ought not to object, even though his amendment was tantamount to continuing *bona notabilia*.

None of these amendments had been considered at the committee stage on 31 May, because of the time spent on Clause 1, nor was there an opportunity to debate them later in the session.

Nonetheless, Barnes reacted at the time as if the Bill could pass and as if the
amendments drafted by Elphinstone and Inglis could be a real threat to the effectiveness of the retained jurisdiction of the diocesan courts. With his letter of 1 June, he sent Follett a printed memorandum, dated 30 May, which set out the case for a 'free option either way', a concession the country registrars had been seeking for some time. The reciprocal aim, if a party was to be allowed to go direct to a superior court, was equally to allow a party to ignore the *bona notabilia* rule and to go to his own diocesan court and there obtain a probate as valid as the provincial court could provide. The practical way in which this free option could be accommodated was by introducing, or carrying over from the 1843 Bill, a clause providing for the re-sealing of a diocesan probate in the Arches Court if need be.

This memorandum, which Follett was asked to submit to Graham, travelled by way of Nicholl. It did so with an apology from Follett, now convalescing in Brighton, for having missed the committee stage on 31 May, 'for really I was not equal to it...you do not seem to have wanted me, and I hope the rest of the Bill will go smoothly'. Follett, early in June and admittedly at a remove, was either behaving as if the Bill would be proceeding or simply seeking to encourage Nicholl. Graham told Nicholl on 8 June, having seen the memorandum, that he was not willing to agree to 'any material alteration respecting Probate, which would be a wide departure from the Bill as it came down from the Lords', but he privately admitted that the free option proposed by Barnes 'would be an improvement and I think we ought not to resist it very strenuously'. Having offered that unsettling opinion to Nicholl, Graham added that he saw no prospect that the Bill 'could come on again for a week or ten days'.

In contrast to the efforts of Barnes to defend the interests of the country registrars, Raikes, who was in London for the committee stage on 31 May, seemed to be relatively enthusiastic about the Bill as it stood and was then contemplating its further progress. And even as late as 8 June, Nicholl, who was as close to what was happening as anyone outside the Cabinet could be, was seeking the advice of Follett on how best to brief Peel and Graham about the criticisms directed against Clause 1 of the Bill. However, the turning point for the Government seems to have been reached on or immediately after 10 June when Peel was questioned in the House. The weekly *Legal Observer* appearing on 8 June and evidently monitoring the situation closely, hoped that the Bill would not go forward because it failed to provide a single tribunal for wills of real and personal property. By the next issue, on 15 June, it was being
assumed that the Bill would go no further in that session and that such a fate would be fitting for an 'imperfect measure'.

The wider reality was that June 1844 was a dreadful month for Peel. A substantial number of his own party had voted against the Government over sugar duties, and, since he seemed unable to carry his own measures through the House, he was close to resigning at the Cabinet meeting on 15 June, in company with Graham and Stanley. Against that background of crisis it is hardly surprising that the Ecclesiastical Courts Bill was once again accorded no priority. Peel had made up his mind by the beginning of July and he pronounced for it the same fate as its predecessor. On 1 July, in his 'Survey of Business before the House', he concluded by saying that 'seeing the mass of other business in the house and the great differences of opinion which existed as to various details of the measure, the Government did not intend to press it this session as they had no chance of passing it through'. The session continued until the beginning of September but the Bill had been abandoned.

An editorial in The Times on 6 June had already drawn attention to the spate of postponed measures, almost as if 'it is now established by the tacit consent of all parties that the correct way of disposing of a threatened conflict [is] to dispose of the bone of contention quietly'. Thus, when it came to the Prime Minister's decisive statement on 1 July, The Times was already poised to provide a hostile epitaph of sorts for that Bill and for the other failed Bills. 'The period of the session has now arrived which is usually as fatal to all schemes of legislation as the approach of Christmas is to the existence of geese and turkeys [sic].'

Later in the year, and from its longer perspective, the Edinburgh Review provided a specific indictment of the introduction of so weak a measure under 'Tory Rule', a measure which the public had not understood or 'they would never have submitted to be made the victims of a cabal of interested individuals'. It noted how 'The zeal of the reforming Lord Chancellor burned high and clear while sweeping away the smaller courts of the peculiars'; but much regretted that the Government had not then stood firm over reforming the diocesan courts and resisting 'the power exercised by country proctors and attorneys. When their columns advance, or their lines deploy, we know well how powerful is their charge on even a thoroughly disciplined Parliamentary phalanx'.

Finally, a different kind of postscript to the Bill was provided from an unlikely
source. George Martin, the Chancellor of Exeter, wrote to Nicholl on 1 July 1844, knowing then only what Peel had said prior to that date, but guessing and fearing that the Bill would be 'again indefinitely postponed'. What Martin suggested was that it would be generally beneficial and acceptable if 'a shorter and more simple bill' could be introduced to abolish all the peculiar jurisdictions, although he hinted that MPs needed to be made aware of the difference between the evils of that level of inferior jurisdiction and what he felt to be the worthwhile jurisdiction of the archdeaconry courts. The argument now implied by Martin, but previously rehearsed by Brougham and by Elphinstone, was that the intended reforms might be more likely to pass if they were divided into a number of separate bills. That strategy, although not adopted in what remained of Peel's administration, was to influence the reforming bills of the early 1850s.
Notes to Chapter 13.

1. A question put to Lyndhurst by Cottenham during the Lords second reading debate on the Ecclesiastical Courts Bill, see Hansard, 3d. ser., lxxiii, 21 March 1844, c.1337.


3. GP, 19 Oct.1843, Graham to Peel.


5. MMP, L.85/(viii), 30 Jan.1844, annotated copy of 1844 Bill.

6. MMP, L.89,[late 1843], notes on 1844 Bill.

7. MMP, L.93, 12 June 1843, Archdeacon of Sudbury to Nicholl; L.88, 17 June, Nicholl to Archdeacon of Sudbury.

8.P.P.1844 (12) iii. A Bill... to consolidate the Jurisdiction and improve the practice of the Ecclesiastical Courts of England and Wales, and for otherwise altering and amending the Law in certain Matters Ecclesiastical; see also MMP, L.85/(viii), 30 Jan.1844, annotated copy of 1844 Bill.


10.Ibid., 10 Feb.1844, cc.488-89.

11.Ibid., 12 Feb.1844, c.490.


13.MMP, L.98,[early March 1844], 'The case of the Country Registrars'; 4 March 1844, Kaye to Lyndhurst; 5 March, Lyndhurst to Kaye.


17. LJ, 76, 1844, pp.63,74.


19. Hansard, 3d.ser., lxxiii, 21 March 1844, cc.1311-22, 1349-51; The Times, 22 March. Nicholl did not expect the Bill to enjoy an easy passage, 'I suppose we shall beat them but it will be a hard fight', see MMP, L.98, 21 March 1844, Nicholl to Follett.


21. Ibid., cc.1343-49.

22. MMP, L.112, 29 March 1844, Nicholl to Follett.


24. Ibid., cc.1338-40.


27. MMP, L.112, 29 March 1844, Nicholl to Follett.

28. The Times, 29 March 1844.

30. *Hansard*, 3d. ser., lxxiii, 1 April 1844, cc.1684-86.


34. MMP, L.98, 26 March 1844, Nicholl to Steward.

35. MMP, L.112, 29 March 1844, Nicholl to Follett.

36. MMP, L.98, 26 March 1844, Fox to Nicholl.


38. MMP, L.98, 28 March 1844; L.112, 29 March, Nicholl to Follett; 20 April, Follett to Nicholl.

39. MMP, L.112, 29 March 1844, Nicholl to Follett.

40. Sir Herbert Jenner became Jenner-Fust in 1842 when he succeeded to the estate of his cousin, Sir John Fust, see H.E.L., xvi, p.150, n.2.

41. MMP, L.112, 20 April 1844, Jenner-Fust to Follett.

42. MMP, L.98, 13 April 1844, Martin to Nicholl.

43. HLRO, Appendix to Reports of Commons Select Committee on Public Petitions, 1844, pp.156-57.
44. *Hansard*, 3d.ser., lxxiv, 22 April 1844, cc.149-92.

45. In April 1844 Graham was detained in London by Irish affairs, which possessed him 'like lead' at a time when his daughter was seriously ill at Netherby, see GP, 6 April 1844, Graham to Peel.

46. Peel had justified his pragmatic approach to politics as early as 1832. 'You might as well say that you shall always navigate the same water with the helm set the same way, without regard to the state of the tide or the shifting of the wind', see BL, Add.Ms.40402, ff.233-39, 5 Feb.1832, Peel to Harrowby.


51. Ibid., 4 May 1844; CJ, 99, 1844, p.265.

52. P.P.1844 (239) ii. A number of annotated copies of the 1844 Bill, as amended on 3 May, have survived at Merthyr Mawr, see MMP, L.85/(xiv-xvi).


54. LM, xxxi, May 1844, pp.483-84.

n. 133.


58. When a correspondent appeared to be presuming upon a long acquaintance with Nicholl, he was told, 'The argument of "Auld lang syne" has not any weight with me', see MMP, L.108, 29 April 1844, Nicholl to Swabey.

59. MMP, L.108, 16 May 1844, Lawton to Nicholl.

60. Ibid., 24 May 1844, Nicholl to Kaye.

61. Ibid., 27 May 1844, Holt to Nicholl.

62. Ibid., L.98, 7 May 1844, Nicholl to Howley.

63. Ibid., L.112,[late May 1844], Nicholl to Graham.

64. *The Times*, 11 June 1844, reporting an exchange in the Commons between Peel and Charles Buller on 10 June.

65. *Hansard*, 3d. ser., lxxv, 31 May 1844, cc. 87-131; *The Times*, 1 June 1844.


68. MMP, L.108, 1 June 1844, Barnes to Follett.

69. LO, xxviii, 18 May 1844, p. 38.
70. Gladstone Library, Hawarden, N.55/9/2, proposed addition to Clause 18, with 'Observations' by Inglis, [May] 1844.

71. MMP, L.108, 3 June 1844, Follett to Nicholl.

72. Ibid., 9 June 1844, Graham to Nicholl.

73. Ibid., 1 June 1844, Raikes to [?Nicholl], 'though there are many awkward points in the Bill of this year which will require modification yet it is conceived in so much more kind a spirit to the country courts'.

74. Ibid., L.112, 8 June 1844, Nicholl to Follett.

75. LO, xxviii, 8 June 1844, pp.85-86; 15 June, p.106.

76. Gash, op.cit., p.447.

77. The Times, 2 July 1844, reporting Peel's statement in the Commons on 1 July.

78. Ibid., 2 July 1844, commenting on Peel's statement in the Commons on 1 July.

79. Edinburgh Review, 80, October 1844, pp.485-87. The Whig author was Thomas Spring Rice, Lord Monteagle.

80. MMP, L.112, 1 July 1844, Martin to Nicholl.
Chapter 14: The 1845 Ecclesiastical Courts Consolidation Bill; ‘the same as the Bill which was settled in the Select Committee in the year 1836’.1

This chapter deals with the final phase of Peel’s administration, when it was content to let the Opposition revive an earlier version of the Bill, one more faithful to the ‘authorities’ than the 1844 Bill had been, although no more successful in the event. It was also the year in which John Nicholl’s involvement came to an end.

Weary of failure in successive years, and with other priorities to contemplate, Peel’s administration lost any direct interest in the Bill from July 1844 onwards. Peel had to deal with a sequence of complex, time-consuming and divisive issues, the Bank Charter Bill, the Factory Bill and sugar duties in 1844, the framing of an innovative budget and the increased grant to Maynooth in 1845, and then the repeal of the Corn Laws and the impact of the Irish Famine in 1846. By 1845 he was exhausted.2 Thus, by contrast with what had gone before, Peel’s Government took no active steps to revive the Ecclesiastical Courts Bill or to promote its aims in the two years from July 1844, when the Bill had been abandoned, until July 1846, when Lord John Russell formed his first Whig administration. Prior to July 1844, spokesmen for the Government, the Prime Minister, the Lord Chancellor, the Home Secretary and the Judge Advocate General, had all acted publicly and communicated privately in a consistent fashion and with a consistent aim, that of bringing about the reform of the testamentary jurisdiction of the ecclesiastical courts. After that date, and for the remainder of the administration, the official line taken by the Government was that it would neither take further action itself nor do overmuch to encourage it. Instead the reforming drive was to come from the Opposition benches in the Lords.

That pattern of Government inactivity began to become plain enough in Parliament when it re-assembled in February 1845. Since there was no mention of the Bill in the Queen’s Speech on 4 February, Campbell asked in the Lords, as he had done a year before, if the Government was planning to revive it, since it was a measure which he wanted to be introduced ‘very soon’. In reply, Lyndhurst dealt specifically with Campbell’s enquiries about other failed bills, the Criminal Law Bill and the Conveyance of Real Property Bill, but was ambiguous, or so it seemed at the time, when it came to the Ecclesiastical Courts Bill.3 As reported in The Times, Lyndhurst did suggest that he would support any other Bill ‘which he thought he could fairly support’,4 but the Lord Chancellor’s later re-working of what he had
said on 4 February was equally equivocal and discouraging, 'I have no intention to bring in a Bill, but if you bring one in, I will tell you what we will do with it'.\(^5\) Similarly, when Grey asked Graham about the Bill in the Commons on 6 February, he was told that the Government had it in mind to introduce 'several measures of great importance' but that the Ecclesiastical Courts Bill was not one of those. The explanation given by Graham was that 'from the experience of the two preceding Sessions, he despaired of being able to frame a measure respecting the Ecclesiastical Courts which would be acceptable or satisfactory to the present Parliament', an answer punctuated by laughter from MPs.\(^6\) Lyndhurst's answer to yet another question from Campbell on 4 March, 'I have no intention of bringing in such a Bill in the course of the present Session', seems to have been the last straw for the Opposition.\(^7\) What happened next was the introduction by the Opposition of its own reforming Bill in the Lords.

On 25 April 1845, Cottenham, the former Whig Lord Chancellor, presented a Bill to consolidate the jurisdiction of the ecclesiastical courts into one court. It was read for the first time and ordered to be printed. The second reading, originally fixed for 23 May, was subsequently postponed to 26 May.\(^8\)

Cottenham's Consolidation Bill had two origins. First, it was descended from Lushington's Bill of July 1835 which had helped to shape the Bill brought in by Cottenham himself in 1836. It sought, therefore, so far as it applied to testamentary jurisdiction, to abolish the existing ecclesiastical courts and to create a new and centralised Court of Probate. Secondly, it was modified to take account of the amendments decided by the Lords Select Committee in 1836, amendments which allowed probate business below £300 in value to remain with the local courts.

In the second reading debate on 26 May, Cottenham described his measure thus, 'The Bill...was precisely and identically, word for word, the same' as the amended version of the 1836 Bill.\(^9\) What Cottenham was doing, therefore, faced with an uncooperative Government, was introducing, or reintroducing, a Bill which he had previously promoted and then been obliged to amend.\(^10\) The likelihood is that the text of what was to become the 1845 Bill had been revised under Cottenham's direction immediately after the Select Committee stage in 1836, and then hurriedly dusted down after the rebuff from Lyndhurst on 4 March 1845. Otherwise there would have been insufficient time to get the Bill into shape de novo. In fact, Cottenham had to admit that it would still need 'some trifling alterations to bring it
up to date'.
Although the 1836 Bill as amended was never ordered to be printed, a simple comparison between Cottenham's original Bill as printed in February 1836 and the version printed in April 1845 makes sufficiently clear both the similarities and the differences. Whereas the original Bill consisted of seventy-seven clauses, the later Bill had been inflated to ninety-nine clauses, with much re-shuffling of their sequence and numbering. As far as testamentary jurisdiction was concerned, both measures contained several constant features. First, the creation of a Court of Probate and registry in London, presided over by a Crown-appointed and salaried judge, with new powers to direct trials of fact by jury but otherwise following the procedures in the Prerogative Court. Secondly, the automatic appointment or admission to the new court of the existing deputy registrars, advocates and proctors at Doctors' Commons, with conditional admission for proctors from the local courts. Thirdly, and importantly, both Bills presented by Cottenham provided for the registration in London of wills of real property, Clause 25 in 1836 and Clause 64 in 1845. That reform had been recommended by the 'authorities' but had been set aside in other versions of the Bill; in the 1845 Bill the provision was intended to apply to deaths after 1 November 1845. Finally, both 'Consolidation' Bills had the same title.
As suggested above, the main difference between the measures was produced by the amendments decided by the Select Committee in 1836. The probate function of the diocesan courts was to be preserved by allowing them to handle local probates under £300 in value, with all the subsequent arrangements for approval by the London Court. There was also to be close control over the transmission of applications to London and of copies of wills from London, Clauses 35-39 in the 1845 Bill. Otherwise, both Bills intended to abolish all the ecclesiastical courts inferior to the diocesan courts, variously estimated as being between 350 and 400 in number.
Alongside these proposed reforms in testamentary jurisdiction, Cottenham persisted in including in his 1845 Bill, despite the experiences in previous years, a number of non-testamentary clauses which had appeared in the earlier Bill. Bringing up the rear, therefore, were sequences of clauses dealing with tithe suits, church rates, sequestrations and the boundaries between lay and spiritual jurisdictions. However, Cottenham did take care, or so it must have seemed to him at the time, to retain a clause which protected episcopal jurisdiction in respect of clergy discipline, Clause 43 in 1836 and Clause 83 in 1845.
In the event, his proposals had a mixed reception at second reading on 26 May 1845. The Bishop of Lincoln expressed a number of reservations about the Bill and, most pertinently, about the fact that the creation of a lay Court of Probate made it 'a very different measure from that recommended by the Ecclesiastical Commission in 1832', the Commission upon which Kaye had served. He thought, therefore, according to the report in The Times, that 'some of its provisions would require alteration'. Kaye was given support of a kind by the Earl of Winchelsea, an uncomplicated opponent of centralisation. On the other hand, it was predictable that Campbell, briefly, and Brougham, at greater length, should have spoken in favour of the Bill. Brougham took the opportunity to attack once again the efforts of self-interested proctors to organise objections 'out of doors', and he referred to how obstructive they had been in previous sessions. In fact, among the hostile petitions presented at the committee stage on 5 June, there was to be one from all the country registrars 'in dioceses in England', demanding that the Bill be altered so as to be 'consistent with the principle of the measure' which had been sanctioned by the Lords in 1844.

Much less predictable was the concluding statement of support from Lyndhurst. It seemed at that stage as if 'the Bill would pass unanimously', as Campbell put it. The Lord Chancellor said, therefore, that he felt obliged in all honour to react favourably to a Bill which he found similar in principle and detail to the Government Bill which had passed the Commons in 1843. That was a response to be repeated later by Peel. What was also surprising, given the continuing interest of The Times in the reform of the ecclesiastical courts, was that its coverage of the second reading of the Bill was no more than a factual summary of the debate. That may have been caused by the priority given to the Maynooth Question.

It was at the committee stage on 5 June that the Bill ran into difficulties. Two experienced and combative bishops, Henry Phillpotts of Exeter and Edward Denison of Salisbury, attacked it from different directions against a background of hostile petitions. The Bishop of Exeter seemed convinced that the Bill was capable of giving a jurisdiction in spiritual matters to a lay court, and moved that it be postponed. The Bishop of Salisbury feared that even changes in testamentary jurisdiction might be accompanied by unspecified 'evils', and asked the Government to intervene. What was eventually agreed, as a compromise, was that the Bill should be referred to a Select Committee. Even then, Exeter and Salisbury saw that as an alternative method
of killing it off, 'once the Bill was buried in the Select Committee it would not be disinterred until next Session'.

When complete, the Select Committee consisted of eighteen peers, some of whom had served previously in 1836. The prelates were Howley and five others, the Bishops of London, Lincoln and Bangor, all of whom had served on the Ecclesiastical Courts Commission, together with Denison of Salisbury and John Lonsdale of Lichfield, the latter having been appointed by Peel only two years before. The lawyers were Lyndhurst, Brougham, Cottenham, Campbell, Denman and Langdale, all favourable to reform. The other peers were Wharncliffe as Lord President, Ellenborough, Monteagle, Normanby and Portman, with Landsdowne as a subsequent addition.

Lyndhurst reported on 19 June that the Select Committee had made 'several amendments'. The amended Bill was ordered to be printed, committed to the whole House on 24 June and debated again at the report stage on 27 June. That further scrutiny left intact not only all the clauses dealing with the new Court of Probate, its testamentary jurisdiction and its procedures, but also those dealing with tithe suits, church rates and sequestration. What were dropped, at the insistence of the bishops, were three clauses which had attempted to define the boundaries between lay and spiritual jurisdictions. With the addition of several general provisions the number of clauses now stood at 101.

Nonetheless, the unease about the Bill among the bishops surfaced again at the report stage on 27 June, despite the fact that Blomfield and Denison, who spoke then, had just served on the Select Committee. Both argued that if the present Bill was allowed to pass the effectiveness and standing of the diocesan courts would be affected in a variety of ways. But their main grievance was that the Government had made a relevant promise earlier in the session. It was alleged that, at a meeting between Graham and Denison, the Government had undertaken not to bring in such a measure, and yet it now appeared to be supporting, or at least not resisting, an Opposition Bill to similar effect. The two bishops further argued that reforms of this kind could only be introduced by the Government, and then only after proper and prior consultation with all the bishops.

Some sharp responses followed. Brougham denied that there had been any 'concert or compromise' between Government and Opposition; Lyndhurst again referred to his honourable stance in respect of the Bill; and Campbell chided Blomfield with
having shifted his ground since serving on the Ecclesiastical Courts Commission.\textsuperscript{21} The report was agreed on 27 June; the Bill was read for the third time on 30 June, was passed and was sent down to the Commons. It was 'not returned'.\textsuperscript{22} In fact, despite the progress made in the Lords, the 1845 Consolidation Bill went no further in the Commons than its first reading and subsequent printing on 1 July.\textsuperscript{23} By 7 July, \textit{The Times} had begun to renew its interest in the fortunes of the Bill, describing as 'scandalous' any attempt to hurry the measure through the Commons so late in the session, and repeating the allegations made by Blomfield and Denison that the Government was secretly pushing the Bill forward. That latter claim was also made by 'BETA' in an offensively worded letter to \textit{The Times} on 8 July. On the previous day, \textit{The Times} had printed a long letter from an anonymous 'Country Registrar' who had resented Brougham's remarks about the activities of country practitioners, pointing out that it was those in the metropolis who would benefit from the Bill.\textsuperscript{24} As it happens, at exactly the time that there was so much posturing in the columns of \textit{The Times}, Peel was bringing about in the Commons the withdrawal of the Bill for the third year in succession.

On 7 July, Peel's review of the 'Business of the Session' was supposed to be confined to the progress or otherwise of Government measures. However, an interruption from an MP, not named in the reports in \textit{Hansard} and \textit{The Times}, gave Peel the opportunity to speak about the Opposition Bill. He said that he could neither allocate sufficient Parliamentary time to the Consolidation Bill nor commit the Government to 'the management of such a Bill', even though he would have been ready to affirm the principle, but not the details, of it and to vote for it at second reading. He told the House generally, and later told Inglis directly, that he regarded the Bill as being close enough to what his own administration had brought in in 1843. Lord John Russell, leader of the Opposition, who had taken charge of the Bill personally in the place of Sir George Grey, promptly withdrew the Bill for that session; but he hoped that the Government itself would try again in the next session or, failing that, that Peel would support a measure introduced by Russell or Grey.\textsuperscript{25} Both the \textit{Law Review} and the \textit{Law Magazine} were to add the measure to their lists of postponed or miscarried bills for that session.\textsuperscript{26} The failure of the 1845 Consolidation Bill can be attributed to a number of factors, taken in combination. First, Ministers were weary over their previous lack of success with this reform and were preoccupied with more pressing matters during the
session. Secondly, the Bill was handicapped by not being a Government measure and not being able to call upon that kind of support; but it was also handicapped because its opponents suspected it of being secretly backed by the Government. Thirdly, it was introduced dangerously late in the session and was then confronted by the opposition 'out of doors' of the country practitioners and their supporters, and also by the opposition within Parliament of distrustful bishops. Fourthly, its persistent omnium gatherum nature seems to have added to its difficulties.

John Nicholl, who was present in the Commons when the Bill was withdrawn, appears to have had no involvement with it during its resuscitation and its passage through the Lords. However, his dealings with Peel on three separate occasions between the demise of the 1844 Bill and that of its successor in 1845 do provide a commentary of sorts upon the Prime Minister's private attitude at this time towards other aspects of the ecclesiastical courts and their reform. Those dealings may help to explain in part Nicholl's withdrawal from the scene.

First, between August 1844 and March 1845, Peel and Nicholl corresponded about the justice of throwing open Doctors' Commons and the Irish ecclesiastical courts to non-Anglican lawyers, something wanted by Peel but a source of discomfort to Nicholl. Secondly, in November 1844, when Nicholl presumed to recommend a close relative to the vacant office of Queen's Proctor at Doctors' Commons, he was told by Peel that such a post should be filled by 'fair competition'. That blatant example of a 'job' gave both the Morning Chronicle and the Law Times the opportunity to launch a personal attack upon Nicholl and upon his family connexions at Doctors' Commons. Finally, although he was sympathetic to the principle of the measure, Peel had refused to let Nicholl take charge of the 1845 Bill in the Commons. Nicholl had had a 'conversation' with Lord John Russell 'some weeks' before the Bill was due to reach the Commons, seemingly about doing so, since the Opposition Bill was a non-party measure. Peel was told of this by Nicholl just before the first reading of the Bill in the Commons, and he made it clear to Nicholl that he did not want him to be involved and that Grey 'was to have the conduct of it'. Nicholl immediately wrote to Russell, on 2 July, to keep the Leader of the Opposition informed, as he had been asked to do by Peel. He admitted to Russell that he was relieved at not having to take charge of the Bill, and the reason he gave was that he thus 'escaped the imputations of sordid motives...which must to a certain extent have prejudiced the measure. In your hands it must be above all suspicion'.
That account of what happened, and what did not happen, at the beginning of July 1845 may pose more questions than it answers, not only about Peel's attitude at the time towards the reform of the ecclesiastical courts but also about his attitude towards Nicholl. To have sanctioned the involvement of a junior minister would have identified the Bill as a Government Bill in all but name and would have confirmed the worst suspicions of those hostile to it. And to have given that responsibility again to someone who had twice been closely associated with failure, and who also saw himself as disadvantaged by his links with Doctors' Commons, might not have been wise.

In the event, Peel's administration, beset by its other difficulties throughout the 1846 session, never did revive the Bill. And by the time that Lord John Russell had formed his Ministry in July 1846, with Cottenham as Lord Chancellor and Grey as Home Secretary, it was too late in that session for any legislative activity.
Notes to Chapter 14.

1. Lord Cottenham, when moving the Lords second reading of his Ecclesiastical Courts Consolidation Bill, see Hansard, 3d.ser., lxxx, 26 May 1845, c.836.


4. The Times, 5 Feb.1845.


6. Ibid., lxxvii, 6 Feb.1845. c.169; The Times, 7 Feb.

7. Ibid., lxxviii, 4 March 1845, c.261; The Times, 5 March.

8. P.P.1845 (135) iii. A Bill... to consolidate the Jurisdiction of the several Ecclesiastical Courts in England and Wales into One Court and to enlarge the Powers and Authorities of such Court; and to alter and amend the Law in certain Matters Ecclesiastical, ; LJ, 77, 1845, pp.180,229.

9. Hansard, 3d.ser., lxxx, 26 May 1845, cc.835-46. The Times, on 26 April, had noted the close relationship between the Bills when reporting the first reading of the Consolidation Bill.

10. The comment in the Law Review, drafted the day after the first reading, was that 'The Government having brought in no Bill on the Ecclesiastical Courts in the present session, Lord Cottenham has introduced his former Bill. Surely these Courts cannot be left in their present state', see LR, ii, May 1845, p.240.

11. See Chapter 9, n.11.

correspondence between Peel and Nicholl, etc.

28. Ibid., 40553, ff. 288-91, Nov. 1844, correspondence between Peel and Nicholl; LT, iv, 30 Nov. 1844, p. 162.

29. MMP, L. 114, 2 July 1845, Nicholl to Russell, endorsed 'declining to take charge of Cottenham's Bill in 1845'.
Chapter 15: Lord John Russell's first administration, 1846-1852; "All great abuses they are willing to leave untouched...they are too powerful for a Cabinet of little men".1

When Russell took office in July 1846, he found himself relying upon a body of traditional Whig supporters, 'but beyond their influence was a shifting mass of individuals or of independent groups...who might or might not support the Government and its measures'.2 As a consequence of that lack of discipline, the inevitable pressure of other business and the poor health of his Lord Chancellor, Russell's administration never brought forward a measure to reform the ecclesiastical courts throughout the whole of its period of office, almost six years. There were, it is true, two decisions taken which came to have longer-term consequences. The House of Commons decided to investigate the fees charged by those courts, and the Government decided to expand an inquiry into the Court of Chancery. But generally speaking, instead of the progress expected of the new Government, the banner of reform was carried by a number of committed back-benchers, by those who edited and contributed to the numerous law periodicals and, notably, by the recently-formed Law Amendment Society.

In fact, Russell had put together a formidable team of lawyers. He recalled the experienced Cottenham to serve as Lord Chancellor, and chose Sir George Grey to be Home Secretary, a barrister by training who had previously 'shadowed' Graham. Sir Thomas Wilde served for only a few days as Attorney-General before succeeding Tindal as Chief Justice of Common Pleas, but he was succeeded in turn by Sir John Jervis who had earlier taken an interest in the reform of the ecclesiastical courts. Sir David Dundas completed the team as Solicitor-General until 1848. The composition of the new Cabinet as a whole was welcomed fulsomely in the Commons by Edward Horsman, the Whig MP for Cockermouth,3 although he was later to express himself quite differently in the privacy of his diaries.

However, with the session ending on 28 August 1846, there was a general recognition that the change of Government alone had brought about the postponement of several Bills. Brougham spoke in that vein on 14 August4 and the Law Magazine doubted 'whether any measure of importance to the profession will become law' in that session.5

The only two flickers of interest shown by Parliament in the condition of the
ecclesiastical courts came in the Commons at the beginning and at the end of the session. In January 1846, Bickham Escott had asked Russell if he had any plans as Leader of the Opposition to revive the 1845 Bill and had offered to pass on information, which would certainly have been hostile, from the 'many persons able and desirous' to communicate it. Russell had accepted the offer and promised a reply, but he never followed up the exchange in the Commons. Then, in August, Charles Newdigate Newdegate, whose family had owned the peculiar of Harefield in Middlesex 'since the reign of Edward III', and who had previously petitioned for its survival, convinced himself that it and several other peculiars had just been abolished by the Ecclesiastical Commission with royal approval. Grey, by then Home Secretary, explained that the spiritual supervision over the incumbent at Harefield had been transferred by the Ecclesiastical Commission to the diocese, something much less than would have been brought about by the Bills of 1843 and 1844. No hint was given that the substance of those measures might be reintroduced.

The picture was markedly different outside Parliament. For example, late in 1845, the Revd. Edward Muscutt, an evangelical minister based in Islington, brought out a substantial pamphlet which was intended to inform the public about the history and constitution of the ecclesiastical courts. A revised version appeared in 1846 which went into its 'fifth thousand'. Muscutt believed that only an informed public could exert pressure upon Parliament to bring about the 'alteration' or 'reconstruction' of those courts. What had immediately prompted his pamphlet was, first, the failure to date of legislation to reform the courts when Ministers were faced with the 'determined and systematic opposition of parties beneficially or otherwise interested in preserving them in their present state'; and, secondly, the indifference of the general public to 'the struggle between high clerical pretension and national benefit'.

Muscutt formed, more or less single-handedly it seems, a 'Society for the Abolition of the Ecclesiastical Courts', a misleading title when his main target was the anomalous peculiars. He attracted an heterogeneous group of influential supporters. Among those who sat on the Committee, or chaired public meetings, were Benjamin Hawes, son-in-law of Brunel and MP for Lambeth; Charles Hindley, MP for Ashton-under-Lyne; Dr John Lee, a senior member of the College of Advocates; Lord Ducie, prominent in the newly-created Evangelical Alliance; and the Reverend Dr John
Campbell, a London Congregational minister and editor of the *British Banner*. The Society presented a petition to Russell in April 1846, and then, between August 1846 and January 1847, Muscutt addressed at least four well-attended public meetings in London on behalf of the Society. From reports of what he said at venues in Threadneedle Street in August, in the City Road and in Southwark in October, and in the Borough of Westminster in January, it seems that on each occasion he reworked the material contained in his pamphlet, and reserved the peculiars as his special target. Muscutt's supporters in the Borough of Lambeth petitioned the Commons in August 1846, praying that the peculiars be abolished and that the civil jurisdiction of the other ecclesiastical courts be transferred to the Crown. His aims were also communicated to the Committee of Deputies of Protestant Dissenters, and in October 1846 that body decided to petition both Houses to bring about either the 'thorough reform' or 'the entire abolition of the Ecclesiastical Courts'.

And yet, despite that flurry of protests outside Parliament, no progress was made in the new session towards reviving Cottenham's Bill of 1845. Grey did acknowledge, in the Commons in June 1847, in response to a question from Nicholl, that a measure was needed 'at as early a period as possible, but great difficulties attended the question'. Roebuck inferred, correctly, that no general bill dealing with the ecclesiastical courts would be brought forward in that session. It was also true that the intolerable pressure of business during the 1847 session was complained about in both Houses and doubtless did tend to crowd out such an awkward measure. However, Edward Horsman, who was keen to see the ecclesiastical courts abolished, recorded in secret what he saw as the contrast between Grey's inactivity as Home Secretary at this time and the way in which he had 'badgered Graham' during Peel's administration. 'He neither let Graham eat by day nor sleep by night'. In its 'Retrospect of the Session', the *Law Magazine* took a gloomy view of law reform progress generally, commenting that 'the number of measures slaughtered or abandoned is unusually great'. It was pessimistic also about the immediate future, 'In all probability no law reforms of moment will be carried next session'.

As with Muscutt's activities in the previous session, the more lively debate and discussion in 1847 was to be found outside Parliament. In its February and August issues, the *Law Review* provided summaries of the proceedings of the Law Amendment Society. The Society, founded in 1844 with Brougham as its President, was a 'non-party organisation which sought to provide a forum for
generating legislation', and the Law Review was happy to be a vehicle for making known the Society's proceedings and resolutions.19 The Law Magazine gave space to reviews of The Practice of the Ecclesiastical Courts, by Henry Charles Coote, an experienced proctor in Doctors' Commons, and of The Ecclesiastical Statutes at Large, by James Thomas Law, a former judge in the diocese of Bath and Wells.20 At a dinner in his Liskeard constituency in September 1847, Charles Buller, by then Judge Advocate General, said that 'ecclesiastical law, even the law of the spiritual courts - is the disgrace of this country'; and the reaction of the Law Review to Buller's speech was that the courts 'require great alteration to adapt them to the necessities of the present time'.21 The inhabitants of Liskeard were to petition the Commons in the following April, asking for 'one uniform and beneficial system of jurisprudence' and the transfer to the Crown of the civil powers of the ecclesiastical courts.22

Finally, there was one firm decision taken in the Commons in 1847 which was to contribute, in time and indirectly, to the pressure for the reform of the ecclesiastical courts. A Select Committee was appointed in May 1847 to 'inquire into and report on fees in the Courts of Law and Equity'. Almost immediately, the terms of reference were extended to include the ecclesiastical courts and the Court of Admiralty.23 The Select Committee produced a series of reports at intervals from 1847 onwards, but the revealing report which dealt with the ecclesiastical courts appeared in August 1850.

Initially, the 1848 session of Parliament showed no more promise, with nothing in the Queen's Speech for those who wished to see a revived Bill. More generally, it was a 'demoralising' session for Russell and his 'battered Whig administration', which only just struggled through to the end. It had all the appearance of a 'caretaker cabinet keeping the administration of the country going until some more permanent political combination could replace them [sic]'.24 By contrast, the proceedings within the ecclesiastical courts were causing uproar and even delight in the press early in 1848. In February, the Law Times, the Standard and The Times all reported and commented upon 'A scene in the Arches Court'. Dr Addams, counsel for the wife in a matrimonial cause, had complained that both the advocate and the proctor on the other side were closely related to the presiding judge, Jenner-Fust. The proceedings were 'abruptly terminated' by Jenner-Fust amid much mutual recrimination. The Times in particular seized the opportunity to make
many gibes about 'hungry Jennerlings', about Doctors' Commons being 'like an oyster-bed, and every oyster in it is called Jenner', and about 'the ubiquity of the Jenner...clan'.

There also appeared early in 1848, possibly in April and certainly prior to May, a pamphlet written by the Revd. Edward Craig, brother to the Revd. J.K Craig who had recently been found guilty of indecency by Jenner-Fust in Farnall v. Craig. Edward Craig challenged that judgement on several grounds, but one ground was that of the 'ties of blood' which linked two of the lawyers, F.H. Dyke and Edward Jenner. Dyke was not only Registrar to the Archbishop of Canterbury's Vicar General, and custodian of evidence to which the defence lawyers were allegedly denied access, but he was also 'the partner in business, the cousin, and brother-in-law by marriage of Mr Edward Jenner, who is the proctor for Mr Farnall and the son of Sir Herbert Jenner-Fust'. Craig thus regarded Doctors' Commons as a 'family preserve', and complained about 'the grievous irregularities committed in the course of the proceedings by those who are members of the Judge's own family'. In April 1848, he petitioned the Commons, asking the House to 'proceed to such measures of Reform as shall assimilate the Ecclesiastical Courts to the general principles of judicature in our land'.

The Spectator had earlier called attention to the theme of 'well-connected nepotism' within those courts, and it was predicted that Edward Pleydell Bouverie, armed 'with an accumulated weight of authority and evidence', would be asking in the Commons for the creation of an entirely secular tribunal. Bouverie, or Pleydell-Bouverie as he became known, was a recently-admitted barrister and had been in the Commons only since 1844, as MP for Kilmarnock, although he was later to develop into 'a prominent figure' in the House. The second son of the Earl of Radnor, who, as Viscount Folkestone, had campaigned on behalf of Mary Ann Dix in 1812 and who currently supported the Law Amendment Society, Pleydell-Bouverie was as ready as his father had been to criticise the ecclesiastical courts. In fact, between 30 March and 30 May 1848, a number of public petitions in favour of change were presented to the Commons. They came from 130 Liverpool solicitors, from Liverpool merchants, from Charles Buller's constituency of Liskeard, from the inhabitants of Macclesfield and of Newport Pagnell, and from the 'merchants, manufacturers and gentry' of Stockport. What the petitioners had in common was that they sought the abolition of the civil jurisdiction of the ecclesiastical courts and its transfer to 'the
Crown'. In some cases they also linked that abolition with freedom of conscience and religious liberty, or even, in the case of the Liverpool solicitors, with the ending of the proctors' monopoly of practice. However, it was only at the end of May, when presenting the Stockport petition, that Pleydell-Bouverie spoke up.

He presented a motion to abolish the ecclesiastical courts, and argued his case so skilfully that he provoked the nearest thing to a full-blown debate on the subject that the Commons had heard since 1844. Most of the MPs who supported him, and some who did not, believed by the end of the debate that Russell's administration had no choice but to act in the following session. Pleydell-Bouverie explained that he wanted to 'stir up' the Government and make it 'grapple and deal with this subject'. He had chosen the mechanism of a motion, first, because the process of making inquiries into the problem been tried several times and had become exhausted, and, secondly, because the preparation of a bill by an individual MP would involve 'a great deal of attention and learning'. With the findings of the General Report as his principal authority, he recited the catalogue of attempts 'made by several Governments to remedy some of these evils'. Those attempts had fallen between 'two stools', he said, the interests of the public and the interests of a 'small number of people...who claimed a kind of tenant-right to the abuses of those courts' and who offered a 'combined and vigorous' opposition to proposed reforms. His other targets included the confusing number of courts, their 'abuses and maladministration', the monopoly enjoyed by their practitioners, the episcopal appointment of unqualified judges, and the recent and well-publicised confrontations in the Prerogative Court, all of which features were damaging to the Church of England.

Grey agreed that action was needed instead of further inquiries, and suddenly announced to the House that Jervis, the Attorney-General, had been working on a Bill for some time and that it would have been 'submitted to Parliament in the course of the present Session had the Government any prospect of securing time and attention for the consideration of its details'. Challenged by Inglis and Sibthorp to make his own position clear, Jervis went further than Grey when he stated that 'the subject had been maturely considered' and that 'a Bill was prepared and would be introduced at an early period next session'. He told the House that he had been considering the problem even before he became Attorney-General in 1846, and was convinced that there was a middle way between the principle of centralisation and the taking of justice 'to every man's door'. Then, echoing the Home Secretary, Jervis
said that the Bill could have been introduced in the present session, had it not been
certain that such a complicated and detailed measure 'would provoke much
discussion at a time when other Bills were on the table which it was important
should be carried as soon as possible'.
The debate closed with characteristic contributions from back-bench MPs. Inglis
warned Grey that any attempt to centralise 'after the modern fashion' would be
defeated. 33 The indefatigable Hume and an MP new to the House, William Page-
Wood, later Lord Hatherley, both welcomed the pledge given by the Government to
act in the next session, although the latter would have preferred members to have
had a sight of the Bill beforehand. 34 On the strength of the Government's promise,
Pleydell-Bouverie withdrew his motion without pushing matters to a vote, although
Aglionby thought that there should have been a division. Without it, he predicted
that 'the whole matter would end in smoke' because 'unless the public forced
measures on the Government, they would never proceed ... in the way in which the
national interests required'. 35
Both Jervis and Aglionby proved to be right in their forecasts, although in different
ways. By mid-July, when Russell was questioned about the business of the session,
there was no further mention of a Bill, and by the end of August the Government
was being accused by Disraeli of procrastination and of mismanaging Parliamentary
time. 36 Earlier in the session the Law Magazine had been complaining that 'More
than the usual number of bills introduced have been smothered, dropped or
postponed', but it had to acknowledge that by the time that Parliament was prorogued
on 5 September 1848 bills were passed 'thickly and rapidly'. 37 The Law Review went
even further in its November issue and listed, approvingly, the final tally of
reforming bills, 38 but there clearly was no place in that crowded time-table for the
Bill mentioned by Jervis.
Notwithstanding, the debate about reform was continued outside Parliament. During
1848, the Law Amendment Society had begun to look at the jurisdiction of the
ecclesiastical courts and had considered a number of resolutions as to the law of
divorce received from its Committee on Ecclesiastical Law. 39 More particularly, the
Law Magazine helped to give coherence to the debate about testamentary jurisdiction
by publishing two substantial articles in its issues for 1848. Both were the work of
an unidentified contributor, 'H.J.H.' and both were entitled 'The Jurisdiction of the
Ecclesiastical Courts'. In fact, only the first article, which is likely to have appeared
in June but drafted before Pleydell-Bouverie's speech, dealt exclusively with the testamentary jurisdiction of those courts. The second article, which appeared later in the year, dealt principally with 'cases arising out of the marriage state'. What was called for in the earlier article, after it had traced the history of successive inquiries and failed bills since 1812, was a resolute approach by Government to abolishing Doctors' Commons and finding 'one plain and uniform plan' for dealing with the non-contentious registration of all wills, whether real or personal. 'H.J.H.' hoped that the attention of Parliament would be directed towards reforms, but he expected opposition from 'a large and influential class of persons...interested in preserving existing abuses'.

About the time that the first article by 'H.J.H.' appeared in the Law Magazine, a markedly contrasting set of 'reforming' proposals was published in pamphlet form, the work of Robert Phillimore, a distinguished practitioner in the very courts which 'H.J.H.' sought to emasculate. As the self-appointed defender of those courts, Phillimore was reacting specifically to Pleydell-Bouverie's speech on 30 May 1848. His pamphlet was in print shortly after that date, but was drafted before the appearance of the article by 'H.J.H.' Phillimore had been a friend of Gladstone at Oxford, a friendship which became closer over the years, and he couched his text in the form of a letter to Gladstone, whilst protesting that Gladstone would be interested in subject matter rather than author.

The 'First Part' of the pamphlet was a detailed refutation of Pleydell-Bouverie's criticisms of the ecclesiastical courts, described by Phillimore as amounting to the 'severest bill of indictment'. Rather as Lushington had done before him, he dealt with charges of nepotism at Doctors' Commons in a remarkable credo or justification, designed to appeal to any successful lawyer. 'When a man has risen to the top of his profession, whether it be in the Court of Common Pleas or Exchequer, or of the Vice-Chancellor, or of Doctors' Commons, his relations will be disposed to embark in the same profession, partly with the hope of sharing any patronage in his gift, or recommendation, partly for the advantage in the way of business which may accrue to them from bearing his name'. Phillimore concluded the 'First Part' of his pamphlet by setting out his own programme of pre-emptive but limited reforms, based upon 'the principle of preservation and useful improvement and not of violent and inconsiderate destruction'.

He offered several concessions designed to stave off the wholesale destruction of
the ecclesiastical courts. First, the abolition of the peculiars but the retention of about thirty diocesan courts equipped with qualified judges and registrars. Secondly, an interchange of copies of wills between Doctors' Commons and the preserved diocesan courts. Thirdly, the abolition of all sinecure offices. Fourthly, the introduction of viva voce evidence, subject to certain limitations. And, finally, the amalgamation of the several courts for Canterbury and York into one superior court in each province.

The 'Second Part' of the pamphlet did no more than repeat Phillimore's earlier apologia for the civil law, although it was appropriate to set out again his defence of the expertise of civilians in international law at a time when Doctors' Commons seemed to be coming under siege.

The 1849 session, which ran from 1 February to 1 August, produced no Bill, despite the evident impact made at the time by Pleydell-Bouverie's speech, despite the promises made by Government, and despite the feeling outside Parliament that something radical, or even limited, had to be done.

By that stage, the lawyers serving the administration were Cottenham as Lord Chancellor, Jervis as Attorney-General and Sir John Romilly who had succeeded Dundas as Solicitor-General. Cottenham had a special knowledge of the reform of testamentary jurisdiction, both in and out of office. However, he was then in his late 60s and, as was common knowledge, had been in poor health for some time. He was not able to attend his Court regularly by the winter of 1849, and, after resigning the Great Seal in 1850, he died in Tuscany in the following year on his way back from convalescing in Malta. The declining health, by 1849, of an otherwise experienced Lord Chancellor should certainly be considered as one factor in the continuing failure of the Government to prepare reforming legislation.

However, another inhibiting factor was the general disarray of parties and allegiances within the Commons throughout the 1849 session. Even before Parliament met, Peel was regretting in private that 'the position of parties, or rather the relics of ancient parties, is more complicated and embarrassing than ever'. Early in the session, Stanley was complaining in the Lords about 'great delays' in the introduction of measures, and, at its close, Brougham called for better management of the progress of Bills through Parliament.

Throughout that entire session, the only questions asked about the promised Bill were put to the Home Secretary by Horsman and by Hume in March 1849.
Horsman referred to an unreported statement made 'a few nights since that a measure was prepared with reference to the abuses of the Ecclesiastical Courts', and he wanted the Commons to be given an outline of its provisions. For his part, Hume asked if the Bill would abolish the courts. The response from Grey was that his earlier remarks had been about a Bill which was 'in an advanced state of preparation' but he was not prepared to say more than that to either Horsman or Hume. There the matter rested for the remainder of that session, although Horsman, who was by then disaffected with Russell's administration, was angered by Grey's evasiveness over the Bill. In his commonplace book, started about this time and retrospective in part, Horsman made several disbelieving and savage references to the promised legislation. For example, he wrote that Grey 'showed great prudence in keeping the Eccl.Courts one in the background. Week after week he promised it, the bantling was there he said - conception was far advanced & the anxious public would soon be gratified with a view of its interesting features. But it never showed - the parent kept it hidden behind the curtain - whether there really was a bantling or not is only known to the midwives of the Home Office - the belief is that there was not even an abortion but a fausse concette [sic]'.

Once more the Law Magazine complained about how the administration was conducting the business of Parliament, 'the usual crowd of bills is to be found being hurried along during the last week or two of its existence', and about how 'several bills have died or been abandoned'.

Nor, in the 1850 session, did Ministers say or do anything to suggest that there was any enthusiasm for introducing a Bill. When the session opened on 31 January, the Queen's Speech was silent on the subject, and Grey made only a passing reference in May to the lack of time to prepare such a measure. However, in spite of the inactivity of the administration, there were a number of initiatives during that year which were to presage later legislation. There were awkward questions from another active back-bencher; diocesan statistics were being made available to the Commons; a Commons Select Committee published its detailed findings about fees in the ecclesiastical courts; there were enforced changes among the law officers; and, at the close of the year, a Royal Commission was appointed to examine the workings of the Court of Chancery and was to be subsequently expanded.

In April 1850, Sir Benjamin Hall, MP for Marylebone, drew attention to the ecclesiastical courts by holding up to scrutiny in the Commons the sinecure office of
Registrar of the Prerogative Court of Canterbury, and by accusing Archbishop Sumner, Howley's successor, of having granted his own son a reversionary interest in that office. Russell was obliged to reply, and the row about that sinecure continued into May, in both the Commons and the Lords. Hall later added fuel by suggesting that the bishops were not giving accurate information to the Ecclesiastical Commission about the extent of their incomes.  

The interest of Hall, and others, in these matters was quickened by the gradual appearance that year of statistical information about the income of dioceses, about their system of appointments to office and about the business of their courts. These returns to Parliament had been initiated in the previous session. Once the statistics were available, the *Law Times* was able to present its readers with an analysis, by type of cause, of the sittings in the Arches Court over the previous four terms.

The Commons Select Committee which had been looking at the court fees charged in the ecclesiastical courts produced a report, in August 1850, which pointed to a generally unsatisfactory state of affairs, and the legislature was invited to apply the 'necessary remedies'. The Committee, chaired by Pleydell-Bouverie, had Graham, Page-Wood and Hume among its members. Graham took an active part in interviewing a number of registrars about the arrangements at Doctors' Commons, Bristol, Chester, Durham, Lincoln, Rochester, Salisbury, Wells and York. Taken together, the report, evidence, appendix and index, constituted a damning exposure of continuing abuses, and provided law reformers with factual grounds for pursuing their criticisms of those institutions. About a year later, when the Government had still done nothing, Graham wrote to Pleydell-Bouverie on the subject, and with some feeling, 'the abominations of the Ecclesiastical Courts still offend the nostrils even of bystanders. These things ought not to be so when you are in possession of power and know both the extent of the evil and the necessary remedies'.

The retirement of Cottenham in June 1850 brought Sir Thomas Wilde to the Woolsack as Lord Truro. His appointment, although later confirmed, was only temporary to begin with and the *Law Magazine* had expected Rolfe to be given the permanent appointment. Jervis succeeded Wilde as Chief Justice of Common Pleas, Romilly became Attorney-General and Alexander Cockburn took Romilly's place as Solicitor-General.

Finally, in December 1850, but only after several years of pressure upon the Government to improve the 'slow and costly' arrangements in the Court of Chancery,
a Royal Commission was appointed to 'inquire whether any alterations could be made for the better administration of justice in the process, practice and system of pleading in the court of chancery'. Both its remit and its membership were subsequently widened. It was the imposition upon that Chancery Commission of an 'additional subject of inquiry, the state of the law in relation to matters testamentary...and the jurisdiction of the ecclesiastical courts', which came about in November 1852, which was to have great significance for the future of those courts.

The new session began with a stutter in February 1851, with Russell resigning for two weeks. The administration then turned much of its attention to matters other than law reform, prompting the Law Magazine to comment that 'amidst ministerial crises, debates upon Papal Aggression and questions of Finance, the promised consideration of Law Reform has been greatly delayed'.

However, whilst still being confined at that stage to the condition of the Court of Chancery, the new Royal Commission was asked to look at the Chancery Masters' offices and at ways and means of reducing delays and expense to suitors. By then, Romilly had become Master of the Rolls, on the death of Lord Langdale, with Cockburn moving to Attorney-General and Page-Wood coming in as Solicitor-General. Romilly, Page-Wood and Richard Bethell, a Chancery barrister and a future Lord Chancellor as Lord Westbury, were added to the membership of the Chancery Commission. Two non-lawyers were also appointed, Joseph Henley, MP for Oxfordshire and Sir James Graham. Graham by then was 'weary of inquiry; he thought they had inquired too much and done too little', but he did accept Russell's invitation to serve.

Meanwhile, statistics about the condition of the ecclesiastical courts continued to be received at intervals in the Commons, notably those for the Province of Canterbury, and, as early as February, Hall was again asking what the Government intended to do about sinecures and about abuses in general. Grey acknowledged the importance of the subject, even revealing that 'communications had taken place with ecclesiastical lawyers on the subject', but he offered no immediate prospect of legislation.

By contrast, 1851 saw much activity in print outside Parliament. In February, Muscutt brought out a treatise on church laws in England in which he continued to deplore the public apathy towards the 'subject of testamentary jurisdiction'. The Law Times also did what it could to keep that issue before the
public. In the previous November the editorial emphasis had been upon transferring the jurisdiction to a civil tribunal, with local will registries linked to a central registry in London and with fees so set as to provide compensation for 'existing interests in the present system'. Then, during May, June and July 1851, the Law Times published a number of letters and queries about wills.

Late in 1851, there came a tardy but forceful assessment in the Law Review of the findings of the Commons Select Committee on fees. The reviewer, doubtless reflecting the views of the Law Amendment Society, predicted that the abuses exposed by the report, such as the sinecurism in the Prerogative Office and the absence of any table of fees in the busy Chester Registry, would be 'received with sentiments of surprise and indignation throughout the country'. It thought that the public would condemn the Government for its apathy in allowing that state of affairs to continue, but that there was apathy also in the constituencies where 'the gentlemen interested in those abuses have...succeeded in thwarting the government, controlling the legislature and setting public opinion at defiance'. The solution, it was urged, lay in the bringing forward of a reforming Bill in the next session, and one which had a place for local tribunals and the new county courts acting in tandem.

Similarly, and in the same issue, there was a renewed call for a bold programme of law reform generally and a plea that other matters 'should not be permitted to interfere'.

Advocates of reform were to be disappointed, in the event. Russell's administration, which had several times promised or hinted that it would bring in an Ecclesiastical Courts Bill, did not last much longer. Soon after the new session opened in February 1852, it was replaced by Lord Derby's First Ministry.
Notes to Chapter 15.

1. Buckinghamshire Record Office (BRO), D/RA/3E/22 f.2v., [c.1850], commonplace book of Edward Horsman, MP.


4. Ibid., lxxxviii, 14 Aug.1846, c.706.

5. LM, xxv, 1846, p.367. An inaccurate prediction because the County Courts Bill was passed in August 1846.


9. Ibid., 1846, p.2.

10.Ibid., 1846, p.46.


16.BRO, op.cit., ff.28v.; 152v.

17.LM, xxviii, 1847, pp.108-12, 289.


23.LT, ix, 12 June 1847, p.231.


25.LT, x, 5 Feb.1848, pp.382-83.


27.CJ, 103, 1847-48, p.449.


29.DNB, xv, p.1309.

31. Thomas Turner à Beckett later described how impossible it was for an individual law reformer to make progress without assistance, see Law Reforming Difficulties Exemplified in a Letter to Lord Brougham. London, Butterworth, 1849; LR, xi, Nov.1849, pp.79-93.

32. Hansard, 3d.ser.,xcix, 30 May 1848, cc.100-27.


38. LR, ix, Nov.1848, pp.182-83.

39. Ibid.,viii, Aug.1848, p.347; ix, Nov.1848, pp.216-17.


42. LR, xiv, Aug.1851, pp.353-59.

43. GP, 20 Jan.1849, Peel to Graham.

44. *Hansard,* 3d.ser., cii, 5 Feb.1849, cc.221-22.

45. Ibid., cvii, 31 July 1849, cc.1136-38.

46. Ibid., cii, 5 March 1849, cc.169-70.

47. BRO, op.cit.,f.38.


50. Ibid., cx, 29 April 1850, c.894; 30 April, cc.978-81; 1 May, c.1059; 6 May, cc.1157-59; 10 May, cc.1310-16.

51. CJ, 105, 1850, pp.303,450.

52. LT, xv, 29 June 1850, p.315.


54. GP, 20 Sept.1851, Graham to Pleydell-Bouverie.


57. LM, xiv, May 1851, p. 282. Sir George Cornewall Lewis predicted that 'The Session will open not with the Income Tax but with the Pope!', see GP, 18 Jan. 1851, Lewis to Graham.

58. Hansard, 3d. ser., cxvii, 27 June 1851, cc. 1359-78.

59. The promotion of Romilly, Cockburn and Wood was greeted as evidence that law reformers were no longer excluded from office, see LR, xiv, May 1851, pp. 213-14.

60. Hansard, 3d. ser., cxvii, 27 June 1851, c. 1372.

61. GP, 20 Sept. 1851, Russell to Graham.

62. CJ, 106, 1851, pp. 194, 201, 224, 441.


65. LT, xvi, 23 Nov. 1850, p. 186.


Chapter 16: Lord Derby's first administration, 1852; 'Present prospects are not promising'.

Walter Bagehot described sudden changes of administration at this period as being productive of 'three great evils', namely the bringing together of new and inexperienced Ministers, their justified uncertainty as to how long they would remain in office and the consequent likelihood of abrupt changes of policy. All that was broadly true in 1852.

Most of Derby's Cabinet, which he presided over from the House of Lords, were unknown, apart from Disraeli. So much so that it was nicknamed 'the Who? Who? Ministry' after the Duke of Wellington's reaction as he strained to catch the unfamiliar names of the new members. The administration came to power in February 1852 and was out of office by the end of December. None of that augured well for those who had hoped to see a comprehensive Ecclesiastical Courts Bill, but the administration did generate a surprising amount of law reforming activity between 27 February and the close of the session on 1 July. It also left an important and unexpected legacy in that the Chancery Commission, appointed by the previous administration, was asked to consider, additionally, the 'vexed question' of the testamentary jurisdiction of the ecclesiastical courts.

The lawyers chosen by Derby were Lord St Leonards, formerly Sir Edward Sugden, as Lord Chancellor; Sir Frederic Thesiger as Attorney-General and Sir Fitzroy Kelly as Solicitor-General. Spencer Walpole replaced Grey as Home Secretary.

As early as March, the new Lord Chancellor was able to introduce a short and entirely technical Bill to make valid any will which bore the signature of the testator, regardless of its precise position, and to allow the witnesses to be in reasonable proximity at the time of signing. That uncontroversial Bill, the principle of which was applauded, defended and explained in the Law Times, moved rapidly through both Houses.

At the end of March, leave was given to Pleydell-Bouverie and Thomas Thorneley, MP for Wolverhampton, to prepare and bring in their own short Bill to do no more than abolish the criminal jurisdiction of the ecclesiastical courts 'in certain cases'. That was in itself a notable departure from the preoccupation of successive governments with presenting omnium gatherum bills. The Bill moved unremarkably through the Commons stages and was passed on 29 May. However, the reaction
was very different when Lord Wodehouse introduced the Bill at second reading in the Lords in mid-June. He described it then as seeking to remove from the ecclesiastical courts 'the cognisance of defamation, and brawling or smiting in the church or churchyard'. It derived from the General Report and was intended to be only the first 'instalment' of what the public wanted. In opposing the Bill, the Bishop of Salisbury appeared to be accepting the principle of reform but to be rejecting any measure which was piecemeal and not originating with 'Her Majesty's Advisers'. The ensuing debate is of interest because the Bishops of Salisbury and Oxford were attacked for their opposition to the Bill by Campbell, Cranworth and Fitzwilliam. Brougham was strangely silent, although he did vote for the Bill, and it was Fitzwilliam who challenged the Bishop of Salisbury to admit that his 'professed objection to the Bill was not his real objection to it - that it was not because it was a small reform, but because it was the commencement of a reform which might lead to something further.' Derby intervened to make the peace, to invite Wodehouse to withdraw a measure introduced so late in the session and to say that the Government would itself look at the wider problem of abuses within the ecclesiastical courts. The Bill was defeated by eighty votes to forty-five, with only the Bishop of Gloucester voting for it from the bench of bishops.

The frustration felt by Pleydell-Bouverie, Wodehouse and others was evident elsewhere. In March, after St Leonards had outlined a number of intended reforms in the Court of Chancery, the Law Times noted that he had said nothing to date about 'the other monstrous legal grievance, the Ecclesiastical Courts; but they must follow the Reform of the Court of Chancery, only, being incapable of improvement, they will be abolished'.

Nor had Horsman lost sight of the slumbering Ecclesiastical Courts Bill. On 27 April, he asked if the Government had any such measure in contemplation or preparation. That question elicited a reply from Walpole, the new Home Secretary, which may have thrown a little more light upon the process of consultation and drafting than Grey had ever offered, but it was otherwise similarly unhelpful. 'Mr. Walpole (who spoke in a very low tone) was understood to reply that the Queen's Advocate had been at great pains to prepare a draft Bill...but whether the Government would feel justified in adopting that particular measure, or any other, he could not - seeing that it was a subject of difficulty and very complicated - undertake at the present moment positively to say.'
Outside Parliament the commentators were in considerable disarray, as the end of the session approached, about the prospect of law reform generally. The *Law Review* hoped that there would be time 'to do something'. The *Law Times* thought it would be wrong to hurry through 'important measures' with 'imperfections in their details'; then, with both the close of the session and a General Election approaching, it confirmed its view that, 'A dying Parliament, whose members are thinking only of the hustings, is not competent to deal with questions that demand so much calm thought and deliberate discussion'.

After the General Election in July 1852, the legal press turned its attention to analysing the MPs returned and to speculating about what they might achieve in the next session. For example, the *Law Review* greeted the re-election or election of a number of 'active members of the Law Amendment Society', such as Bethell for Aylesbury and Robert Porrett Collier for Plymouth. The *Law Magazine* took a jaundiced view of the quality and motives of most of those elected, but it noted the election of Robert Phillimore and of a sizeable number of barristers. Its later analysis showed that there had been a total of 155 lawyer candidates, ninety-eight having been elected, namely eighty-four barristers and fourteen solicitors, either practising or by training.

And yet the signals were confused about the likelihood of the Ecclesiastical Courts Bill re-appearing in the new session.

In November 1852, when the *Law Review* published Brougham's letter to Denman about law reform, a letter which made no reference to an impending Bill, it appeared alongside a reported rumour that the Government would be introducing such a Bill and that the Law Amendment Society would have a hand in shaping it. A similar rumour about intended legislation was reported in the *Law Times* on 30 October. In fact, the *Law Times* had made up its mind some weeks earlier that 'the proper subject of the next great Law Reform' must be the ecclesiastical courts and that nothing less than their abolition would suffice.

Whatever the uncertainty and speculation, Sir Benjamin Hall busied himself with his campaign against the more notorious abuses within the ecclesiastical courts. In October 1852, he sent a letter to *The Times* which he then published as a pamphlet with some additions. His letter took the form of a reply to a London vicar who was trying to raise funds to build a church. Hall pointed out to him the wealth of the Bishop of London and his fellow prelates, drew upon the statistical returns made to
the Commons and argued that the returns showed 'the utter disregard for common decency in the distribution of patronage and prove these courts to be mere sinks of episcopal nepotism'.

He was joined in print that year by another pamphleteer in the same vineyard, William Downing Bruce, a barrister with antiquarian and genealogical interests. Like Protheroe before him, Bruce had assiduously visited many of the diocesan registries in the course of his research, and he combined his first-hand knowledge of conditions and attitudes there with the information contained in the returns used by Hall. Bruce's criticisms of the abuses in the diocesan registries first appeared in print in *Postulates and Data* in 1852, but the same material cropped up in a reworked form in a succession of pamphlets brought out by him between 1852 and 1856.

Whatever was being said or written inside or outside Parliament, the critical factor had to be the stability and resolve of the Government of the day. To begin with at least, the new session did get under way in November 1852 in a promising fashion. The Queen's Speech on 11 November stated that 'Inquiries are in progress...with a view of bringing into harmony the Testamentary Jurisdiction of My several courts'.

Although that announcement was overshadowed on the day by tributes on the death of the Duke of Wellington, St Leonards was to make the position perfectly plain in the Lords on 16 November.

'It is a great misfortune that a man's will has to be subjected to the jurisdiction of different tribunals, whose principle of procedure cannot be reconciled....This is a state of things which is discreditable to the country, and ought not to continue'. He had decided, therefore, to further revise the terms of reference of the existing Chancery Commission, asking it to inquire into 'the working of the jurisdiction in testamentary matters in the different courts of the country' and bringing its strength up to thirteen members.

The next Lord Chancellor, Cranworth, later praised his predecessor's resolve to tackle 'this vexed question, which no person has yet been able to solve', and to do so by bringing together the Chancery members of the Commission and their civilian counterparts under the chairmanship of Sir John Romilly MR; 'the Chancery practitioners and judges, and the ecclesiastical practitioners and judges' was how Cranworth described the spread of membership. The civilians added by St Leonards were Sir John Dodson, the Dean of the Arches, Stephen Lushington, Judge of the London Consistory Court and Dorney Harding, the Queen's Advocate. Graham agreed to continue to serve as a
Commissioner, even though he was otherwise busy and lacked 'professional knowledge'. He explained to St Leonards, much as he had done to Pleydell-Bouverie, that he was 'ardently desirous to see the Jurisdiction in Matters Testamentary improved'.

The findings of the Chancery Commission relative to testamentary jurisdiction will be examined below in Chapter 18, but, from the time that its remit was extended, both Derby's administration and its immediate successor were able to take the evasive line that no measure could be introduced until the Commission had reported. For example, Hall asked Walpole on 22 November what was being done about implementing the report on fees, and was conveniently referred to the Lord Chancellor's statement. Walpole also told Hall that the Government was 'unanimously of opinion that there ought to be a stringent, an extensive and a decided reform in the Ecclesiastical Courts', but that it would await the Commission's report.

On the same day that Hall put his question in the Commons, Derby was speaking with seeming confidence in the Lords about 'great measures of legal reform'. In fact, only a few days before, he had said privately that 'he felt both uncertain and indifferent: he might be able to carry on the Govt. or might not'.

In the event, Lord Aberdeen formed his coalition Government at the end of December 1852.
Notes to Chapter 16.

1. LT, xix, 15 May 1852, p.49.


4. *Hansard*, 3d.ser., cxx, 23 March 1852, cc.2-9; LT, xix, 27 March 1852, pp.3-4; 3 April, p.9; 10 April, p.17.

5. P.P.1852 (209) ii. A Bill... to abolish the Criminal Jurisdiction of the Ecclesiastical Courts in certain cases; CJ, 107, 1852, p.132; LT, xix, 24 April 1852, p.33; *Hansard*, 3d.ser., cxxi, 29 May 1852, c.1291.

6. John Wodehouse, later Lord Kimberley, was a young peer with liberal tendencies. He had been a member of the short-lived Colonial Reform Association, 'a society comprising men of all parties' and had sat on its committee alongside Hume, Cobden, Spencer Walpole, Roebuck and Horsman. He was determined to make his mark and 'In 1852 when Lord Derby's first Government was formed I took an active part in opposition', see Hawkins, Angus and Powell, John, eds. *The Journal of John Wodehouse, First Earl of Kimberley for 1862-1902*. Camden 5th series, ix, RHS, (1997), pp.45-46.


9. Ibid., xix, 8 May 1852, p.42. The office of Queen's Advocate had changed hands in February 1852 so the consultation must have been with Dorney Harding.

10. LR, xvi, May 1852, p.17.

12. Ibid., xix, 15 May 1852, p.49.

13. LR, xvi, Aug. 1852, p.414. Richard Bethell, later Lord Westbury, was at that time 'undisputed head of the Chancery bar'; see H.E.L., xvi, p.71. Robert Collier, later Lord Monkswell, was a barrister on the Western Circuit and only in his mid-30s. Like Bethell, he attended meetings of the Law Amendment Society and in the previous year he had published a pamphlet, addressed to Russell, setting out desirable reforms of the 'Superior Courts of Law', see LT, xviii, 8 Nov. 1851, p.78.


22. Ibid., cxxx, 16 Feb. 1854, c.710.

23. GP, 30 Oct. 1852, Graham to St Leonards.

25. Ibid., c.287.

Chapter 17: Lord Aberdeen's Coalition, 1852-1854, Part I; 'Every one agrees that the present system is bad. The only doubt is how to remedy it'.

The coalition formed by Lord Aberdeen was in office for little more than two calendar years, 1853 and 1854. This chapter deals with 1853, a busy year, marked by renewed hopes among the law reformers, including the Law Amendment Society, that legislation to deal with the testamentary jurisdiction of the ecclesiastical courts was imminent; by the resolve of the new Government not to show its hand until the Chancery Commission had reported; by frustration on the part of individual MPs to the extent of promoting their own measures; by emerging friction between common lawyers, equity lawyers and civilians about which courts should receive the transferred jurisdiction; by signs of unease over the question of compensation for loss of profits; and, finally, by hints of tensions within the new team of law officers. The tests applied by Gladstone at the time to 'the formation of a mixed Government' required that its members should trust each other, that they should agree a policy and that there should be a great crisis of State. It has to be said that the performance of Aberdeen's legal team, setting aside the qualities of the individuals involved, failed to meet those strict criteria. Those chosen by Aberdeen were Palmerston as Home Secretary; Cranworth, formerly Robert Monsey Rolfe, as Lord Chancellor; Sir Alexander Cockburn, who had previously served under Russell, as Attorney-General; and Richard Bethell, an active supporter of the Law Amendment Society, as Solicitor-General. They proved to be strange bedfellows. Palmerston was not a natural reformer, hating reform 'as he hates the Devil', according to Sidney Herbert. Roundell Palmer, who was later to serve for four years as Solicitor-General in Palmerston's second administration, said that Palmerston 'was not in the habit of communicating personally with the law officers'. As to the new Lord Chancellor, Aberdeen would have preferred to have retained St Leonards, as would the Queen, were it not for the fact that he had already agreed to appoint Cranworth because he was more acceptable to Russell, thus keeping the Coalition together. And, most crucially as the administration got under way, there were whispers and rumours about a lack of co-operation between Cockburn and Bethell, and also about tensions between both the law officers and their Lord Chancellor.

At the time, however, and in the first of two editorials which appeared in print before the session was resumed in February 1853, the Law Times confidently predicted the
reform of the ecclesiastical courts. It was suggested that Derby had so promised on behalf of the previous administration, and that Graham, now at the Admiralty again, had done the same on behalf of the new administration. For the *Law Times*, therefore, the only question remaining was whether the courts should be reformed or abolished. It favoured the latter course because the courts were 'fundamentally bad', because they concerned themselves with matters which were for the civil power and because they needed to be confined to the deciding of disputes within the Church itself. 'Nothing less than this will satisfy the requirements of the age we live in'. In the second editorial, it was reported that, like Robert Phillimore, the practitioners in those courts had expressed their willingness to submit to reform but only 'for the purpose, if they can, of saving them from entire destruction'.

Because Parliament had been adjourned and not prorogued before Christmas 1852, there was no Queen's Speech when the session was resumed on 10 February 1853. What the House of Lords then provided was the unusual spectacle of St Leonards tabling a number of law reform bills which had been prepared when Derby was in power, and tabling them with the consent and co-operation of Cranworth. Even when the new Lord Chancellor spoke about his own law reform intentions, as he did on 14 February, he described the condition of the ecclesiastical courts in language reminiscent of that used by St Leonards in the previous November. However, Cranworth was hesitant about introducing a reforming measure for two reasons. He wanted to wait until the Chancery Commission had presented its report, and he recognised that there was a risk of 'shocking a great many interests' and of imposing 'hardships upon many innocent and meritorious persons'. In that latter respect, he revealed that he was already consulting Lushington about how to bring about change with the minimum of hardship. Lushington had drafted the text of the General Report dealing with compensation, and Cranworth may with reason have foreseen problems ahead on that score.

Nonetheless, the *Law Times* was sufficiently moved by all this activity to report approvingly about how busy Parliament was going to be with the proposed law reforms, and it looked forward, more specifically, to seeing a measure which would strike 'a death blow at the Ecclesiastical Courts'. *Au contraire*, there was much impatience in the Commons with the 'marking time' on the part of the Government, as Brougham elsewhere described it.

On 10 February, John Bright asked bluntly if it was intended to reform or abolish
the ecclesiastical courts. He received the stock reply from Russell, as Leader of the House, about the pending report of the Chancery Commission, although, as reported in the *Law Times*, Russell added that if the report was 'likely to be too long delayed, it was the intention of the Government to submit a proposition on the subject without [the] report'.

On 1 March, the new MP for Plymouth, Collier, moved for a Commons Select Committee to inquire into those courts, although he claimed at the time to have nothing more specific in mind than the transfer of their testamentary jurisdiction to 'other existing tribunals'. Then, on 8 March, George Hadfield, newly-elected as MP for Sheffield but a Manchester solicitor of long experience, sought to bring in a short Bill to simplify the probate of wills.

Collier's motion on 1 March, and his fluent speech in support of it, made a considerable impact. He had given notice as far back as November that he wished to bring in a reforming Bill, but had delayed his present motion until he was convinced that the Government was going to do no more than wait for the Chancery Commission's report. Besides, Collier, as a common law barrister, felt that such a piecemeal scrutiny carried out by Chancery barristers and by civilians was bound to be unsatisfactory. What he now proposed as an alternative was a Commons Select Committee to look at a system which was 'a reproach to the civilisation of this country'. In a long and skilful performance, Collier drew together all the familiar strands of evidence about the history of the ecclesiastical courts, about *bona notabilia*, about the sinecures publicised by Hall and about the need for the proper registration and custody of wills. Finally, he addressed himself to the problem, touched upon by Cranworth, of those practitioners likely to suffer as the result of change. He did not accept that there was any case for direct compensation but thought that advocates and proctors should instead be admitted to the common law courts as barristers and solicitors. His motion was seconded by the old campaigner, Hume, who reminded the House that he had brought these arguments forward twenty-five years earlier.

Although Collier's speech seemed to be welcomed by the new Solicitor-General, Bethell was concerned about practicalities, such as avoiding a possible clash between what the Chancery Commission and a Commons Select Committee might each recommend. On the other hand, if the Chancery Commission report was delayed or was ineffectual, he would be willing to see a comprehensive remedial bill brought
forward either by the Government or by Collier. It is highly likely, though, that Bethell already favoured an outcome which would benefit the Court of Chancery, and later events point to that conclusion. For the moment, however, it was enough for a delighted Sir Benjamin Hall 'to find that the course he had taken for some years was now about to be taken by...one of the law advisers of the Crown', and he congratulated both Collier and Bethell. Nonetheless, all those who agreed with Collier that the existing abuses were intolerable, and they included Hall, Pleydell-Bouverie, Palmerston and Cockburn, also pressed him to wait for the Government's measure. Cockburn's purpose in urging caution was in order that the correct decision could be made about which court was best equipped to accept the transfer of testamentary jurisdiction, a prescient warning but it was as displeasing to the Law Times as Collier's speech had been pleasing.

The only defence of the ecclesiastical courts on that occasion came from Robert Phillimore, another new MP, and now able to repeat in the Commons what he had previously said in print. Like others, he welcomed 'an effective and searching reform' of the courts, but it emerged that he and a fellow advocate had drawn up their own measure, and submitted it to Walpole and to Grey. It seems to have followed closely the limited and pre-emptive reforms suggested by him in his 1848 pamphlet. The Law Times was not impressed. It observed that it was no more than Phillimore's duty 'to struggle to the last for an institution [Doctors' Commons] that had been so liberal a benefactor to his family'; and it repeated the warning to its readers that the new tactics of Phillimore and his ilk were 'to avoid destruction by voluntary proposals of reform' rather than, as in the past, 'passive resistance in public and the backstairs influence of powerful interests in private'.

Allegations were traded towards the close of the debate on 1 March, when the House sat until after midnight. Collier said that Phillimore was ready to sacrifice the inferior ecclesiastical courts so that the business would be transferred to Doctors' Commons. Phillimore said that Collier wanted the common law bar to benefit. Finally, Collier agreed to withdraw the motion because of all the assurances given him by the law officers, and specifically by Palmerston who promised to 'sweep away what he might call the Augean stable of the Ecclesiastical Courts'.

A week later than Collier's motion, came one from Hadfield. He wanted to introduce a short Bill to make one probate sufficient and to be 'proof of the devise of a real estate as it was personal'. He had been in the House during the debate on Collier's
motion and had asked Bethell then if he intended to bring in such a form of probate. 

He was told that 'it was proposed to abolish the present practice of probate, and to 
establish in lieu of it one general system of registration'. Because Hadfield had 
been unwilling to wait for the general measure which Bethell had in contemplation, 
he had then spoken to the Solicitor-General privately in the intervening week and 
had been assured that 'at least the introduction' of his simple Bill would not be 
opposed by the Government. Phillimore agreed the importance of what Hadfield was 
trying to achieve, but preferred that that change should be part of a comprehensive 
measure. Leave was given for the Bill to be brought in, and when Hadfield sent a 
copy of his Bill to the Law Times it was welcomed there as 'the first instalment of a 
large measure of reform demanded by this branch of our law; and we trust it will 
receive the support of the Profession by petitions, and pass safely through a 
Parliament pledged to the improvement of the law'.

That mood of cautious optimism was also present in two contributions to the 
February issue of the Law Magazine. 
The first, W.D. Cooper's survey of 'Law Reform and its Prospects', thought that much 
of what needed to be done by way of reforming testamentary jurisdiction was 
already available in the reports of the Ecclesiastical Courts Commission and the Real 
Property Commission. What he wanted from the present Chancery Commission 
was 'some plain and intelligible rule by which compensation may be given to 
various vested interests which will be affected more or less by any change in the 
system'. The implication was that a compensation formula needed to be in place to 
make any legislation fair and acceptable. His own reforming preference was a hybrid 
one, namely the transfer of contentious business above a certain limit to the Court of 
Chancery and the transfer of not only non-contentious business but also contentious 
business 'in estates of small amount' to the county courts. 

The second contribution to that issue of the Law Magazine, made by 'J.C.S', took the 
form of a report and commentary on meetings of the Law Amendment Society. The 
picture painted was one of total agreement that the testamentary jurisdiction must be 
changed, but also of vehement disagreement over three successive evenings about 
how it should be done. The Society's Committee on Ecclesiastical Courts had 
proposed something close to Cooper's preferred solution. Dr Waddilove from 
Doctors' Commons wanted to see one metropolitan tribunal, styled 'Her Majesty's 
Court of Probate and Succession for England and Wales', an outcome which would 

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have benefited and suited the civilians. Collier favoured a common law solution, as his Bill was to do subsequently, dividing the business between the Superior Courts and the county courts. Lastly, James Stewart proposed that the Common Law and Chancery Commissions be invited to consider jointly which court, existing or new, should receive the transferred jurisdiction. That mixture of indecision and self-interest, found even within a group of committed law reformers, was what was manifesting itself quite markedly in Parliament in 1853 and it would remain a feature of debates on the jurisdiction.

Meanwhile, Hadfield's Bill came to the second reading stage on 6 April. It was dismissed by Bethell, ever sharp of tongue, as so poorly drafted that it would 'render the evil ten times more insufferable than it was at present'. What he proposed instead was that the limited measure be read a second time but only pro forma, and then laid on the table until the Government could bring in its 'larger measure'.

Not content with that intervention, but without seeming to be under any pressure to say more, Bethell proceeded to set out the main features of a Bill which he, and seemingly the Government, had in mind whatever the Chancery Commission might eventually say.

Crucially, the Court of Chancery had been chosen to receive the jurisdiction because it already took cognisance of the construction of wills of both real and personal property, determining not the validity of the will but the intention of the testator, and because it had been recently reformed. Within that framework there was to be a re-shuffling of familiar components. The abolition of the peculiars; the retention of the diocesan courts, with qualified judges, to handle non-contentious business below a limit of £1000 or £1200; the transfer of original wills proved locally to a metropolitan registry, with copies retained locally; the abolition of the York Court and the subsequent concentration of all contentious business, real and personal, in a Court of Probate situated in London at Doctors' Commons; the immediate transfer of control over that Court, with all the London officials and practitioners, to the Court of Chancery; and the retention by the transferred London practitioners of a monopoly of all the higher value non-contentious business for 'a certain period', although that business would subsequently be thrown open to all practitioners. As a Queen's Court, the new Court of Probate would also control the activities of the diocesan courts, and the existing country registrars and proctors would thus become officers of the Court of Chancery.
Bethell's 'bombshell' announcement, even though it was made before 'so thin a House', was met with a flurry of questions. Henley, who had been a reluctant President of the Board of Trade in Derby's short-lived administration and who was respected by MPs for his commonsense, was, like Bethell himself, a member of the Chancery Commission. What annoyed him was not that Bethell had spoken in advance of the findings of that Commission, but that the announcement of the details of such an important measure had been made in such an 'irregular manner'. Henley was also puzzled, first, at the need for qualified diocesan judges when non-contentious business could be handled by registrars, and, secondly, at the arrangements for preserving a short-term monopoly of business for the existing practitioners at Doctors' Commons. After addressing the drafting defects in Hadfield's Bill, which was what the debate was supposed to be about, Phillimore welcomed Bethell's statement. However, as a serving Chancellor himself, he asked that both judges and registrars in the diocesan courts should be properly qualified and that his own profession of advocate should be fairly treated. Spencer Walpole, the former Home Secretary, urged Bethell to consider bringing in a Bill which dealt with the entire jurisdiction of the ecclesiastical courts not just the testamentary business, and he sought more immediately the postponement of Hadfield's Bill for a month. Hadfield agreed to that.

Bethell's statement, which none of the periodicals had predicted, was well received by the Law Times, the Law Magazine and the Law Review. The Law Times praised Bethell precisely because he had not waited for the Chancery Commission to make its report, and because he was not willing to co-operate in any 'volunteer semi-reforms' of the kind that Phillimore and his profession might bring forward. It was also seen as being to his credit that he was not even willing to spend time over Hadfield's well-meaning but limited Bill. Finally, but not least, Bethell's statement held out the promise of 'a new and extensive branch of business' for the readers of the Law Times. Such was the enthusiasm and optimism of that periodical that it launched into elaborate military metaphor, looking forward to the surrender of the garrison at Doctors' Commons, attacked as it was on all sides by 'the spirited member for Plymouth...the guerilla forces of the Law Amendment Society...the heavy batteries of two Commissions...and the regular troops of the Government under the skilful guidance of the Solicitor-General'.

The Law Magazine provided its readers with an almost entirely favourable
commentary upon what Bethell had said, and also with the text of a relevant resolution offered by the Law Amendment Society. Where the Law Magazine did take issue with Bethell was over his proposed retention of the diocesan courts. It was assumed that he was only keeping them as 'the means of conciliating support in the Upper House' but otherwise it was felt to be a mistake to do so. In the eyes of the Law Magazine, the county courts favoured by Collier were more numerous and more likely to be close to the homes of executors. Thus they were to be preferred on grounds of 'convenience and utility'.

For its part, the Law Review was also encouraged by better news from the Law Amendment Society. Its Committee on Ecclesiastical Courts, composed 'not only of members of the Common Law and Equity Courts, but also of many members of Doctors' Commons', had at last reached an agreed position on what should be done. It had recommended on 11 April that the Government should consult the Common Law and Chancery Commissions, and then create a new court 'of conjoined law and equity, having jurisdiction over wills of real and personal estate'. That resolution had been moved and seconded by Stewart and by William Tarn Pritchard, a proctor member of the Society. Since the aim of the Society was to influence Government directly or indirectly, it cannot have been accidental that the resolution came hard on the heels of Bethell's statement.

Nor were the pamphleteers silent at this critical time. Hall persisted with another version of his statistics about diocesan abuses, offering 'proofs of infamous jobbing'. In May 1853, Pritchard set out the case for 'consolidating the Courts of Doctors' Commons into one Central Metropolitan Queen's Court and Registry, with branches in the country'. That was consonant with his support for the resolution arrived at by the Law Amendment Society, but the drift of his pamphlet suggests that he saw it as a means of ensuring a future for his brethren in Great Knightrider Street. He suggested too that there could be some scope for 'minor improvements' in ecclesiastical jurisdiction pending the appearance of the Chancery Commission report. It may be that Pritchard was collaborating with Phillimore, who did secure some such reforms later on, but the Law Times again dismissed the idea of mere amendments when only abolition would be acceptable.

Easily the most novel contribution to the general debate at this time was made in a pamphlet, addressed to Cranworth, by Archibald John Stephens, joint author of Municipal Corporations and author of A Practical Treatise of the Laws relating to
the Clergy. His pamphlet, which must have appeared in print immediately prior to May 1853, proposed that all the ecclesiastical courts should be abolished and be replaced by two distinct courts, one spiritual and one temporal. Stephens even offered heads of bills which would bring about those changes. Within his scheme of things, testamentary jurisdiction would be transferred to a new court within the Court of Chancery, styled 'The Queen's Court of Probate and Administration', and accompanied by a central registry of wills. Proctors would be given the rights of solicitors, and the cost of any compensation would be reduced by the re-employment of some existing practitioners in 'the offices created under the new system'. Stephens' prescient expectation was that the advocates would share in the proceeds of the eventual sale of Doctors' Commons.

And yet, because expectations had been raised so high, there was to be much growing disappointment among reforming MPs, legal journalists and pamphleteers as the session proceeded.

When it came to the postponed second reading of Hadfield's Bill on 4 May, Bethell announced, first, that the Government's Bill was not quite ready and, secondly, that it had been referred to the Chancery Commission. He promised, as he had done before, that if the expected report was delayed much longer he would simply bring forward the Bill as it stood, but that meanwhile he would not object to Hadfield's Bill going forward. There followed much confusion among MPs about what should be done, given that the debate was supposed to be about a simple probate Bill. Phillimore and Henley wanted to halt that Bill, the former because he regarded it as flawed, the latter because he believed that a more comprehensive measure of reform could be in prospect; and Russell, speaking as a Minister, was inclined to let it go forward because the Government's Bill was not yet before the House. To complicate matters further, Collier now made it clear that he had in mind a measure of his own, one which would divide the testamentary jurisdiction between the Superior Courts of Common Law and the county courts, and that he was anxious to put it before a Select Committee so that it could be compared with the Government's Bill. At this point, the hapless Hadfield declared himself prepared to delay his Bill until Bethell's measure was before the House. In fact, despite all that commotion, Hadfield's relatively simple Bill was read a second time.

Some three weeks after Bethell's explanation as to why he could not present the Bill to the House, Hume asked what was happening. The discouraging reply, provided
by Russell not Bethell, was that the Chancery Commission had made up its mind about the outline of a Bill but not yet about its details, and that it would take the Commission 'not less than three or four months to go through all the details of the measure'. In those circumstances, the Government had decided not to bring in a Bill, either 'at present' or 'for some time', as Russell's statement was variously reported. How far the Chancery Commission really had been involved in shaping a Bill, as was claimed by Bethell on 4 May and by Russell on 27 May, is far from clear. The Commission did not begin to address the 'vexed question' of testamentary jurisdiction until the beginning of February 1853. Between then and June the Commission met six times to hear evidence from sixteen witnesses. In the same period it met twelve times to try to agree upon its findings. There was a final meeting on 21 December to settle the report, and it was presented on 11 January 1854. At none of those meetings was the drafting of a Bill mentioned, or so it appears from the published details. On the other hand, Bethell should have been well placed as a Commissioner himself to know what the Commission was doing, even though he attended only three of the business meetings, the first two in February and the final meeting in December. One possible explanation of this discrepancy between what a Minister and a law officer claimed that the Commission was doing, and what the Commission was actually doing, may lie in the summary of its recommendations (pp. 34-51). There, by design or by accident, the text might be construed as the heads of a bill, but no more than that. Be that as it may, the published outcome of the Commission's work was not at all what Cranworth and Bethell had wanted. The impact and consequences of that setback for the Government will be discussed below in Chapter 18.

Meanwhile, in Parliament, Collier reacted to Russell's discouraging statement at the end of May 1853 by moving for leave to bring in his own Bill. He did so, on 5 July, partly because of the Government's unwillingness to act and partly because he wanted the House to know what remedies he had in mind, even though it was then much too late in the session for his measure to pass. Collier's plan was simple and direct. It involved the transference of testamentary jurisdiction to the common law courts, exactly as he had advocated at meetings of the Law Amendment Society. In that way, all the ecclesiastical courts would be deprived of that jurisdiction, and the diocesan courts as such would simply be allowed to die without such 'a great source of pabulum and nutriment'. The non-contentious business, involving wills of both
real and personal property, would be transferred to the county courts for registration, after which the original wills would be transferred to a metropolitan registry. The contentious business, both real and personal, would be transferred either to the county courts or to the Superior Courts of Common Law, according to a value limit below or above £300. And Collier remained opposed to compensation for loss of profits, suggesting again that the practitioners at Doctors' Commons could 'follow this jurisdiction wherever it went'.

Collier's speech, which was printed in his constituency, attracted praise and comments from interested Ministers and MPs. Hall lent his support and asked when the Chancery Commission would be reporting. Hadfield, as well as complaining about the lack of assistance for his own 'small measure', declared his lack of confidence in Cranworth's commitment to this reform. He also mentioned the current rumour that all was not well between Cranworth and Bethell, and that Bethell 'found himself fettered' as a consequence. If the Solicitor-General was present during the debate, he was silent; instead, Cockburn again preached caution about what the solution should be. Finally, Palmerston warned Collier that the complexity of the issues demanded 'great deliberation' and that allocating time in that session would be difficult because of other pressures of business. He suggested that the recess would provide an opportunity to consider the matter and allow the Government to bring forward a measure early in the next session. Nonetheless, the Bill was ordered to be brought in.

Just as Collier was earning plaudits for his skills in speaking to the motion on 5 July, Hadfield reached the committee stage with his own Bill on the following day. By then he seemed to want to be relieved of responsibility for it. Since no member of the Government was present, he asked Henley if the Chancery Commission itself would be recommending 'any measure of this description'. All that Henley was willing to reveal to Hadfield was that the Commission had been 'continuously occupied' with the subject of testamentary jurisdiction, 'but he could not say what might be their ultimate opinions with regard to it'. Both Henley and Phillimore still felt that Hadfield's own Bill was full of faults, and that opinion, according to Phillimore, 'was the opinion of every lawyer who had looked at its provisions'. When the debate was resumed on 13 July, a weary Hadfield was ready to accept the assurances of Russell, indirectly, and of Palmerston, directly, that the whole subject would be dealt with in a Government measure early in the next session.
With the session ending on 20 August 1853, it remained only for the legal press to look back upon the events of 1853 or to look forward to what might happen in 1854. The *Law Magazine* had found the old session 'entirely barren of results'. Despite his statement of intent, Bethell had laid nothing before the House, and Collier's Bill had 'not yet been printed'. Thus, because nothing had changed, only the proctors could claim success. The ironic comment was that 'Doctors' Commons still keeps its head erect, and the practitioners can still hold out themselves, and their court, to the wondering world, as so near perfection, that the mere change of a name from 'The Prerogative Court of Canterbury' to 'The Queen's Court of Probate' is all that is required to make the London court a model tribunal'. A particular target of ridicule was Pritchard's pamphlet and his claim, put briefly, that only minor reforms were needed.39

The *Law Review*, on the other hand, wanted to stimulate a continuing debate about testamentary jurisdiction during the recess. To assist in that, it reminded its readers of what the deliberations and recommendations of the Law Amendment Society had been throughout the year, and published three papers presented to that Society. Two were technical papers by Dr Bayford of Doctors' Commons, dealing with *bona notabilia* and with grants of probate in common form. The third, by Alfred Hill, proposed a hybrid liaison between the Court of Chancery and the county courts for the handling of testamentary business.40

In conclusion, and to put the reform of the ecclesiastical courts into a quite different perspective, it has to be said that the Government did have an intervening priority to attend to during the Autumn of 1853. The Cabinet was becoming preoccupied by then with the events leading up to what was to be the Crimean War. The possibility of that conflict had been in the minds of both Aberdeen and Palmerston when the Coalition was formed. War was declared in March 1854, and was then to dominate proceedings in Parliament throughout 1854 and 1855. What Graham's correspondence as First Lord of the Admiralty reveals is that he was concerned with little else than preparations for war during the Autumn of 1853; and Aberdeen told him in October that at the Cabinet meeting the previous day, 'Not a syllable was said ...about any other subject'.41
Notes to Chapter 17.

1. LM, xviii, Feb.1853, p.179.


8. Hansard, 3d.ser., cxxiv, 10 Feb.1853, cc.3-10.


14. DNB, xxiii, p.43.

15. LT, xx, 20 Nov. 1852, p.100.


17. *Hansard*, 3d. ser., cxxiv, 1 March 1853, c.872.

18. Ibid., 8 March 1853, cc.1318-19.

19. LT, xxi, 26 March 1853, p.2.


21. Ibid., pp.179-83.

22. DNB, xxv, p.416.


24. LT, xxi, 9 April 1853, pp.17,22.


33. Ibid., cxxvii, 27 May 1853, c.715; LT, 4 June 1853, p.96.


35. Collier, Robert Porrett. *A Speech on moving for leave to bring in a Bill to transfer the testamentary jurisdiction of the ecclesiastical courts to the superior courts of common law and the county courts*. Plymouth, [July 1853].


38. Ibid., cxxix, 13 July 1853, cc.149-50.


41. GP, 8 Oct.1853, Aberdeen to Graham.
Chapter 18: Lord Aberdeen's Coalition, 1852-1854, Part II; 'it is expedient that the Court of Probate should be a Queen's Court and not an Ecclesiastical Court'.

This chapter examines the second and final year of Aberdeen's ministry, a year dominated by the findings of the Chancery Commission, by a contrary reaction on the part of the Government, and by much confusion in consequence among interested parties.

The report of the Chancery Commission recommended that the testamentary jurisdiction should be transferred to a newly-created metropolitan probate court, independent and temporal, which would in turn control a number of district offices with limited powers. That abolitionist recommendation departed from the long-held view of Governments that the mere reforming of the ecclesiastical courts would be enough to satisfy demands for changes in the jurisdiction. In that sense, the authority of the Ecclesiastical Courts Commission was replaced in 1854 by the authority of the Chancery Commission, and all the subsequent arguments were less about reform and more about which courts should receive the transferred jurisdiction and how affected practitioners should be treated. In fact, the immediate reaction of the Government to the report was to introduce a Bill, confined for the first time to testamentary jurisdiction, which sought to bring the jurisdiction under the wing of the Court of Chancery. That plan alarmed the London proctors; the York interests were again aroused over their loss of local justice; Cranworth and Bethell were accused of partiality towards the Court of Chancery; the Bill struggled to get through the Lords; hostile petitions were fired at it during its Commons stages; and, finally, dogged by opposition and crowded out by other preoccupations, it was dropped.

The 1854 session opened on 31 January with a Government pledge to bring in the legislation promised by Palmerston, and with the order to print the long-awaited second report of the Commission.

The Queen's Speech, the first and last in Aberdeen's Ministry, was dominated by the prospect of war, as was the debate which followed. Nonetheless, it was announced that 'Bills will be submitted...for transferring from the Ecclesiastical Courts to the Civil Courts the Cognizance of the Testamentary and of the Matrimonial Causes'. That statement was welcomed by Carnarvon in the Lords and by Thomas Hankey, MP for Peterborough, in the Commons. Carnarvon looked forward to an 'alteration in the Ecclesiastical Courts, which are a remnant of an antiquated jurisdiction', and
Hankey said that 'The abuses existing in these courts have become a by-word throughout the country'. Hume, with his long experience of governmental promises, was not prepared to accept any half-measures and he preferred the Bill brought in by Collier in the previous session. Hadfield was pleased at the prospect of the courts having to surrender their two most important jurisdictions, but he referred also to the 'widespread scorn and contempt' with which the courts were regarded by his own profession, and marvelled at the influence which could still be brought to bear in the Commons in support of their retention. That prompted an intervention from Phillimore who suggested that Hadfield 'weakened a cause strong enough in itself by much unnecessary and violent vituperation'.

On that same day, the report from the Chancery Commission was formally presented to the Lords and ordered to be printed. Curiously, it had still not been tabled in the Commons by early March, but a summary of its contents did appear in the Law Times as early as 11 February.

The Commissioners responsible for the report were thirteen in number. Sir John Romilly, MR, then in his early 50s, chaired the Commission, all twelve of the business meetings and all but one of the interview sessions. He was flanked by Lord Justice Turner, and by Vice-Chancellors Kindersley and Page-Wood, the latter having preferred that post to being Solicitor-General again. The three civilians were Dodson, Lushington and Dorney Harding. The other lawyers were Bethell; Mr Justice Crompton, who had been promoted to the bench by Truro as recently as 1852, and John Rolt and William James, both Chancery barristers. The remaining Commissioners were Graham and Henley. Having returned to the pressures of the Admiralty, Graham appeared at only the first and the last of the meetings, whereas Henley was a quite regular attender. Throughout the five years or so of its existence the Commission had Charles Chapman Barber as its secretary. Barber, a barrister, was highly regarded by Page-Wood and had prepared the bills arising from the first report.

As well as hearing witnesses, the Commission consulted the reports of the Ecclesiastical Courts Commission, the Real Property Commission, the Select Committees of the Commons in 1833 and the Lords in 1843, the Commons Select Committee on fees in August 1850, and also the succession of failed Bills, especially Cottenham's Consolidation Bill of 1845. It called for returns of wills proved and administrations granted between 1850 and 1852, and it received a number of
unsolicited submissions.  

The witnesses heard by the Commission represented a fairly even balance between proctors and solicitors, since so much was to turn upon the division of business between the two professions, although almost all the witnesses were based in London and the narrow preoccupation of the Commissioners seemed to be with what the future arrangements in London should be.

There were two deputy registrars from London, Iggulden from the Prerogative Court and Shephard from the Consistory Court, both of whom had given evidence to the Ecclesiastical Courts Commission; the Queen's Proctor, Francis Hart Dyke; and four other London proctors, William Fox, Henry Cadogan Rothery, Henry Graham Stokes and George Samuel Heales, all 'in considerable business'. The exceptions were Ben Hawkridge from the registry of the Archdeaconry of Nottingham, and William Sharp of Verulam Buildings, a solicitor in London since 1830 but informed about the unusual Commissary Court at Lancaster. The five experienced solicitors heard were William Strickland Cookson, active in both the Incorporated Law Society and the Law Amendment Society; Germain Lavie, also a member of the Incorporated Law Society; John Young; Edward Archer Wilde; and William Sharpe of Bedford Row.  

The questioning of Iggulden, Dyke, Fox and Shephard concentrated on the non-contentious procedures at Doctors' Commons and on the duties and training of proctors, but the proctors in private practice were asked if both kinds of business, non-contentious and contentious, should be thrown open to solicitors. In reply, all stressed the expertise of proctors in non-contentious business and the need for that monopoly to be retained. That was because of the relative ignorance of solicitors and the impossibility of the 3000 London solicitors gaining 'even a superficial knowledge' of what to do if the business was divided equally amongst them. The attitude of the proctors to the idea of solicitors handling contentious business was less unified. Some found themselves in difficulties with questions which suggested, first, that proctors could act as London agents for provincial solicitors, as happened with Parliamentary business, and, secondly, that it would be illogical for solicitors to be allowed to handle the more complex contentious business but not the more routine non-contentious business.

On the other hand, the reaction of the solicitors to that kind of questioning was
much less predictable. It is true that Cookson thought that both kinds of business should be thrown open to his profession, and he drew on his experience as an examiner for the Incorporated Law Society when he suggested that it would be a relatively simple matter to provide appropriate training; but only Sharpe agreed with him. The other solicitor-witnesses, notably Lavie, argued that the existing arrangements at Doctors' Commons should not be interfered with, apart from 'such improvements as might very easily be made'. He was aware of the 'popular cry' over Doctors' Commons, but he refused to alter his opinion that both kinds of business should remain in the hands of civilians, even when he was asked if proper compensation for those affected by changes would make him think differently. Similarly, Young, Freshfield and Wilde saw no public benefit in re-distributing the non-contentious business. For Young, a Court of Probate thrown open to solicitors would bring 'absolute ruin to the proctors' and 'the gain to the attornies, when divided...would be very trifling'. For his part, Freshfield was impressed with the control exercised over the proctors by the Judge of the Prerogative Court, and wanted that control to remain; and Wilde thought that the greater the number of practitioners 'the greater is the chance of your having unprincipled persons'. Conversely, none of those three solicitors raised any objection to their profession being allowed to handle contentious business. That overall consensus in favour of allowing the proctors to continue to have a monopoly of the routine business was to carry weight with a majority of the Commissioners.

The abstract of the returns requested by the Commission, supplemented by the evidence from Trevor, enabled a grouping of the probates and administrations by province, by court and by value. For example, the number of grants for England and Wales in 1852 was just under 19,000 probates and 7000 administrations, and the business handled at Doctors' Commons was something less than half that total of 26,000 grants. The returns also provided interested parties with an accessible record of abuses within the peculiars.

Finally, among the several submissions received by the Commission were a practical suggestion from the Registrar General and a conditional threat from the London proctors.

What George Graham at Somerset House suggested, on 26 November 1853, was that when wills had been proved in the new Court of Probate, which he was fully expecting to be created, they should be transferred to Somerset House to be kept
safely, indexed and made accessible. The communication from the Committee of Proctors at Doctors' Commons, signed by Dyke as its Chairman, was dated 22 December 1852. That was not long after the Commission had been given its extra remit and some weeks before it first met. The communication may have been hastily compiled, but its evident purpose was to put the case of the London proctors to the Commissioners as soon as possible, rather as had happened in December 1835. According to the proctors, the experience of failed measures in the past suggested that the establishing of a central court in London would be resisted in the country and could be overthrown, 'an impractical amendment might issue in a practical overthrow'. The Commission was urged, therefore, to ensure that the central court was given enough jurisdiction to maintain its efficiency, and if that did not happen then there would be resistance from the London proctors, 'It should be borne in mind that by drawing the cord too tight there would be risked the same kind of opposition as to the extinction of the diocesan registries'. So, at the end of a process which had lasted about a year, the length of time seemingly stipulated by the Government, the Commission produced and summarised a number of well-defined recommendations. These derived from a series of resolutions upon which the Commissioners had voted, meeting by meeting, and had then reviewed.

Put briefly, the Commission proposed to transfer the testamentary jurisdiction of every ecclesiastical court to a metropolitan probate court which would decide all disputes over the validity of wills of both real and personal property. That new Court of Probate would be presided over by a single judge, appointed by the Crown, salaried, and qualified as an advocate, serjeant or barrister of ten years standing. Outside London there would be a network of 'not less than twenty or more than thirty' district offices of the new Court to deal with 'cases of small properties'. It was proposed that probate applications should be made to the district office for the district where the testator lived when the property was under £1500 in value; and that all such grants, made locally and under the seal of the Court of Probate, should be as valid as grants made in London. Advocates, serjeants and barristers would be allowed to practice on equal terms in the new Court, but proctors alone would be given an indefinite monopoly of all the non-contentious business to be handled there. The system of pleading and taking of evidence followed in the Prerogative Court would be simplified; pending suits would be transferred to the new Court; and the
existing judges and registrars who suffered loss would be compensated. Finally, despite the efforts of Hadfield and his supporters to secure one probate sufficient throughout the United Kingdom, the Commission proposed instead to limit the effect of probate to the jurisdiction of the tribunal granting it.\textsuperscript{22}

There had been significant disagreements at the final meeting, in December 1853, when the Commissioners were under pressure to put the recommendations in their final form. Those disagreements were made public in the report. Bethell had failed to carry a motion to recommend the transfer of the jurisdiction to the Court of Chancery. The Solicitor-General had also failed to reduce the proctors' monopoly of non-contentious business to a short period. And, at the same meeting, Turner had failed to prevent the recommendation that the jurisdiction of the new court should cover wills of real property also.\textsuperscript{23} Each of those minority preferences would be argued over again and again, and exploited, in subsequent Parliamentary debates. A civilian, Dorney Harding, was the only Commissioner to oppose every reforming motion and he did not sign the report.

On 16 February 1854, shortly after both the pledge contained in the Queen's Speech and the contents of the Commission's report had become known, Cranworth introduced the Government's own version of reform. The short title of the Bill, as ordered to be printed at first reading, was the 'Testamentary Jurisdiction Bill, 1854'. It could not be the familiar 'Ecclesiastical Courts Bill' because it no longer sought to embrace reforms other than those narrowly concerned with testamentary jurisdiction. Indeed, as Cranworth accurately observed in the course of the debate which followed, 'the failure of previous attempts to reform these courts had arisen from Bills dealing with too many subjects, and thus enlisting against them a variety of interests'.\textsuperscript{24}

Cranworth has been described as a poor performer in the Lords,\textsuperscript{25} and on the day his speech matched that assessment, opening with an apology for introducing such a dull subject and going on to describe at length earlier attempts at legislation. The pace did quicken, however, when he introduced the work of the Chancery Commission, described his predecessor's decision to widen its remit and defended his own decision to wait for the report. As to the report itself, Cranworth was happy to endorse the principle of transferring the jurisdiction to a civil court but he made clear how much the Government disagreed with the Commission in other fundamental ways. Put briefly, the Government proposed to introduce in Parliament the two
provisions which Bethell had failed to secure within the Commission, namely the choice of court in which to invest the jurisdiction and the limited degree of exclusivity to be given to the London proctors.

On the first point, Cranworth proposed to transfer contentious business to the Court of Chancery since it 'had been in the habit of dealing with the subject'. That was in preference to having a quite separate judge who would deal only with 'a single class of case', and who might find himself with no more than sixty days of business annually. On the other hand, the Court of Chancery solution would provide an original jurisdiction over both real and personal estate, 'a great advantage' according to Cranworth; the opportunity to divide the workload between four judges; and the flexibility to add a further Vice-Chancellor if business increased. He noted also that the Commission had itself considered the option of transferring the jurisdiction either to the Court of Chancery or to a separate court within Chancery.

On the second point, Cranworth was prepared to maintain the monopoly of the London proctors in non-contentious business but only for a limited period, ten years being what he had in mind. There would, as a consequence, be the continuing extra cost to the public of having 'a double set of agents', but that would only continue until such time as solicitors were able to take on the business of proctors and vice versa.

Otherwise, the Commission's recommendation about creating district offices was acceptable to the Government, albeit with some variations in detail. Even where a will had a value less than £1500 parties would be given the option of taking out probate in London, and where it was proved locally the original would be sent to London for sealing and safe-keeping after a local consultation period of six months.26

Responses in the Lords to what the Government's Bill would do and would not do came from two former Lord Chancellors and the former Chairman of two Royal Commissions, Brougham, St Leonards and Campbell. All seemed relatively favourable at first reading.

Subject to seeing the Bill in print, Brougham welcomed in principle both what Cranworth had said and his choice of the recently reformed Court of Chancery.27 St Leonards also agreed with that choice at the time, but what he found unreasonable was the imposition of probate procedures upon real property, his view being that since real property was fixed 'there was no fear of its being dispersed'.28 Campbell's
only concern, speaking as the Chairman of the Divorce Law Commission which had reported in February 1853, was that the Government was failing to embark upon a more 'complete reform of every aspect of the ecclesiastical courts, leaving to them only a spiritual jurisdiction'. Cranworth was able to promise to Campbell that a Bill based upon the work of the Divorce Law Commission would be tabled early in the session, and to offer his comments upon the disadvantages of an omnium gatherum bill.

If the reception accorded to the Bill within the Lords was calm, initially at least, it was not so elsewhere.

Shortly before second reading, fixed for 6 March, Dodson led a deputation of senior proctors from Doctors' Commons to present Cranworth with a Memorial at the House of Lords. The London proctors had been expecting the Government to adopt the Chancery Commission's Court of Probate option, an option which protected their profession and their monopoly of non-contentious business. They had, therefore, been thrown into great 'alarm and anxiety' at hearing that the Government proposed to act differently. The deputation tried to persuade Cranworth that the interests of the public would be better served by following the Commission's preference, and suggested that the combined effect of restricting the exclusive conduct of non-contentious business to ten years, and setting so low a ceiling as £1500, would be ruinous for their profession. Cranworth refused to move on the principles of his Bill but said that he would consider anything which might ameliorate their position. He was also able to tell the deputation that the second reading had been deferred from 6 March to 14 March in consequence of 'representations from the country'.

When it came to the second reading on 14 March, Cranworth again mentioned those 'representations', public petitions in fact, although they seemed at the time not to have surprised or seriously influenced him. In three separate petitions from the same city, the mayor and aldermen of York, the merchants and bankers of York, and the registrars of York all wanted the testamentary business to remain there unaltered. At the same time, a number of leading business houses in London positively wanted to have a new Court of Probate in the metropolis. And, in separate petitions, the College of Advocates wanted to ensure the survival of the profession and of the study of international law, whilst the registrars and proctors at Doctors' Commons were concerned about protecting their own interests.

What both professional groups from Doctors' Commons were agreed upon was in
pressing for a Select Committee to scrutinise the Bill. It seems that Cranworth had had a Select Committee in mind anyway, because, as he admitted, 'The Bill was necessarily framed in a hurry'. Other than that, he continued to behave as if he was expecting the Bill to receive as favourable a reception at second reading as it appeared to have had at first reading. If that was his calculation, he was to be disappointed.

Brougham, who again reacted first, had performed something of a volte-face in the interval and after the printing of the Bill. He now questioned Cranworth's judgement in the matter, doubting if the days which needed to be spent out of court by the probate judge had been taken into account; doubting also if the judges in the Court of Chancery could cope with the extra work-load; expressing sympathy with the advocates and proctors who would be 'ruthlessly' attacked by the measure; and proposing that the ecclesiastical judges should be consulted after the Select Committee stage. St Leonards' considered view was also less sympathetic to the Bill. He argued that the jurisdiction should be 'kept together in one court' when it was transferred to the Court of Chancery, just as Turner, Page-Wood, Lushington and Crompton had wanted. Finally, a young peer, Lord Donoughmore, 'sedulously coached by a learned member of Doctors' Commons', demanded compensation for loss of profit for those advocates and proctors who were practitioners and not officers of the court, and he questioned the increased patronage which the Bill would give to the Lord Chancellor.

After that confused but unpromising set of reactions, the Bill was referred to a Select Committee. The Committee, when complete, consisted of twenty peers, with Cranworth in the chair. It included Lyndhurst, Brougham and St Leonards as lawyers, and Canterbury, York and St Asaph as prelates. It met first on 17 March and then on 21 March, and it was provided with the reports of the inquiries in 1832, 1836 and January 1854. As further petitions trickled in they also were referred to the Committee. Two of them were concerned with the locations of the District Offices, and one was from Hawkridge at Nottingham who, as a notary public, wanted to be admitted to office on the same terms as proctors. When the Select Committee reported on 24 March, it had struck out the clauses relating to probate over wills of real property. That was done at the behest of St Leonards, although the clauses had embodied a reform which the Chancery Commission had recommended and to which the Government had agreed.
In an inconsistent editorial, *The Times* blamed Cranworth for treating the mature recommendations of the Chancery Commission as 'so much waste paper', for obstinately favouring the Court of Chancery when that choice represented 'falling out of the frying pan into the fire', and for generally missing an opportunity for real reform. And yet Cranworth was also criticised for having put the real property provisions into the Bill, and for having thus taken on a 'powerful foe' in the shape of St Leonards and 'his party'. The forecast was that the committee of the whole House of Lords was sure to uphold the line taken by the Select Committee on this issue. As it turned out, after having initially given notice that he would restore the clauses, Cranworth accepted the setback. He said so on 30 March in the debate on the motion that the House go into committee on the Bill. By that stage he took the view that the Bill would be defeated if he tried to restore the clauses, and he admitted that he had been swayed not only by the wishes of the Select Committee but also by the many communications received from peers on the Government benches and from Brougham. The hostility shown by landed interests towards this proposed change is well conveyed by Palmerston's abrupt instruction to Cranworth and Bethell about not extending probate duty to real property, 'I consider hereditary succession to unbroken masses of landed property to be absolutely necessary for the maintenance of the British Constitution'.

However, St Leonards was not satisfied with securing that single concession. He now wanted the jurisdiction to be confined to a separate court within the Court of Chancery and to be presided over by the Judge of the Prerogative Court. He also wanted the advocates at Doctors' Commons to be given precedence in the conduct of contentious business for a ten year period. To add to Cranworth's difficulties, those fresh demands now had the support of Brougham, who had travelled far since the first reading stage. Even Campbell agreed with much of what St Leonards was asking for, despite his regret over the loss of the real property clauses. That short debate on the motion closed with a further gadfly intervention from Donoughmore, who was assured by Cranworth that the minor officials at Doctors' Commons would receive salaries in line with their present fee income. The House then went into committee, some amendments were made and the debate was adjourned.

Two things happened between that stage on 30 March and 3 April, when the House went into committee upon re-commitment. Several more hostile petitions were received, from deputy registrars or proctors for the most part who sought either to
prevent the Bill from passing into law 'in its present shape' or to secure full compensation if it did. And Cranworth had an urgent exchange behind the scenes with Sir John Dodson. The provision of a judge or judges to preside over any new probate arrangements exercised minds greatly at this time, as had happened with Sir John Nicholl and Lushington in the past. The imponderable element was the likely extent of the workload. Dodson, then Dean of the Arches and Judge of the Prerogative Court, and well into his 70s, was asked privately by Cranworth if he was willing to be involved in the new arrangements in the way proposed by St Leonards. Cranworth seemed, however, to be confining Dodson's judicial assistance only to causes which were pending in the Prerogative Court when the new regime came into effect, and those were the terms in which Dodson replied. In brief, Dodson was willing to help with causes heard under the rules and practice of his own Court, but declared himself to be 'wholly unacquainted' with the equivalent rules and practice in the Court of Chancery, 'and at my time of life (already in my 75th year), and at a still more advanced age when the Bill shall have come into operation, it would be vain for me to attempt to learn them - and I cannot therefore venture to undertake it'. He had also been asked by Cranworth to comment on the securing of precedence for advocates in the new court, and he thought, as did Cranworth himself, that it might be disadvantageous to most of the advocates to be given precedence because it would prevent them from holding junior briefs.

When the committee stage was resumed on 3 April, in a thin House, there were still more discontented petitioners. Most sought full compensation if the Bill was passed, although the proctors at Doctors' Commons wanted either the continuation of their absolute monopoly of practice or full compensation, the demand which had been made by Donoughmore on their behalf at second reading. Compensation for loss of profits was something which was to haunt Ministers to the end. Cranworth took the line at the time that since the precise purpose of the Government's reforms was to cause those who made large profits to 'lose a portion of their profits' it made no sense to admit the principle of compensation for that kind of loss. Compensation for loss of office was a different matter. Although the Bill was agreed on the day, there were still calls for the separate Court of Probate option, for provisions which would allow proctors to practise privately for ten years longer and for the outright rejection of the measure. Most strikingly, St Leonards was able to carry his clauses about the Judge
of the Prerogative Court and the precedence of advocates by fourteen votes to ten, despite the wishes of Cranworth and the private reluctance of Dodson.\footnote{48} The third reading stage was reached on 7 April, again in a thin House, with the Bill still on course to transfer the jurisdiction to the Court of Chancery, and with Cranworth still asking their Lordships the question, 'What was the use of constructing another court, if the Court of Chancery could discharge the functions?'. Only then did the Archbishop of Canterbury, Sumner, make public his sympathies for the practitioners at Doctors' Commons, the 'large body of professional men with whom he was officially connected and who would suffer grievous loss by the provisions of the Bill'. By his account, he had abstained from earlier discussions lest it be thought that he was 'personally interested in the matter'. Petitions were presented in favour of the Court of Probate option,\footnote{49} claims were made that some of the Court of Chancery judges opposed the transfer, and an amendment to kill off the Bill was defeated by only seven votes to five.\footnote{50} It was at this stage, after the Bill passed the Lords and was sent to the Commons, that it began to run into the sand.

There was no debate at its first reading in the Commons on 1 May.\footnote{51} When Sir Fitzroy Kelly later asked what was happening, he was told by Russell that the second reading had been fixed for 18 May,\footnote{52} although the Bill was in fact deferred on that date. On 2 June, Campbell asked the Lord Chancellor if the Bill was to be abandoned because the amendments it had suffered in the Lords had made it less 'valuable' than was originally intended. Cranworth maintained that the aim of Government was still to carry the Bill in its amended form, despite the receipt of more hostile petitions, but that Campbell's wishes could be met by separate legislation to extend the jurisdiction to real property. He also denied the claim that the Government was trying to reach a compromise over compensation for proctors.\footnote{53} A few days later, Derby asked about the Bill, and expressed a Gladstonian concern about the residual authority of the ecclesiastical courts if they were to lose both of their more substantial jurisdictions, testamentary and matrimonial. Cranworth told him that it was still the intention of Government to try to carry both of those Bills that session and repeated what was by now the Government line about the good sense of presenting separate Bills. Nonetheless, he did acknowledge that proper provision would have to be made for what would be left of the ecclesiastical courts. Oddly, St Leonards seemed only then to have become aware that matrimonial causes
were also to be transferred to the Court of Chancery. He said that that would be imposing too much upon the Court and that he might have to revise his thoughts about the transfer to it of the work-load of testamentary jurisdiction as well.⁵⁴ Even as late as 3 July, or so it was claimed in the Law Chronicle,⁵⁵ Russell was still speaking about proceeding with the second reading of a Bill which by then had been several times deferred,⁵⁶ but on the following day that position was surrendered in public. Aberdeen had told the Queen on 1 July that his Cabinet had agreed to abandon several bills for that session, including the Testamentary Jurisdiction Bill, in view of 'the anticipated opposition'.⁵⁷ Thus, on 4 July, Russell was authorised to say in the Commons that, in the light of differences of opinion about how that jurisdiction should be transferred and given the lateness of the session, the Government had decided not to proceed with the Bill.⁵⁸ Cranworth said something similar in the Lords on 10 July in answer to a question from St Leonards.⁵⁹ A number of factors contributed to the dismal failure of the Bill in 1854. First, there was the 'anticipated opposition' in the Commons, referred to by Aberdeen. It was said at the time that the Commons opposition, which was being prepared by Richard Malins, was over the refusal of the Government to concede the principle of compensation for loss of profits by the proctors, 'who, therefore are straining every nerve to obtain the rejection of the measure'. As a newly-elected Conservative MP for Wallingford and a Chancery barrister, Malins was an unlikely champion in the cause of compensation for proctors, but he proved to be a highly effective one.⁶⁰ Secondly, it was alleged that Cockburn was at odds with Cranworth and Bethell, and had refused to support the Bill in the Commons.⁶¹ These damaging tensions between the Lord Chancellor and the two law officers were to be mentioned more explicitly in the following session. Thirdly, Cranworth's proposal to transfer the jurisdiction to the Court of Chancery led The Times to accuse Cranworth and Bethell, both of whom were Chancery lawyers, of deliberately favouring their own kind.⁶² That seeming favouritism had brought together in opposition to the Bill those reformers who wanted a new Court of Probate for its own sake, and the supporters of Doctors' Commons who saw the new Court as the only hope of salvaging the careers of advocates and proctors. Indeed, Cranworth was so distrusted over this issue that it was said that he had not been able to find 'a single expert in the old Probate practice' to assist in drafting the
Fourthly, there was the inability of the Law Amendment Society, in its self-appointed advisory role, to assist the Government with either a united front or a timely solution. For much of the session the conflicting choices debated within the Society were no more and no less than those debated within Parliament, 'the retention of the Ecclesiastical Courts on an amended plan'; 'the transfer of their jurisdiction to the Courts of Chancery or of Common Law or to the County Courts'; or the creation of a new Court. It was not until August 1854, and then only after 'animated discussions', that the Society was able to recommend that 'the Superior Courts at Westminster' be given the full powers of both common law and equity, with a supporting role for the county courts.

The final factor in holding back the Bill that session, although Cranworth was to claim that everything became much worse in 1855, was the impact of the Crimean War upon the time and energies of Ministers. War had been declared in March 1854, and even before that date, Graham, who might have been expected to press for the reforming measure, was desperately busy at the Admiralty. He told Russell that 'my mind is so distracted with daily heavy work that I have no time...to turn my thoughts from Ships & Victualling'. Ironically, the Crimean War also caused the Government to call upon the advice of both Lushington and Harding in 1854 in connexion with prize cases and with the rights of neutrals, the very expertise in international law which reforms could have put at risk.

Whilst the Government was having no success, even with a Bill narrowly confined to testamentary jurisdiction, Robert Phillimore was busy with the first in a sequence of modest reforming bills. They derived from the General Report and were seen by him, and by others associated with Doctors' Commons, as an alternative to the dismantling of the ecclesiastical courts. Phillimore's Evidence Bill, which enabled those courts to summon and examine witnesses viva voce in lieu of issuing a commission, was piloted through the Lords by Brougham and received the royal assent on 24 July 1854. A Defamation Bill and an Ecclesiastical Judges Bill duly appeared in 1855 and 1856 respectively.

So, when the session ended on 12 August 1854, Aberdeen's administration was no further forward with its own version of what should be done about testamentary jurisdiction. And yet, the Law Review, in spite of that setback and all the unresolved pressures, fears and prejudices associated with it, chose to look forward with some
degree of confidence to the Bill being reintroduced and passed in the following session.\textsuperscript{68}
Notes to Chapter 18.


3. LJ, 86, 1854, p.4.

4. LT, xii, 11 March 1854, p.236.

5. Ibid., 11 Feb. 1854, pp.196-97.

6. DNB, lvii, p.338.

7. DNB, xxxi, p.124.


9. DNB, xiii, pp.146-47.


11. DNB, xxix, p.230.


16. Ibid., pp.84-96.

17. Ibid., pp.96-112, 118-27. At this time the pages of the *Law Times* were full of warnings about 'sham' solicitors.


19. Ibid., Appendix D, p.151.

20. Ibid., pp.147-48. See also Chapter 9, n.17.


22. Ibid., Summary, pp.38-42.

23. Ibid., Appendix A, pp.53-54; Conclusion, p.42.


25. H.E.L., xvi, p.60.

26. P.P.1854 (25) vi. A Bill...to transfer to the Court of Chancery the Testamentary Jurisdiction of the Ecclesiastical Courts and to alter and amend the Law in relation to matters of Testacy and Intestacy; *Hansard, 3d.ser.*, cxxx, 16 Feb.1854, cc.701-20; *The Times*, 17 Feb. According to Cranworth the figure of £1500 was arrived at by taking the approximate value of the ordinary stock of a farm of 150-200 acres, see *Hansard, 3d.ser.*, cxxx, 16 Feb.1854, c.718.


29. Collinge, op.cit., p.43.


31. LT, xxii, 11 March 1854, pp.240-41; *The Times*, 7 March ; LJ, 86, 1854, p.49.


33. LJ, 86, 1854, pp.57-58.

34. *Hansard*, 3d.ser., cxxxi, 14 March 1854, cc.764-68.

35. Ibid., cc.768-72.

36. Ibid., cc.774-77.


38. LJ, 86, 1854, pp.58,60,63,67.

39. Ibid., pp.65,71.

40. Ibid.,p.75; P.P.1854 (67) vi. Testamentary Jurisdiction Bill 'as amended by the Select Committee'.

42. *Hansard*, 3d. ser., cxxxii, 30 March 1854, cc.59-62; *The Times*, 31 March 1854.


44. P.P.1854 (72) vi. Testamentary Jurisdiction Bill 'with amendments made in Committee'.

45. LJ, 86, 1854, pp.82,90.

46. Bodleian Library, Monk Bretton deposit, Box 34, 31 March 1854, Cranworth to Dodson; 1 April, Dodson to Cranworth.

47. LJ, 86, 1854, p.91; *The Times*, 4 April 1854.

48. P.P.1854 (72a) vi. 'Clause to be moved by the Lord St Leonards'; *Hansard*, 3d. ser., cxxxii, 3 April 1854, cc.320-25.


50. P.P.1854 (78, 78a) vi. Testamentary Jurisdiction Bill 'as amended on re-commitment and on report, and clauses to be proposed by the Lord Chancellor on third reading'; *Hansard*, 3d. ser., cxxxii, 7 April 1854, cc.670-72; LT, xxiii, 15 April, pp.31-32; *The Times*, 8 April.

51. P.P.1854 (81) vi; *Hansard*, 3d.ser., cxxxii, 1 May 1854, c.1105; CJ, 109, 1854, p.200.

52. LT, xxiii, 6 May 1854, p.60.

53. Ibid., 10 June 1854, p.116.

54. Ibid., 17 June 1854, p.127.

55. LC, i, 1 Aug.1854, p.i.


58. *Hansard*, 3d ser., cxxiv, 4 July 1854, cc. 1090-91; LT, xxiii, 8 July, p. 163.


60. LC, i, July 1854, p. 29. Malins, later a Vice-Chancellor, had a reputation for being 'talkative and impulsive' and for his skill in prolonging debates in the Commons, see DNB, xxv, pp. 423-24, and Fraser, Sir W. *Disraeli and his Day*. London, Kegan Paul, 1891, p. 114. It has been said that the practitioners at Doctors' Commons 'saw ruin staring them in the face' and did what they could to sabotage the Bill, see Atlay, op. cit. ii, p. 70.

61. Atlay, op. cit., ii, p. 70; H.E.L., xvi, pp. 61-62. Atlay was incorrect in stating that the Bill was dropped in the Lords.


63. Atlay, op. cit., ii, p. 70.

64. LR, xx, Aug. 1854, pp. 382-83.

65. GP, 16 Feb. 1854, Graham to Russell.

67. P.P 1854 (105) ii; LC, iv, 1 Sept. 1854, p. 136; for a pamphlet recommending the correcting of abuses within the ecclesiastical courts instead of their 'total annihilation', see Conyngham, Cuthbert. *Doctors' Commons unveiled, its secrets and abuses disclosed, with suggestions for the reform of the Ecclesiastical Courts.* London, 1854.

68. LR, xx, Aug. 1854, p. 430.
Chapter 19: The Testamentary Jurisdiction Bill, 1855; 'The Ecclesiastical Courts are the Sebastopol of the Tribunals. Will they ever be taken?'

Parliament met for a short period in December 1854, with Aberdeen's makeshift Cabinet barely holding together, but with some optimism about an end to the Crimean War. When Parliament met again in January 1855, Roebuck's call for a Committee of Inquiry into the conduct of the War provoked, or was the occasion for, Russell's resignation from the Cabinet. That act precipitated in turn the resignation of Aberdeen, the fall of his ministry and the advancement of Palmerston to Prime Minister.

It has been said that Palmerston had no interest in domestic affairs beyond a readiness to consider matters submitted to him, but what was remarkable about the legal team which he had assembled by 16 February was that he chose to retain Cranworth as Lord Chancellor, Cockburn as Attorney-General and Bethell as Solicitor-General, with Grey, already with substantial experience in the post, as Home Secretary. That unusual degree of continuity of office-holding from one administration to another may have been at the suggestion of Cranworth, and it was not shaken by the resignation of the Peelite members of the Cabinet, Graham, Gladstone and Herbert, at the end of February 1855. Instead, that direct experience of what had gone wrong in 1854, and why it had gone wrong, caused the Government to greatly modify the dropped measure of the previous session. Even so, that was not enough to prevent the further failure of the Bill in 1855. It was again confronted with a combination of self-interested opposition from both sets of proctors, with disagreement among the law reformers about the choice of court to receive testamentary business, with alleged disarray within the Government, and with the other pressures and distractions caused by Parliamentary business and by the War. The 1855 Bill never managed to reach second reading in the Commons.

The Queen's Speech and the addresses which followed had been dominated by the Crimean War, but what was the new administration proposing to do about testamentary jurisdiction? That was the question put by Hadfield to Bethell on 27 February. It elicited the answer that 'he hoped to be able to present to the House a Bill for transferring the testamentary jurisdiction of the Ecclesiastical Courts to a new tribunal'. Bethell was less encouraging about Hadfield's other interest in having a single probate sufficient throughout the United Kingdom.
On 30 March, and in answer to a question from St Leonards, Cranworth explained that the Solicitor-General would be moving to bring in a Bill that day with provisions which 'would not be exactly the same as those contained in the bill of last session on the same subject'.

When the time did come, it was already late in the evening of 30 March and in what was to become a thin House. Speaking to the motion, Bethell's statement of what his measure would contain, what it was intended to achieve and what his hopes were about its general acceptability, provided the Commons with one of the longest and most detailed accounts of the jurisdiction and its ramifications ever heard in Parliament. After the obligatory preamble about the failure of earlier attempts, he spoke sharply about the self-interested resistance those attempts had met with. He also felt that the 1854 Bill had been 'very little understood out of doors', and, in order to correct that deficiency, he was going to send to the Law Times 'an early copy of this important Bill'.

What Bethell now proposed, in a Bill of 119 clauses, was a series of compromises on the hitherto vexed questions of which court should receive the jurisdiction, of what the relationship should be between central and local arrangements, of what to do about wills of real property and of what kind of compensation should be offered to those affected by the changes.

The intention was to transfer the jurisdiction from both the inferior and the diocesan courts to what was now emphasised as being a distinct and metropolitan court within the Court of Chancery and with a new name, 'Her Majesty's Testamentary Court'. That court would have its own judge, officers and clerks and its own Testamentary Office. As for contentious business, the procedures of the new court would be simplified so that it could act as a court of construction as well as of probate, thus dealing omnicompetently with disputed wills. That was what the Real Property Commission and the Chancery Commission had recommended in principle. As for non-contentious business, the public could choose between direct access to the Testamentary Office in London without any professional intermediaries, or going to those local solicitors who were Commissioners of the Court of Chancery; in the latter instance, the will would be scrutinised and the papers transmitted to London, all under the supervision of the Testamentary Office. Bethell had considered giving both contentious and non-contentious business below £300 to the new county courts but had yielded to objections that those courts were not yet
ready for the responsibility. However, there was one innovation over which he enthused at length, and that was the proposed printing of wills as a means of creating accurate, readable and cheap multiple copies, both for probate purposes and for statistical purposes.

Bethell explained that the Bill was not proposing to embrace wills of real property as such, because of the opposition in 1854 to what had been regarded as 'the first step towards applying the probate duty to land'; but he now sought to circumvent that difficulty by enabling the new court to create good title by pronouncing on the validity of a will of real property.

Since the present Bill was offering the London proctors no 'priority of business in the new court' and was abolishing the diocesan courts, Bethell next tackled the question of fair compensation for loss of profits as well as loss of office. The formula which would now be offered to both the London proctors and the country proctors suffering possible loss was an annuity equivalent to half of their net income from testamentary business. The advocates, for their part, would not only be admitted to the new court as barristers but would also profit by the future disposal of the 'valuable property' at Doctors' Commons. Bethell deplored, as had others, the abuses which went with the holding of sinecures, but thought it only correct to include the Moore family, for example, when compensating those 'who would be thrown out of employment' by the proposed measure.

And there was, after all, to be a clause providing for a single probate sufficient throughout the United Kingdom. The clause was there to placate Hadfield and his supporters, although Bethell thought that 'it would not work' in Scotland. Bethell's purpose, therefore, had been to put together a measure which conceded enough to gain general acceptance, in the light of previous criticisms, 'although it might not exactly accord with the views of every individual who might entertain theoretical speculations of his own'. Despite all that, his conjuring tricks still received a mixed reception, both in the Commons and 'out of doors'.

The immediate reaction of MPs on 30 March could have given him little comfort. Joseph Napier, Conservative MP for Dublin University, and Sir John Pakington, Conservative MP for Droitwich, would both have preferred a cluster of bills which dealt with all aspects of the non-spiritual jurisdiction of the ecclesiastical courts, and which could be considered together. Malins, as the champion of Doctors' Commons, saw no reason to break up a business which was conducted as satisfactorily as it was
in the Prerogative Court, transfer it to the Court of Chancery and then pay compensation to proctors who wanted to do no more than carry out their professional duties. Far better, said Malins, to improve the Prerogative Court and change its name to the Court of Probate. Phillimore agreed in principle with removing this non-spiritual jurisdiction from the ecclesiastical courts, but he too defended the abilities of his colleagues at Doctors' Commons. There was some qualified support for the measure from George Bowyer, the barrister MP for Dundalk, and from Bethell's Irish counterpart, William Keogh, although the only unequivocal welcome came from Hadfield. However, after midnight and despite its uncertain reception, the Bill was ordered to be prepared and brought in by the two law officers and Grey.

Outside Parliament, the immediate reaction to Bethell's statement was also varied, with support coming from the Law Times and with seemingly co-ordinated criticism coming from Doctors' Commons and its allies.

The Law Times had been looking forward to what Bethell would say. Even before his statement in the Commons, it had devoted an editorial to the need for reform. However, it had remained undecided as to whether the Court of Chancery could cope with the extra work or whether there should be a new and separate court. Nor, as it commented wryly, was impartial advice easy to come by since informed sources were also self-interested sources, and each made contradictory assertions. The Chancery advocates are not unwilling to have a large and lucrative business brought to them, and the men of Doctors' Commons...hope to take exclusive possession of a new Court of Probate'. That observation apart, the Law Times was at least sure that it wanted to see testamentary business thrown open to 'the whole profession'. Then, as soon as the compromise proposals were known, the Law Times published appreciative editorials, reported the debate of 30 March and analysed the proposed measure. Finally, on 21 April, it printed the substance of the Bill, a copy of which had been received from Bethell.

On the other side, letters hostile to any measure which might favour the Court of Chancery option had begun to appear even in advance of Bethell's statement on 30 March. The Times published a letter from 'Publica' which assumed that the jurisdiction would be delivered into the 'clutches of the Court of Chancery'. It accused Bethell by name, and Cranworth by implication, of being only 'soi-disant reformers of the law', and influenced, as Chancery lawyers themselves, by 'the demon of jobbery'. Similarly complaining and anonymous letters appeared in The
*Times* throughout April, expressing alarm at the 'railway speed' at which the public was being taken into the Court of Chancery; associating that Court with delay and expense; suggesting that the compensation offered to proctors was intended to divide the profession; seeking compensation for articled clerks at Doctors' Commons; claiming that some solicitors might conduct probate business fraudulently; appealing to Malins to see that justice was done at second reading; and even protesting, as did 'A Father of a Family', about the prying nature of a Bill which sought to print copies of wills.\(^\text{12}\)

The *Law Times* itself published similar letters during April, but also commented that the anonymous contributions which had begun to appear 'in some of the newspapers' were factually wrong in suggesting that the Bill 'will operate to throw all the wills into Chancery'. The continuing campaign against the Bill prompted the *Law Times* to suggest, later in April, that these anonymous correspondents, such as 'One who dreads the Court of Chancery', were all connected with Doctors' Commons and simply wanted to maintain the monopoly of business enjoyed there. What still mattered most to the *Law Times* was that the testamentary business should be thrown open to solicitors, whatever the choice of court.\(^\text{13}\)

The *Times*, however, was not content with merely printing hostile letters and giving space to its own summary of the Bill. In a leading article on 14 April, it attacked, first, the obstinacy and partiality of Cranworth in having, in 1854, favoured a Court associated with 'endless chicanery and delay,[and] so much domestic sorrow in ruined families'; and, secondly, the cheek of Bethell for now trying his hand at the game lost so ungracefully by Cranworth, and 'with the very same cards'.\(^\text{14}\)

Nothing was said in the Commons at the formal first reading on 16 April.\(^\text{15}\) However, on 26 April, after being once deferred,\(^\text{16}\) the debate on the motion that the Bill be read a second time provided a further opportunity for MPs to say what they thought about it. There were already signs of a lack of cohesion between Ministers and law officers. According to *The Times*, Malins, who wanted to speak to a motion to kill off the Bill on 26 April, was told by Bethell that the debate would be postponed until the following week, and it took the intervention of Disraeli and Palmerston to provide time for a debate at the end of that same evening.\(^\text{17}\) In the light of what did not happen subsequently, it was ominous that no Minister or law officer then spoke on behalf of the measure, although Palmerston, Grey and Disraeli had all been in the House that evening. Worse than that, the subject of testamentary
jurisdiction was never to be debated again during the 1855 session.

Among those who spoke on 26 April, three Conservative MPs, Malins, Thesiger and Whiteside, were in agreement that the Bill should not go forward in its existing form. So too was Thomas Headlam, Liberal MP for Newcastle. Collier and Roundell Palmer were prepared to vote for it at second reading, although not without reservations. The Bill's direct opponents were described by the Law Times as being hostile at heart to the reform itself rather than to the choice of court, whereas the others, although finding fault with it, preferred it to having no reform at all, 'I don't like you but I must take you'.

For his part, Malins gave a powerful, if repetitious, performance in rejecting any version of the Court of Chancery option and in supporting instead the retention of a reformed Doctors' Commons as the Court of Probate. His argument contained familiar elements. He presented two weighty petitions from London solicitors and bankers which expressed satisfaction with the performance of Doctors' Commons; he cited the evidence given by Lavie and Young to the Chancery Commission which had been favourable to the London proctors; he relied upon that Commission's preference for a completely separate Court of Probate, a preference which had been confirmed, he said, by his recent contacts with several of the Commissioners; he ridiculed the offers of compensation; and he suggested, insidiously, that the Bill had been conceived by Cranworth and Bethell without consulting Palmerston, Grey and the rest of the Cabinet. In this context, the Law Times was convinced that those, like Malins, who were opposed to the Bill were deliberately putting it about that Doctors' Commons was going to be swallowed up by the Court of Chancery; that the measure had been misrepresented to those who had signed Malins' petitions, as had happened in 1854; and that 'the same influences are again actively at work to defeat the Bill, as have defeated some ten to twelve of its predecessors'.

Frederic Thesiger had been Solicitor-General and Attorney-General in an administration committed to reforming the testamentary jurisdiction, Peel's second ministry. That did not stop him on this occasion, possibly for party reasons and possibly because he disliked Bethell, criticising the Solicitor-General for failing to follow the recommendation of the Chancery Commission. Another Conservative, the Enniskillen MP and lawyer, James Whiteside, thought that Bethell was simply showing partiality towards the Court of Chancery, whilst Headlam, who was also a diocesan judge, was convinced that the measure would only 'increase the cost and
difficulty of proving wills’. When Collier spoke, immediately after Malins, he gave his general support to the Bill, not because it made the right choice of court but because it proposed to abolish the ecclesiastical courts rather than reform them. Predictably enough, he would have preferred to have seen the transfer of testamentary jurisdiction to the common law courts, with non-contentious business, and contested business under £500, allocated to the county courts. That was a modification he promised to try to make when the Bill was in committee. Support for Collier, or at least support for the second reading of the Bill, came in the form of a calm contribution from Roundell Palmer. After denying any bias because he was a Chancery barrister, he thought that the Bill, despite its imperfections, was a reasonable first step towards consolidating the jurisdiction and that it deserved to go forward. The debate on the motion was then adjourned until 30 April.

In fact, Bethell’s Bill was subsequently deferred nine times, and usually after midnight, between 30 April and 21 June, and was finally withdrawn on 25/26 June. That was a familiar experience by then for all those committed to promoting or retarding the progress of reform. What were also familiar were the sporadic glimpses of the doomed Bill during the interval between 26 April, the debate on the motion, and 12 August, when the session ended. Those glimpses were provided by combative questions in Parliament, reticent statements by the Government and the dismayed reaction of commentators. The hints as to why the Bill made no further progress were just as familiar. They took account of the impact of the Crimean War upon Parliamentary time, rumours of tensions within Government and the continued opposition of the London proctors and their friends.

It became obvious that the Government was in difficulties over the Bill on 10 May, the day before the deferred debate was to be resumed. Questioned by Phillimore, by Malins and by Pakington, the Prime Minister, the Home Secretary and the Solicitor-General all agreed that the pressure of ‘more urgent business’ would delay that resumption, but none of them could say what the revised date would be. To add to their discomfiture, a gaffe by Bethell, referring to his Bill ‘if it ever shall arrive’, caused laughter among Malins and his allies.

On the following day, in the Lords, St Leonards complained that the Bill had been re-introduced in the Commons rather than the Lords, that the Government had not explained how the measure fitted into the ‘whole plan’ of reform of the ecclesiastical courts, and that there was no detail provided about compensation. In his imprecise
reply, Cranworth still professed to be confident that the Bill would be accepted in the Commons.\textsuperscript{27}

That confidence, real or assumed, was not shared by either the \textit{Law Chronicle} or the \textit{Law Times}. By the beginning of May, the \textit{Law Chronicle} reckoned that 'the proctors will not die easily, or at all, if they can help it, notwithstanding the tempting offer of compensation'.\textsuperscript{28} At the time of the debate on 26 April, the \textit{Law Times} had warned that the 'power of interests in Parliament' could be 'once more victorious over the lesser influence of the public good', and that same warning about the Bill was repeated on 19 May. 'Half-a-dozen sturdy men in any borough can command the votes of its representatives by threatening opposition at the next election [and] there will be room for infinite devices to mar its efficiency', even supposing the Bill reached the committee stage. The only reservation the \textit{Law Times} had about backing the Bill, although still consistent with its view that solicitors should be united in their support for the Bill, was that the compensation clauses did not provide for those country solicitors who were also proctors.\textsuperscript{29}

The \textit{Law Times} continued to follow events in the Commons, and, amid rumours that the Bill was to be abandoned for the session, reported an exchange on 7 June. Bethell had referred to his 'indirect resolve' to proceed with the Bill and Malins had been more than happy, as part of his 'Fabian policy', to accept that the resumed debate should be further delayed until 15 June.\textsuperscript{30} That arrangement was confirmed by Disraeli on 11 June.\textsuperscript{31} In fact, no debate took place on that date and by 25/26 June the Bill had been dropped without a whimper.

The immediate reaction of the \textit{Law Times}, playing with its military metaphors of assaults and repulses, was to doubt 'if ever the attack had been made in earnest'.\textsuperscript{32} That was a theme taken up in the Lords by Lyndhurst, in a destructive style reminiscent of his performances in the late 1830s,\textsuperscript{33} but his exchanges with Cranworth on 20 July did serve to throw some light on why the Bill had been dropped.

Lyndhurst taxed Cranworth about the delays over the Bill and over several other measures. He found it strange that the law officers had not pushed ahead with the Bill in the Commons, either in 1854 or in the current session. Nor could he accept the Crimean War as an excuse, because he did not think that the Lord Chancellor and the law officers 'had troubled themselves much about the complications of the Eastern question'. The real reason, Lyndhurst suggested, was that there might be
'some want of understanding or co-operation between the Lord Chancellor and the law officers of the Crown', without which 'it was in vain to expect an amendment of the law'. The Law Times later referred to whisperings of a feud between the Lord Chancellor and the Solicitor-General which had hampered certain law reforms, and which had been caused by Bethell's ambitions to succeed as Lord Chancellor. Cranworth failed to deal directly with Lyndhurst's jibes about these poor relationships. He said that he had discussed with Bethell what changes needed to be made to the 1854 Bill to smooth its passage through the Commons in 1855, but that the War had had taken up so much Parliamentary time, 'four-fifths' of the current session, that it had crowded out the Bill. Cranworth failed to deal directly with Lyndhurst's jibes about these poor relationships. He said that he had discussed with Bethell what changes needed to be made to the 1854 Bill to smooth its passage through the Commons in 1855, but that the War had had taken up so much Parliamentary time, 'four-fifths' of the current session, that it had crowded out the Bill. Nor can the continued inactivity of the Attorney-General, Cockburn, be explained satisfactorily. Campbell added his own innuendoes to those of Lyndhurst, suggesting that both Cockburn and Bethell treated Cranworth contemptuously and hoped to succeed him. Edwards has attributed the difference in performance between any pair of law officers to differences in 'political acumen and forensic ability', mentioning, as an example, how Cockburn had refused to assist Gladstone as Chancellor of the Exchequer in dealing with the Succession Duty Bill. Be that as it may, the 1855 session was marked by the government of the day failing yet again to carry through its intended changes in testamentary jurisdiction. A brutal remark made by Gladstone to Graham, before the session even began, must serve as an epitaph of sorts for that lack of progress. 'I would far rather see Titles to Land dealt with in Session 1855 than Eccl.Court Reforms: for when there have been ninety nine failures there will probably be an hundredth'.
Notes to Chapter 19.

1. LT, xxv, 30 June 1855, p.146.


4. The Times, 31 March 1855.

5. Hansard, 3d.ser., cxxvii, 30 March 1855, cc.1429-51; The Times, 31 March.


7. Ibid., p.299.

8. Ibid., p.43.


10. Hansard, 3d.ser., cxxvii, 30 March 1855, cc.1451-64.

11.LT, xxv, 31 March 1855, p.9; 7 April, pp.17,21; 14 April, pp.29-31; 21 April, pp.40-42.

12. The Times, 20 March 1855; 4 April; 9 April; 14 April; 20 April; 26 April.

13.LT,xxv, 7 April 1855, p.23; 14 April, pp.29,32; 21 April, pp.37,43.

14. The Times, 14 April 1855; 20 April.
15. P.P.1854-55 (77) vi. A Bill... to establish a Distinct Court of Probate and Administration; *Hansard*, 3d. ser., cxxxvii, 16 April 1855, c.1469.


17. *The Times*, 27 April 1855.

18.LT, xxv, 28 April 1855, pp.46-47.

19.Ibid., pp.45-46.

20.Bethell and Thesiger 'had the faculty of rousing what have been happily termed the travelling acids in the system of the other', see Nash, T.A. *The Life of Richard, Lord Westbury*. London, Richard Bentley & Son, 1888, ii, p.37.


22.Thomas Emerson Headlam, QC, an expert on Chancery procedures, had been Chancellor of the dioceses of Durham and Ripon since 1854, see Stenton, op.cit., p.185.

23.Roundell Palmer, later Lord Selborne, was MP for Plymouth. It was rumoured that he might have been offered the post of Solicitor-General in 1852 had he been in the Commons then. Instead, Aberdeen chose the more experienced Bethell, see Heward, Edmund. *A Victorian Law Reformer: A Life of Lord Selborne*. Chichester, Barry Rose, 1998, p.69.


27. Ibid., 11 May 1855, cc.384-90.

28. LC, i, 1 May 1855, p.390.

29. LT, xxv, 28 April 1855, p.45; 19 May, pp.79-80.

30. Ibid., 9 June 1855, p.115.

31. Hansard, 3d. ser., cxxxviii, 11 June 1855, c.1829.

32. LT, xxv, 30 June 1855, pp.145-46.


38. GP, 22 Sept.1854, Gladstone to Graham.
Chapter 20: Palmerston's first administration, 1856; 'The present battle-cries are only shams. The true bone of contention has been, and is, about the business'.

This chapter will show that despite the successive compromises contrived by the Government, and made partly to meet the demands of law reformers, partly to placate Doctors' Commons and partly to offer a form of 'local justice', the 1856 measure failed to reach the committee stage in the Commons. Apart from the customary factors which had opposed or retarded previous bills, the cause of reform was not helped either by disagreement among lawyer-MPs about how testamentary business should be divided or by Bethell's handling of the Commons.

Granville offers glimpses of Cabinet meetings in November and December 1855, when a 'very ill' Cranworth was 'poked up about Law Reforms', but there was no mention of testamentary jurisdiction in the Queen's Speech on 31 January 1856. Nor had the Law Times heard of any pledge to that effect. Its reaction was to regret the absence of any allusion to one of 'the two most pressing Law Reforms', that is to say the abolition of the Ecclesiastical Courts and the amendment of the law of real property, and it clung to the hope that 'If there should be peace, there will be ample leisure for improvements of all kinds'. However, the mood soon changed when there was talk of Palmerston having promised 'another measure' for the reform of the ecclesiastical courts. The Law Times would have settled for a revived version of the 1855 Bill, although what it had really been looking forward to was Collier's promised Bill and the transfer of the jurisdiction to the common law courts. That aside, what it was firmly opposed to was a court built out of the ruins of Doctors' Commons, 'with the same materials new faced'.

First in the field was Collier on 7 February, with a motion to bring in his Bill. What he said had a familiar ring to it. He dealt with the delays of Government, with the importance of giving a role to the county courts and with the pretentious claims to expertise made by the proctors, but he spoke fluently and entertainingly, likening the ecclesiastical courts to rotten boroughs. He was seconded by Hadfield, still anxious to secure a single and sufficient probate, which Collier's Bill promised, and still tired of having to explain to his fellow-solicitors that no progress had been made in the face of 'influences at work, adverse to reform beyond the power of any Government'. Firm support for the Bill came, seemingly regardless of party affiliations, from a number of Collier's fellow-barristers, Keating, Atherton, Perry
and Mc Mahon and, in a qualified fashion, from George Butt. The Birmingham manufacturer, Muntz, reminded the House in plain language of what the public needed and urged Collier to press ahead with his Bill. Again Malins spoke for those who wanted no more than the reform of Doctors' Commons and the retention of the monopoly of business enjoyed by the metropolitan advocates and proctors. There were also hints in the debate that the tactic of Collier and his supporters was to force Bethell to reveal the intentions of the Government in respect of the ecclesiastical courts. In fact, when the Solicitor-General did promise a series of measures to deal with testamentary jurisdiction, matrimonial causes and clergy discipline, which would bring about 'the utter abolition of all these tribunals', his statement was greeted with 'loud cheers', according to The Times, and Collier promptly offered his assistance to the Government.

Collier's own Bill received its first reading the following day, by which time it was in the names of Collier, Hadfield and Atherton, and 26 February was fixed for second reading. In that interval, further support for Collier came from the barrister and pamphleteer, William Downing Bruce, in yet another version of his attack upon the diocesan registries. But Collier's Bill, whether intended merely as a spur to Government or as a serious measure in its own right, was overtaken by other initiatives. Its second reading was deferred fourteen times and the Bill was finally withdrawn on or about 9 July.

Bethell had never bound the Government to any timetable for the measures promised to Collier and his supporters. In fact, it was not until some five weeks later, immediately before the Easter recess and after midnight on 15 March, that he moved for leave to bring in a Bill to deal with the transfer of the jurisdiction, by now called the Wills and Administrations Bill. That Bill, of which the Lord Chancellor had already given some warning, was read then for the first time, and second reading was fixed for 4 April.

When speaking to the motion on 15 March, Bethell was at pains to explain that the introduction of his measure was so timed that it could be considered by Parliament alongside Bills in respect of 'Marriage and Divorce' and 'the improvement of Church discipline' which the Lord Chancellor was currently introducing in the Lords. Bethell corrected a remark of Fitzroy Kelly about the jurisdiction being transferred to the Court of Chancery, a most sensitive issue, and emphasised that 'The Court to be created was a distinct Court...and would be wholly independent of the Court of
Chancery’. That, he claimed, had also been the intention of the Government in 1854, although it had been misrepresented at the time 'out of doors, and even, occasionally, in that House'.

The Law Times was highly enthusiastic in its response to what Bethell had announced. Over five successive issues, from 22 March to 19 April, it devoted an extraordinary amount of energy and space to reporting the exchanges on 14/15 March, to summarising the Bill, to praising Bethell for his ingenuity in framing it, to setting out the arrangement of its 138 clauses, to printing the full text of its 'professional clauses', to publishing other reactions to it and to arguing the case for compensation for 'all who may be injured by it'.

In fact, Bethell's modus operandi seems to have been to adopt the most acceptable and workable parts of earlier schemes and to avoid those parts which had encountered stiff opposition.

The advocates of centralisation were offered the abolition of the ancient testamentary jurisdiction of the ecclesiastical courts and the creation of a metropolitan 'Court of Probate and Administration' with its own Testamentary Office. Concerns about professional standards were met by the requirements that the judge of the new court, a Crown appointee, be an advocate of ten years standing or a barrister of fifteen years standing, and that the Principal Registrar of the Testamentary Office be an advocate or barrister of ten years standing or a registrar with five years experience.

The expertise at Doctors' Commons would be harnessed, and the interests there appeased, by offering employment in the new court 'of at least equal value' to the existing staff of the Prerogative Court. The fears of rank-and-file practitioners from any ecclesiastical court, not just from Doctors' Commons, were intended to be allayed by admitting advocates and proctors to practise in the new court as barristers and solicitors respectively. However, there was to be no continuing monopoly for the proctors, because, to please yet another lobby, solicitors would now be admitted to testamentary business.

Those who had argued for accessible local justice were offered two concessions. In uncontested business, anyone living in London who wished to obtain probate was to have direct access in person to the Testamentary Office, but there was also to be similar access by post for those living outside London. Further than that, and as a gesture towards Collier and his supporters, the county courts would be allowed to decide disputes about personal property under £200 in value, and disputes about real
and personal property under a collective value of £300.

More generally, however, disputed questions would be handled by the new metropolitan court. To meet the demands of those critics who wanted an efficient court, and to deal with the conflicting arguments for either a common law or an equity solution, Bethell was now offering a separate and competent court which would have an equal jurisdiction with the Court of Chancery in respect of the construction of wills, and the ability to enforce its orders 'in like manner as the Superior Courts at Westminster'. There would be provision for the trial of facts by jury and for the examination of witnesses viva voce, and there would be the right of appeal to the House of Lords, in line with the other non-civilian courts.

Finally, Bethell grasped the nettle of compensation. For those who faced loss of office or who would be 'damaged', in the case of the proctors at Doctors' Commons, by the loss of their monopoly of business, there would be 'ample compensation'. What the Bill was to set out was a formula offering 'one half of the average emolument' based on the previous five years. The only category excluded from that provision were those proctors who were also solicitors. That exclusion, as the Law Times was quick to point out, would have punished the greater portion of country proctors who practised also as solicitors, and Bethell was to be urged to alter that detail in his otherwise 'admirable scheme'.

By early April, the Manchester Law Association had given its 'powerful support' to the Bill, although the Law Times warned its readers that the greater the benefit conferred upon the profession of solicitors the more implacable would be the hostility from the Bill's instinctive opponents, the proctors, despite their having been offered a separate court and reasonable compensation.

What followed, however, was that the Government lapsed into silence and apparent inactivity for several weeks, apart from the printing of the Bill towards the end of March. When they asked about the deferred second reading, both Hadfield and Kelly were reminded by Bethell, first, about the priority being given to the Estimates and, secondly, about the need for the Commons to keep in step with the related measures in the Lords. By 19 April, the Law Times was becoming disillusioned with the overall legislative performance of the Government, 'Every measure of any importance stands still'. Then, on 25 April, it was asking more specifically if Bethell's Bill was 'destined to shipwreck like its predecessors', and suggesting, gloomily, that the recent failure of the Church Discipline Bill in the Lords might be
used 'either as an excuse by the Government, or as a pretence by the opponents' to have the Wills and Administrations Bill itself withdrawn.\textsuperscript{20}

On that same day, 26 April, after the second reading had already been three times deferred, and each time after midnight,\textsuperscript{21} Robert Phillimore put his own question about progress. What he was told by Bethell, according to the report in \textit{The Times}, was that the Government did intend to proceed with the Bill 'as soon as possible,' despite the related setback in the Lords. Then, if both the testamentary and the matrimonial bills were passed that session, all the jurisdictions of the ecclesiastical courts would have been 'swept away save that given under the Clergy Discipline Act [sic], which would probably remain until another session'. When Hadfield, in his turn, asked Bethell if the Bill would be brought in that evening, as it was due to be, he was fobbed off with an answer so revealing of muddle and opportunism that it caused laughter in the House. What Bethell said was that he 'did not think there was the smallest probability of the bill being reached in time for its discussion. His object in putting it on the paper was to have the benefit of any chance that might arise.' But, instead of the Commons addressing itself to a much needed and much delayed measure, that evening was taken up with complaints about the official transport arrangements to the Naval Review.\textsuperscript{22}

From that point in the session onwards, the impatience of several committed back-bench MPs manifested itself. Fitzroy Kelly and John George Phillimore\textsuperscript{23} each brought in their own Bills, albeit with very different aims, but it was Kelly's Bill which was to have the greater relevance and impact.

Sir Fitzroy Kelly, Conservative MP for the Eastern Division of Suffolk, and a noted law reformer, had a leading practice in the common law courts. He had been Solicitor-General for the final year of Peel's second administration and again, briefly, under Lord Derby in 1852. He later became Attorney-General under Derby in 1858-1859 and ended his career as the last Chief Baron of the Exchequer.\textsuperscript{24} As he explained later to Brougham, Kelly had 'three great questions' in mind about the outmoded nature of testamentary jurisdiction. What court should be substituted for the ecclesiastical courts? Should the advocates and proctors be allowed to keep their monopoly or should the business be thrown open? And should non-contentious business be conducted locally? Kelly's analysis of what Bethell proposed was that the Solicitor-General was going some way towards answering these questions but was mistaken in two respects. In creating a new court which would be another Court
of Chancery in effect, Bethell was ignoring the recommendations of the Chancery Commission; and in failing to provide local justice he was provoking 'a numerical majority of the House of Commons'.

It was agreed after midnight on 26 April that Kelly, with one of his regular collaborators, Lord Stanley, and with George Butt QC, should prepare and bring in a bill to transfer both the testamentary and the matrimonial jurisdictions from the ecclesiastical courts 'to a distinct court'. That Bill had its first reading on 28 April and was intended to have its second reading on 8 May. In fact, it was to suffer the same fate as Collier's Bill, being withdrawn by arrangement on 9 July, after its second reading had been deferred on twelve occasions.

When stripped of its provisions specific to matrimonial jurisdiction, a mere handful of clauses in a Bill of 126 clauses and four schedules, many of the features of Kelly's Bill were not unlike those of Bethell's Bill. For example, the new court was to have the same 'equal jurisdiction with [the] Courts of Common Law, Chancery and [the] Prerogative Court, with respect to matters within its Jurisdiction'; and the county courts would be given the same limited contentious jurisdiction. However, the ways in which the Bill was different were important and later influential, prompting the comment that Kelly's Bill was 'for the country proctors, or rather those who are registrars in the diocesan towns'. Kelly's answer to the demand for local justice was to introduce a tier of seventeen District Offices, subordinate to the metropolitan Testamentary Office. A member of the public taking out probate could choose between the two, provided that the deceased had a fixed place of abode in that District. Original wills would be retained locally, with copies and indices being transmitted regularly to London. On the other hand, Kelly proposed to give back to the 120 or so London proctors, who would be acting as solicitors, the monopoly of non-contentious business conducted in London. Finally, he proposed to use the newly-created Lords Justices of Appeal in Chancery as an intermediate appeal court rather than the House of Lords; and he preferred to entrust to the judge of the new court the power to make its rules and regulations, rather than give that power to the Lord Chancellor, as envisaged by Bethell.

During May, and into early June, there was a good deal of correspondence in The Times and the Law Times in which solicitors argued amongst themselves about the relative merits of Bethell's Bill and Kelly's Bill. The Law Times itself, opposed as it was to centralisation and anxious to improve the lot of country solicitors, warmly
supported the 'local justice' aspect of Kelly's aims, refuted in its editorials all objections to his proposed provision of District Offices and was generally loyal to him throughout that session and beyond.\textsuperscript{30}

Then, on 20 May 1856, as much as nine weeks after the first reading of Bethell's Bill and when it had been several times deferred, John George Phillimore, Liberal MP for Leominster, sought to bring in a narrow reforming measure, exactly as his younger brother, Robert, had done in previous sessions. On this occasion, and with the Government's Bill making no progress, J.G. Phillimore's conservative purpose was to do no more than transfer the power to appoint the judges in the ecclesiastical courts from the prelates to the Lord Chancellor.

Instead, the ensuing debate turned out to be a quite remarkable affair which transcended Phillimore's simple measure and went to the heart of the Government's performance. Phillimore made it clear from the start that he would have preferred the introduction by the Government of a more comprehensive measure of reform, but he recognised that that was being prevented in the present session by other priorities, 'a collision of interests' as he put it. As did others, Bethell welcomed Phillimore's limited but useful initiative and regretted that his own Bill had been 'for the moment delayed'. He also mentioned for the first time in the House that he had been having 'repeated discussions' with Fitzroy Kelly. He had been doing so because, as he later described these contacts, he had understood Kelly to represent a reforming consensus within the ranks of the Opposition. Bethell's sole aim, it seemed, had been to arrive at a Bill which could be agreed and carried that session.\textsuperscript{31}

However, his mistakes on the day were, first, that he continued to encourage the House to think that such a modified Bill could be carried that session, and, secondly, and worse still, that he blamed any delays upon the 'unprofitable talk and discussion' in the Commons over the past two sessions. At that point, Gladstone intervened with an angry and combative display of what The Times was to call 'corrosive oratory', a performance which was greeted with cheers. He took Bethell to task for setting himself up as an arbiter of how the Commons spent its time, attacked successive administrations 'that brought in bills they did not care about...law officers who brought in bills for the exhibition of their skills; and the partisans...who each rode in on his own hobby, and combined with everybody else to upset every other'. If Gladstone could be said to have had any particular targets they were those MPs who sought to earn 'some popularity by throwing Bills upon the table...without any
rational hope of their being passed'. But his strictures applied also to the lawyer-MPs who disagreed among themselves about what should be done and by so doing held up any reforms. 'There are about as many remedies as there are legal members in the House, and that number is not a small one.'

Amid much disarray, Palmerston tried to defend Bethell and to calm the proceedings; Russell commented upon the unsatisfactory state of a parliamentary timetable which caused much needed legislation to be held back; and Malins took the opportunity to draw attention to the anomaly of the Solicitor-General's support for Phillimore's Bill on the eve of what was to have been the second reading of his own Bill. What that indicated to Malins was not only Bethell's lack of confidence in his measure but also the existence of dissent between the law officers and the Lord Chancellor. Finally, in the rough and tumble of that debate, Malins was accused in turn of having 'the obstructive power of stopping the progress of a good measure, as he had done last Session'.

It was not until 10 June 1856, by which time the distractions of the Crimean War, the peace negotiations and the debates about the Treaty were all at an end, that Bethell set out what seemed to be a precise timetable for his Bill. He did so in answer to a question from Hadfield. The second reading was to be on 23 June and the Bill would then be 'pressed through Committee' in order to reach the Lords in the first week of July. Bethell also now disclosed, first, that his original Bill had indeed been modified, following discussions with Kelly, in order to facilitate 'the proof of wills dying in the country', a clear concession to the demands for local justice; and, secondly, that Collier would be withdrawing his Bill now that the Government's Bill was under way.

The Law Times noted with a heavy irony that the Government's Bill 'is not abandoned after all. It only slumbered - it was not dead', but the prescient verdict was that the success or failure of the Bill would depend on how sincerely and resolutely it would be pushed through the Commons. In the event, the second reading stage, and much else during the evening of 23 June, had to give way to a debate on the National Education (Ireland) Bill. It was not until the late evening of 26 June that Bethell's Bill eventually received its second reading, and it was the ensuing debate which sealed the fate of the measure for that session.

What Bethell intended the Bill to contain by second reading cannot be established with certainty because his comments on that occasion were only a preliminary to
what he planned to explain in detail in committee. However, the substance of the proposed amendments can be traced in the second printing of the Bill.\textsuperscript{36}

It became evident that Bethell, having been ‘warned by experience’, had accepted an amalgam of assistance and representations from Kelly and also from Collier. As a consequence, the proposed new court was not to be ‘mixed up with the Court of Chancery at all’, its procedures were to be as simple and non-technical as possible, and appeals were to lie to the intermediate court favoured by Kelly. Bethell had also by now accepted in principle the argument for having a number of District Offices as well as the Testamentary Office in London. His own version of the scheme envisaged probate applications being received locally, when personal property did not exceed £1500, and then being transmitted to the Testamentary Office where probate would be granted and the original wills retained; copies only being provided locally.

Details of his compensation calculations occupied the final part of Bethell’s opening remarks.

Kelly responded supportively, seeming to prefer to raise in committee such awkward issues as the granting of probates locally, the custody of original wills, jurisdiction over both real and personal property and the proctors’ monopoly of business. However, Bethell’s attitude to business that evening, in that he was expecting a House attended by a mere thirty MPs to debate his oral account of a much altered Bill, created problems for him. He not only played into the hands of its principal opponent, Malins, who wanted the measure to be held over, but he also upset its otherwise natural proponent, Sir James Graham. Graham, by now in his mid-60s, would not hold office again and was privately despondent about his wife’s terminal illness and his own state of health.\textsuperscript{37} Despite his long involvement with bringing about change and despite having been Bethell’s colleague in the Coalition Ministry, Graham behaved on this occasion like an old-fashioned Tory backbencher. He found fault with Bethell’s treatment of the Commons, and quite specifically with the proposals, as far as he could understand them, to create a new metropolitan court, to introduce an intermediate appeal procedure, to give only limited powers to the District Offices, to transmit original wills to London and, finally, to compensate the proctors. Collier made his support for the amended Bill conditional upon the new court being ‘essentially a court of common law’, sought an enlarged role for the county courts and, like Graham, questioned the grounds upon which compensation
was to be offered. Collier said more plainly than others had done in public that the offer of compensation rested not upon grounds of justice but upon 'how much was it necessary to give to buy off opposition to the Bill'. The debate disintegrated into exchanges about whether the county courts were equipped to provide any testamentary jurisdiction whatsoever, with the Phillimore brothers on different sides in the argument, J.G.Phillimore in favour and Robert Phillimore against. However, all but one of those who spoke in the debate were agreed in their different ways, and without a division, that the Bill was likely to be 'a step in the right direction'. The exception was Malins. 38

The verdict of commentators upon the debate on 26 June was mixed. The Law Times could just about accept the Bill as 'the illogical, imperfect plan of a practical man, intended for practical use, and adapted to things as they are, made out of very different designs - a piece of patchwork, in fact.' But, fearing also that the measure would now fail, it criticised the performance of the lawyer-MPs in that debate, rather as Gladstone had done previously, 'every speaker declared himself hostile to some part of it, and if each were to have his way the measure would be annihilated'. 39

The Times, for its part, was scathing about a measure which 'now comes before us in a state of déshabillé which shows too plainly how hastily it has been dressed to meet the public gaze'. At the same time, it was more specific about the ways in which the Bill had been altered in order to satisfy conflicting demands. 'The proposition was for a central office; it is now for an office central and local. The proposition had been in former years for making the proposed court a portion of the Court of Chancery; it is now for a court possessing co-ordinate and concurrent jurisdiction with Chancery. The proposition was for a procedure based upon the present procedure of the courts of equity; it is now for a procedure taken from the courts of common law. The Bill comes into Parliament based on centralisation, and by a single touch of the mighty enchanter who gave it being it is suddenly converted into a local and decentralised measure'. 40

Those thunderbolts from Trollope's Jupiter had no effect upon MPs when the time came for the debate on the motion to go into committee at almost 11 pm on 3 July. Nor could the 'mighty enchanter' exercise his magical powers. Put briefly, what the Commons was now being asked to consider was Bethell's original Bill, amended pro forma and reprinted. It had been adapted and enlarged to take account of Kelly's Bill, and it thus provided for District Offices, after a fashion, for 'common law rules
of evidence and trial' in the new court, for the making of rules by the Judge of that court and for appeals to an intermediate court.

There had been much confusion earlier that same evening about whether the Government had planned to proceed with the Bill 'that night'. The fact that Kelly, thinking otherwise, was absent at a cattle show in his constituency, caused some amusement. However, the debate, when it came, did no more than reproduce the attitudes adopted at second reading. Those who could be said to be supporters of the Bill were evidently despondent that the end of the session should be in sight, 31 July, with the Bill still bogged down in the Commons and with the Solicitor-General quite unable to move matters forward. Bethell, beset by disagreement on both sides of the House, admitted that he had committed the error of 'attempting to please all the world', and was now faced with 'the most formidable antagonist of all - I mean time'. On the brink of failure, he explained and defended his literal borrowing of the common law procedure clauses from Kelly's Bill, 'they might have been cut out of that Bill with the scissors... and pasted upon the draught of the present measure'. At the same time, and with a characteristic sharpness of tongue, Bethell blamed the absent Kelly for having misled him as to the support an altered Bill would attract from the other side of the House, and he also rounded upon Graham for having failed to support a former colleague in Government. Predictably, the House decided to defer the committee stage until the following week and it was then again deferred. Ironically, Hadfield had been assured by Bethell on 10 June that the Government had every intention of 'diligently prosecuting' the Bill that session. But by the time that he asked again, on 11 July, about the Government's intentions, the reply from Grey, not Bethell, was that the Bill had been 'withdrawn last night in consequence of the impossibility of its receiving due attention during the present session'. It took some little time for the dust to settle on that further failure.

As late as the beginning of July, The Times was still publishing letters from proctors in which they asked either for the preserving of their monopoly or for compensation. However, the Law Times reacted promptly to the news of the extinguishing of the Bill by bitterly attacking those MPs, without naming names, who had taken up law reform as a fashionable activity, 'merely as a means of obtaining notoriety, or for professional objects, or as a stepping-stone to place, and it would destroy their design if they were obliged to accept another man's scheme instead of flourishing a scheme of their own'.

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The *Law Magazine* took a longer, but not dissimilar, view of events. Earlier in 1856 it had published two scholarly articles about the workings of the Prerogative Court and the history of probate practice. A third article, about Doctors' Commons, appeared in the November issue. All three articles were almost certainly the work of Henry Charles Coote, a senior proctor at Doctors' Commons. As the *Law Times* had done, the third article laid the blame for the miscarriage of Bethell's Bill, a measure which had been 'anxiously watched and expected by the outside public', at the door of a 'trifling and factious House of Commons'. At heart, however, the author remained as admiring of the standards of professionalism and service at Doctors' Commons as he was dismissive of the 'simply contemptible' exercise of testamentary jurisdiction at diocesan level. For those reasons, Kelly's proposed District Offices, 'a fragmentary and dispersive districtal jurisdiction', were seen by Coote as a dangerously retrograde step.

When the 1856 session was over, Brougham could name none since 1828 'in which so little has been effected for the amendment of the law'. In August, the *Law Times* took issue with Palmerston's seeming preparedness to let Parliament have its own way and then to shrug off defeated measures. It deplored his attitude that the fate of Bills such as the Wills and Administrations Bill was 'no slight to the Government', when the *Law Times* felt that the real test of a measure was that it should be what the country needed and that the country would continue to suffer if it was allowed to fail. The epitaph of the *Law Times* upon 1856 was, therefore, that it 'will be memorable in history as the Do-Nothing session'.

More positively, and also more correctly as it turned out, the *Law Magazine* interpreted the setback to Bethell's Bill as being no more than 'temporary', although it did sense that the Bill would need the resolute support of the Cabinet if it was to succeed in the future. The tactical advice which Graham gave to Kelly, as elder statesman to active protagonist, concentrated similarly upon the duties of the Government in the forthcoming session. 'With respect to the Ecclesiastical Courts and the Testamentary Jurisdiction, nothing effectual can be done except by the Government. The whole matter for the present is in the hands of the Solicitor-General; and I shall wait with patience to see how he deals with it after his recent experience'.

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Notes to Chapter 20.


4. Ibid., 2 Feb.1856, p.209.


7. Henry Singer Keating, QC, was Liberal MP for Reading, and later, Solicitor-General, then a judge of Common Pleas, see Stenton, Michael. Who's Who of British Members of Parliament, 1832-1885. Hassocks, Harvester Press, 1976, i, p.217, and DNB, x, p.1163; William Atherton, QC, was Liberal MP for Durham, counsel to the Admiralty, and later Solicitor-General and Attorney-General, see Stenton, op. cit., p.14; Thomas Erskine Perry had been Chief Justice of Bombay, see DNB, xlv, pp.38-40; Patrick McMahon was Liberal MP for Wexford and a barrister, see Stenton, op. cit., p.254; and George Butt, QC, was Conservative MP for Weymouth, see Stenton, op. cit., pp.59-60.

8. George Frederick Muntz, a 'provocative radical', had been MP for Birmingham since 1840. He was not a lawyer but a successful manufacturer, see DNB, xxxix, pp.313-15.


10.P.P.1856 (24) iii. A Bill...to transfer the Testamentary Jurisdiction...to the Superior Courts of Common Law and the County Courts; CJ, 111, 1856, pp.28,30.


13. For Cranworth's early warning about the group of measures to be introduced, see LT, xxvi, 8 March 1856, p.253.

14. P.P.1856 (74) vi. A Bill...to abolish the Jurisdiction of Ecclesiastical and Peculiar Courts in England and Wales relating to Wills and Administrations, to establish a Distinct Court of Probate and otherwise to amend the Law in relation to the Administration of Estates of Deceased Persons; CJ, 111, 1856, p.102.


16. LT, xxvii, 22 March 1856, pp.2,4; 29 March, pp.9,15-16; 5 April, pp.27-29; 12 April, p.33; 19 April, pp.45-47.

17. 'A Country Proctor' later claimed to have persuaded Bethell to have waived that exclusion, see LT, xxvii, 3 May 1856, pp.72-73.

18. LT, xxvii, 5 April 1856, p.29; 12 April, p.33.

19. Ibid., 12 April, p.37.

20. Ibid., 19 April 1856, p.41; 26 April, p.57.


23. John George Phillimore, Liberal MP for Leominster since 1852 and eldest brother of Robert Phillimore, was a barrister, 'learned jurist' and much interested in law reform, see DNB, xlv, p.185. For accounts of the Phillimore dynasty, see Kemp,


25. For Kelly's open letter to Brougham, 22 Sept.1856, see LT, xxvii, 22 Nov.1856, pp.106-07; and The Times, 4 Dec.1856.


27.LT, xxvii, 3 May 1856, pp.72-73.

28.P.P.1856 (114) vi. A Bill... to transfer to a Distinct Court the Testamentary and Matrimonial Jurisdiction of the Ecclesiastical Courts.

29. The Times, 17,27,29 May and 2 June 1856; LT, xxvii, 31 May, p.115.

30.LT, xxvii, 17 May 1856, pp.89-90, 97: 24 May, p.101. These issues of decentralisation were addressed fully in the following January when the Law Times published its credo, see LT, xxviii, 3 Jan.1857, pp.197-98.

31. Hansard, 3d.ser., cxliii, 3 July 1856, c.301.

32.Ibid., cxlii, 20 May 1856, cc.452-65; The Times, 21 May; 22 May. All that Gladstone's diary reveals is that he was in the Commons between 4.30 and 7.30pm that day, and that he 'Spoke on the Eccl. Courts Bill', see Foot, M.R.D. and Matthew, H.C.G., eds. The Gladstone Diaries. Oxford, Clarendon Press, v, 1978, p.135.

33. Hansard, 3d.ser., cxlii, 10 June 1856, cc.1227-28; The Times, 11 June 1856; LT, xxvii, 14 June 1856, p.135.
34. LT, xxvii, 14 June 1856, pp.133-34.


36. P.P.1856 (204) vi. Bethell's Bill 'as amended in committee'.

37. GP, 1 Dec.1856, Graham to Gladstone, 'I am resigned to decay. I am ready for falling'.


39. LT, xxvii, 5 July 1856, p.169.

40. The Times, 30 June 1856.

41. Hansard, 3d. ser., cxliii, 3 July 1856, cc.266-67.

42. Ibid., cc.296-305; The Times, 4 July 1856; LT, xxvii, 5 July, p.172.

43. CJ, 111, 1856, pp.319,333.

44. Hansard, 3d. ser., cxlii, 10 June 1856, cc.1227-28.

45. Ibid., cxliii, 11 July 1856, cc.679-82; CJ, 111, 1856, p.338.

46. The Times, 2 July 1856; 4 July.

47. LT, xxvii, 12 July 1856, p.181.


51. LT, xxvii, 2 Aug.1856, p.221.

52. LM, II, Nov.1856, pp.81-87.

53. GP, 30 Oct.1856, Graham to Kelly.
Chapter 21: The passing of the Probates and Letters of Administration Bill, 1857; 'a really great measure of law reform, comprehensive and complete, although not so designed originally'.

This chapter will focus narrowly upon events in Parliament in 1857. That was where important and enduring changes in testamentary jurisdiction were openly negotiated and achieved within the space of seven months, despite the interruption caused by a General Election.

What was remarkable about that period from February to August 1857 was that the Government, under the unlikely but crucial guidance of Palmerston, at last succeeded in bringing about the abolition of the testamentary jurisdiction of the ecclesiastical courts after twenty-five years of frustrated effort. A deceptively simple reason for that success, and the changes which accompanied it, was that the Government produced a measure which purported to offer something to everyone. What proved to be complicated, however, was the process by which the Government was forced to give even more than it had intended; those concessions were necessary in order to satisfy interested parties and to save the Bill. As will be shown below, the most critical factors in the final stages of the Bill were the scramble for business between the London proctors and the country practitioners; the argument about compensation for loss of profits; and the unwillingness of a number of predominantly Northern MPs to accept centralised arrangements for local needs.

So, in its eventual form, the Bill offered a temporal jurisdiction in the place of the jurisdiction of the spiritual courts, as the Chancery Commission had recommended in 1854 and as was generally accepted by then. It offered a separate Queen's Court of Probate in London to deal with significant contentious matters, a solution supported by those who wanted to see the centralisation of specialised justice. It offered a network of District Registries for those who demanded local probate arrangements, and also gave a limited contentious jurisdiction to the county courts for those who believed that those courts had a greater part to play in local justice. It opened up the testamentary business, which satisfied solicitors and barristers; and it came round to compensating the proctors for the loss of their monopoly. Finally, but almost incidentally, it 'put an end to Doctors' Commons'.

There was a good deal of speculation in the closing months of 1856, among law reformers generally and those concerned with testamentary jurisdiction in particular,
about what would be done in the new session. Brougham told Aberdeen that Parliament would be 'greatly occupied with Law Reform' rather than foreign policy. As early as October 1856, the Law Times was anticipating that Bethell, assisted by Kelly, would be bringing in a Bill to deal with testamentary jurisdiction. However, no sooner had Brougham forecast that Kelly would have the leading role than rumours were circulating that Kelly's 'practical' measure would be abandoned in favour of a Government Bill, 'some crude scheme of an official who thinks that laws can be made symmetrically in chambers without reference to things as they actually exist'. Those rumours were again reported at the beginning of December amid fears that disagreement among law reformers might once more prevent legislation. Meanwhile, Kelly's apologia for his Bill, in the form of the letter to Brougham, appeared in print in the Law Times and later in The Times where it provoked a critical response from some readers.

A quite separate circumstance which preceded the new session was an enforced alteration in the composition of Palmerston's team of law officers. At the beginning of November 1856, the death of Jervis as Chief Justice of Common Pleas created a vacancy which Cockburn filled. It was said at the time that the demands of the office of Attorney-General were affecting Cockburn's health and that he was choosing to take on lighter duties, although Holdsworth has suggested that he later came to regret the move. As a consequence, Bethell was promoted to Attorney-General and was succeeded as Solicitor-General by the Peelite, Stuart Wortley. In turn, Wortley had to be replaced by Henry Keating in the following June on grounds of ill-health. So, by November 1856 and at a time when the planning of the legislative programme was getting under way, Palmerston's legal team consisted of Cranworth as Lord Chancellor, Bethell as Attorney-General and Wortley as Solicitor-General.

Possibly emboldened by his new authority, Bethell told his Aylesbury constituents later that month that the 'abolition of the Ecclesiastical Courts' was one of several named law reform measures which the Government had in contemplation for the next session. That indiscretion earned him a rebuke from Palmerston. By December, however, the Law Times did know and did confirm that the anticipated collaboration between Bethell and Kelly had been set aside and that the Government would be introducing its own Bill, although what it would contain was 'yet a mystery'. In that same issue, in which Collier's response to Kelly's apologia
was also printed, the *Law Times* suggested with an exact foresight what such a Bill should include. Since the avoidance of centralisation was paramount, it would be necessary to provide not only local probate arrangements but also some level of contentious jurisdiction for the county courts; to strike a balance between what wills were held in central and in local registries; to open up the business 'to the whole Profession'; and to offer proper compensation to those injured by the changes.¹⁸

A Special Committee of the Law Amendment Society had carried out a searching scrutiny of the measures prepared by Bethell, Collier and Kelly in the previous session. It presented its report and resolutions to the Society and they were adopted on 19 January 1857, some two weeks before the beginning of the session. Where the Committee was at odds with what had gone before was in suggesting that the new court should draw upon puisne judges from each of the common law courts; that it should not be a court of construction in competition with the Court of Chancery; that there should be a better spread of District Registries; and that the county courts should have a greater role to play in the provision of local justice. The report and resolutions were printed *in extenso* in the *Law Magazine*, with which the *Law Review* had by then merged.¹⁹ The resolutions also appeared in the *Law Times* where they were commended because they were 'decidedly opposed to centralisation'.²⁰ However, one account of a further meeting of the Society, on 9 February, suggested that the civilians present, Pritchard and Waddilove, were not happy with the report's common law bias.²¹

Similarly close to the beginning of the session, the Liverpool Law Society looked forward to what it believed would be the reintroduction of Bethell's Bill,²² and the *Law Magazine* published a thoughtful article which took for granted that the ecclesiastical courts were doomed and concentrated instead on how non-contentious business should subsequently be handled. It happened to favour control from London and the facilitating of business *in preparation* by the District Registries.²³ Despite these pressures and expectations 'out of doors', the Speech of the Lords Commissioners was vague and anti-climactic at the beginning of the session on 3 February.

The passing reference to the proposed 'consolidation and amendment of important portions of the law' was described by Derby as a 'meagre bill of fare', and he raised again the rumours of 'differences of opinion between high legal authorities'. However, Cranworth immediately remedied the situation by stating that the reform
of the ecclesiastical courts was 'The first subject to which the Government had
directed their attention', and by promising the early introduction of three bills to
reform testamentary jurisdiction, divorce and church discipline. The welcome
given by the Law Times to that initiative was tempered only by the fear that any
connexion between the three measures would make them the more vulnerable. 'It is
easy to foresee the use that will be made of this by the common enemy, who, when
three sides are open to attack, will choose the weakest, and, having defeated one, will
claim a victory over all'.

Then, at first reading on 10 February, Cranworth produced a 'sketch' of a Bill which
was calculated, as the Law Times put it initially, 'not to be as perfect as possible but
to reduce the amount of opposition to the smallest possible limits'. In brief,
Cranworth was so dividing the cake that in the place of the hundreds of ecclesiastical
courts there was to be a Queen's Court of Probate in London, presided over by one
of the Vice-Chancellors; the duties of the judge were to be no more than
administrative, sending issues on matters of fact to 'wherever they can most
conveniently be tried'; the new court was to have a jurisdiction over wills of real
property only in exceptional circumstances; contentious business was to be thrown
open to all branches of the profession, although for the time being the London
proctors were to be allowed to retain their monopoly of non-contentious business, an
arrangement which avoided compensation; the diocesan registries and their staff
were to be preserved and designated as District Registries, which again avoided
compensation; those Registries were to be increased to thirty or so for the
convenience of the public, and they were to be given jurisdiction where the personal
property of a local resident was less than £1500; wills so granted would be valid
throughout the Kingdom regardless of where the property itself was, although there
would still be the overriding option to have any will proved in London; and, finally,
disputes about wills of personal property under £200 could be decided in county
courts.

Cranworth met with a discouraging response, as he later described it at second
reading.

Both Lyndhurst and Campbell warned him that his proposals would run into
difficulties later if the new court was to be in any way linked with the Court of
Chancery, and Brougham pursued what he saw as the illogicality of establishing 'a
new court under an equity judge in order to exercise a common-law jurisdiction'.

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When it came to the second reading on 23 February, Cranworth clarified or expanded upon his intentions as to compensation and local justice.

First, he still drew a distinction between compensation for loss of office and compensation for loss of profits by practitioners, but, since the new court in London and the new registries were now to be staffed by existing officers, the question of compensation would not need to arise for them in practice. Secondly, he denied that he was promoting centralisation. Instead, he claimed to be retaining local registries by allowing original wills to remain where they were proved because it would be 'distasteful to people in the country' to do otherwise, and to be giving an expanded jurisdiction to the county courts. Where Cranworth did not yield ground in order to placate his critics was over his deployment of a Vice-Chancellor as judge of the new court. That was a choice which recognised the expense of adding to the complement of judges when the judicial duties in the new court were likely to be light.

On this occasion, St Leonards chided Cranworth for changing his mind from session to session about what to do with the jurisdiction. He recorded his unease about the misuse of a Vice-Chancellor and indeed about any link with the Court of Chancery, and he made it clear, as did Campbell also, that he would seek to alter the Bill in committee. 29

Although Cranworth's stated intentions at second reading were treated with derisory brevity by the Law Chronicle, 30 the Law Times was quick to applaud the 'anti-centralisation tendencies' of the Bill. It felt that the 'golden prize' of lucrative testamentary business would no longer be confined to London and protected by powerful interests there, but would instead be distributed over the whole country. What did rankle with the Law Times, however, was that one of the reasons given by Cranworth for letting the London proctors keep their monopoly of non-contentious business had been that they exhibited a greater probity than did solicitors. That remark was taken as being gratuitously insulting to the profession, when the real reason for such a decision, according to the Law Times, was that the Government lacked the courage or the power to face up to those who supported the monopoly. Having said that, it was predicted that the Bill would be roughly handled in committee, both in the Lords and the Commons, and that it could still fail like the measures before it, 'stifled by the multitude of its friends', that is to say, by the lack of agreement over matters of detail among those who supported the reform in principle. 31
In the event, all the skirmishing in the Lords and all the attention paid to the Bill outside Parliament came to naught, for the time being at least. Cranworth had to tell Lyndhurst on 9 March that the Government would not be proceeding with the Bill 'in the present state of Parliament', although he added, confidently, that it would be reintroduced 'with some alterations' when Parliament reassembled. The background to Cranworth's statement was that in March 1857 Palmerston had been censured and defeated in the Commons, by a combination of Conservatives, Peelites and Radicals, over his handling of a diplomatic incident with China. His immediate reaction was to fight a General Election, making a patriotic appeal to the electorate and relying upon his considerable popularity with the public. The result was a personal triumph for Palmerston and one which gained him the support, to some extent at least, of about 370 MPs.

When the dissolution of Parliament was known to be imminent, the Law Times had recognised that the law reforms promised at the beginning of the session were 'already dreams of the past'. It had then urged its professional readers to do something about being under-represented in the Commons, 'The Solicitors in half the boroughs in England can return any candidate of their choice'. So, whilst the Law Magazine subsequently regretted the loss of a number of MPs who could have been counted upon as friends of reform, it welcomed the prospect that 'a powerful majority ... assembled round the government, will at once remove all excuse for neglecting the measures of law amendment which had been promised, and in part brought forward, before the termination of the short session'. When the reintroduced Bill later reached the Commons, the Law Magazine noted the 'handsome spirit of co-operation manifested by the members of our profession'. And, in a similar spirit, the Solicitors' Journal published a list of the barristers and solicitors returned to the new Parliament and hoped for a 'practical working measure' to deal with testamentary jurisdiction. The truth of the matter was that that phalanx of lawyers was to be involved not only in shaping but also in haggling over the details of the reintroduced Bill during its Commons stages.

Meanwhile, at the beginning of the new session on 7 May, a testamentary jurisdiction measure was promised in the Lords. Then, on 11 May, Cranworth, who had remained Lord Chancellor despite a rumour that he would be replaced, presented the Government's Probates and Letters of Administration Bill at first reading and it was ordered to be printed. The measure moved briskly to second
reading in the Lords on 18 May, to the committee stage on 22 May, to the report stage on 28 May and to third reading on 5 June. That speed of progress through the Upper House, despite the accompaniment of proper debate and disagreement, was entirely attributable to the alterations made by Cranworth in the brief interlude between sessions and to the flexibility he displayed at each Parliamentary stage. He was very much aware that the 1856 Bill 'was not very cordially received in the Commons' and for that reason he had persisted in reintroducing it in the Lords, but in a form 'free from what appeared to be the vices of the former Bill'.

The issues which were argued over in varying degrees during the successive Lords' stages in 1857 were, first, any links with the Court of Chancery, be it choice of judge or where appeals lay; secondly, the application of probate procedures to real property; and, thirdly, the compensating of proctors for loss of profit.

As early as first reading, Cranworth said that he would be separating the new court and its judge from the Court of Chancery and its judges, and that he would be doing so not out of conviction but 'out of deference to the opinion of the House'. It became clear at second reading that Cranworth now planned to appoint the Judge of the Prerogative Court, still Dodson, to preside over not only a new probate court but also a new divorce court, as a consequence of concurrent legislation. Even then he doubted if that double work-load would sufficiently occupy a separate judge. Having taken advice from Lushington at the Admiralty Court and having drawn upon the evidence of the sittings at Doctors' Commons, he was further inclined at that time to require the appointed judge to discharge 'all the duties of Admiralty, Matrimonial and Probate Courts'. In fact, Cranworth's account of Lushington's current thinking about the volume of Admiralty business was challenged at the committee stage by the second Baron Wynford; whereas Campbell had said at second reading that the appointment 'avoided the very appearance of approaching the Court of Chancery', although it should be ranked no higher than puisne judge.

Cranworth also proposed at second reading, in response to earlier criticisms, that appeals from the new court should lie to the Judicial Committee of the Privy Council and not to the newly-created and intermediate Court of Appeal in Chancery preferred by Kelly. Again he was recognising that 'no proposition connected in word or name with the Court of Chancery would have any chance of success'. That matter was resolved in committee to Cranworth's personal satisfaction when both St Leonards and Campbell agreed that the House of Lords should be the proper tribunal
of last resort 'for all questions respecting the common law of England'.

As to extending probate to real property, Cranworth explained at second reading that he had come round to thinking that the recommendation to that effect made by the Chancery Commission in 1854 would be 'rather injurious than beneficial'. What he now had in mind was that the new court should cite those parties with an interest in both the personal and the real property whenever the validity of a will was contested. That procedure would avoid anomalies in what was likely to be no more than a handful of cases. Such an extension of what had been the ancient but limited jurisdiction of the ecclesiastical courts was challenged by St Leonards with an overt appeal to landed interests, an appeal which Cranworth deplored. However, an amendment to confine the Bill entirely to personal property was defeated by fifty-six votes to thirty-five. Among the lawyers present, St Leonards was the only one to support the amendment. Ranged against him were Cranworth, Campbell and Wensleydale, together with the seven prelates who were in the House at the time.

Finally, the vexed question of compensation was addressed during the Lords' stages. The scale of the problem relative to loss of office seemed to have been reduced by the proposed retention of the officers in Doctors' Commons and in the diocesan registries. Cranworth was even willing, at second reading, to be lenient towards those who had accepted office since 1836 in the face of legislation in that year which would have denied them compensation. Where Cranworth continued to draw the line, however, was against compensating the entire profession of proctors for any loss of profits. It was for that reason, as much as any principle, that he preferred to let them keep their monopoly for the time being provided that their charges were controlled. That display of pragmatism gave him no problems in committee, but, by the report stage on 28 May, St Leonards was clearly uneasy about the appearance of partiality towards proctors who were officers and harshness towards those who were merely practitioners. Both Malmesbury and Donoughmore spoke up then for the London proctors whose profits were going to be considerably reduced by the countrywide redistribution of non-contentious business, or so it was claimed. In support of that contention, Malmesbury presented a petition from the London proctors in which they estimated that they would lose 79% of their income, and said that what they wanted was either to retain their monopoly or be properly compensated. Cranworth, who had received a deputation from the same proctors, again refused to accept that there was any case for compensation for loss of profits.
Instead, he took the line that all reforms for the general good must inflict some hardship upon those who had prospered 'by the system which was about to be overturned'.

Cranworth's Bill had been welcomed by both the *Law Times* and the *Solicitors' Journal* although the former had initially feared that Palmerston, secure in his 'Circumlocution Office', would be offering the public no more than a harmless diversion. Both weeklies followed the Bill's progress through the Lords' stages in a generally approving fashion, once it had become clear that Cranworth was not attempting to preserve the previous monopoly of contentious business. If the *Law Times* sometimes seemed less approving than its rival that was because it had occasional doubts about what the Bill would do for solicitors, and doubts also about the future of the advocates. By the end of the committee stage in the Lords, the *Solicitors' Journal* was predicting, correctly, that compensation would inevitably become the dominant issue at the Commons' stages if the proctors' monopoly of non-contentious business were to be further reduced. And, for all its preoccupation with the securing of business for solicitors, the *Law Times* managed to present a fairly sympathetic account of the likely predicament of the London proctors. It printed extracts from their petition and suggested, magnanimously and prophetically, that Bethell would probably consent to a clause compensating them for loss of profits when the Bill reached the Commons.

The chronology of the Probates and Letters of Administration Bill, as it reached the Commons and passed through its successive stages, can be briefly set out.

It received its first reading on 8 June without debate. The plan had been to have the second reading a few days later, but that stage was twice deferred and after midnight on both occasions. When the debate did take place on 26 June, it was so detailed and so prolonged that it occupied forty-four columns in *Hansard*. The committee stage which followed, punctuated by adjournments and deferments, was spread over a four or five week period from the beginning of July to 12 August. The Bill was then passed, with amendments. There was a hurried coda, as the Lords considered the amendments made in the Commons, before the Act received the royal assent late in August 1857. The most critical stages in the passage of the measure had been the second reading on 26 June, and the five parts of the committee and report stages on 6 July, 10 July, 20 July, 3 August, 4 August and 11 August. The main issues in the Commons were much as they had been in the Lords, namely,
the function of the new court and its judge, what kind of local courts were needed and where they should be located, and how compensation should be handled. Each of those issues in turn had its own ramifications.

Most of the MPs who spoke in the debates were lawyers and some were new to Parliament. They were motivated not only by their own brand of law reform but also by the concerns of their constituents and by the demands of self-interested petitioners. Several of them, notably Rolt, now a new MP, Perry and Napier, managed to be both partisan and yet amenable to realistic solutions. However, it took several debates and many columns in Hansard for a compromise position to be reached.

Bethell's announcement at second reading that the ecclesiastical courts were to be stripped of their testamentary jurisdiction met with general approval. Where he ran into difficulties was over the proposed appointment of a separate judge, but one who would have to refer disputes to the superior courts of common law. Collier argued that it would have been better to have transferred the jurisdiction to those courts in the first place, and especially so since, as he asserted, the success of the county courts had left the senior judges underemployed. He also accused Bethell of simply carrying out the wishes of a Lord Chancellor who had been forced into that choice reluctantly. The Law Times was certainly convinced that that decision had been taken so that the Government could be seen to be denying the transferred business to both of the competitors, common law and equity, even if it meant that the new judge would be underemployed.

In the event, Collier had little direct backing. Napier and Bowyer agreed with him to the extent of thinking that issues involving disputed facts would be better dealt with before a jury directed by a common law judge, but Cairns, Walpole and Ayrton, another new MP, and later Atherton, an erstwhile supporter of Collier, all preferred that the new judge should be given 'complete and exclusive jurisdiction' within his own court. Keating, the new Solicitor-General and another who had supported Collier's Bill as a back-bencher, now sang the praises of the Government's solution and specifically doubted the preparedness of the common law judges to take on extra business.

Both those related issues, the powers of the new judge and the workload of the common law judges, were settled in the initial phase of the committee stage on 6 July.
First, Bethell was able to convey to the House the ukase of Chief Justice Campbell that the common law judges were too busy to take on any part of the testamentary business. Conveniently for Bethell, Campbell had just been chairing a Royal Commission into the judicial business of the superior courts of common law, a circumstance which gave even greater weight to his opinion.\(^{60}\)

Secondly, and consequentially, Bethell announced that the Government would now be reverting to what had been the recommendation of the Chancery Commission, namely that the new judge would be given 'powers of deciding issues' if need be. He also accepted the opinion of Kelly, who had missed the second reading, that it would not be correct procedurally for Parliament to designate the Judge of the Prerogative Court as the new judge automatically. None of these issues were ever again in contention in the Commons' stages.

There was also some early skirmishing about where appeals should first lie from the new court and from the county courts. The Bill had left the Lords so amended that appeals from the new court would lie to the House of Lords. The alternative case for preserving the status quo, the Judicial Committee, was put forcefully at second reading by Hugh Cairns, Conservative MP for Belfast and a future Lord Chancellor,\(^{61}\) and then by his old pupil-master, Malins. However, Bethell, Keating, Collier, Rolt, Henley, and Napier all wanted appeals to follow a course consistent with the common law courts, and Bethell in particular was anxious to avoid any collision with the views expressed by senior lawyers in the Upper House. The outcome was that the Bill was not further amended in that respect, but it was decided by MPs, again for reasons of consistency, that appeals from the county courts on points of law should lie to the new Court of Probate.

The second main issue over which MPs argued with the Government and amongst themselves was what the relative extent of central and local testamentary jurisdiction should be, or, expressing it differently, what the division of business should be.

The Government proposed to create forty-one District Registries to handle non-contentious probates up to a value of £1500, and to use the existing diocesan registries and officials wherever possible. That was in line with the conversion of Doctors' Commons and its officials into a new court. Wills above that limit of £1500 were required to be proved in London, but there was also an option for any parties to take wills to London if they wished. To avoid one of the basic criticisms of earlier Bills, original wills were to be retained where they were proved, either in the
country, with copies sent to London, or in the metropolitan registry. What was not jettisoned by the Government was the requirement that all pre-existing wills be transferred to London for safe-keeping. Finally, the county courts would now be allowed to have a contentious jurisdiction with regard to both personal and real property 'where the amounts involved were very small'.

The extent of local justice now offered by the Bill 'at the poor man's door' was welcomed by Henley at second reading, although he was less happy at the prospect of the older wills being 'hustled together' and sent to London. However, the serious difficulties for Bethell lay in the reaction of Collier, supported by Perry. Collier could not accept the glaring inconsistency of using both the county courts and the former diocesan registries, 'one set of districts for trying the contentious, and a different set for trying the non-contentious, questions'. He also thought that the proposed District Registries were too few in number and too inconveniently distributed by comparison with the network of county courts. By the committee stage on 6 July, Perry, with support from Atherton and Collier, tried again to forge a legislative link between the county courts and the District Registries in the interests of accessible justice. He proposed that the registrars should be attached to the county courts as well as being local officers of the new Court of Probate. That amendment was only withdrawn when Bethell stressed that his plan was 'founded as far as possible upon the existing order of things', upon limited changes and the logic of keeping the business in the hands of experienced diocesan officers and avoiding compensation.

Whilst that attack by Collier and his allies was getting under way, a number of Yorkshire MPs begin their own squabble over where the District Registries should be located. Only Cairns thought to question the profligacy of the Government in undertaking to provide expensive new local registries to please local interests, when the original wills could have been stored more safely and more economically in London.

Another vital aspect of the provision of local justice was the limit which was to be placed on the value of country probates. William Adams, another new MP, from Lincolnshire, had been the first to ask about revising the limit of £1500 contained in Clause 40 of the Bill. The significance of any such revision had gone unregarded at second reading, but it came to be seen to be as so fundamental that arguments about revising or not revising the limit almost wrecked the entire measure. James
Whiteside took up the same complaint early in committee on 6 July, arguing that the new District Registries should be allowed to provide cheaper justice for a wider public. Matters became critical later in that same debate when Joshua Westhead proposed an amendment to actually remove the limit of £1500. Westhead, then MP for York and previously MP for Knaresborough, was a manufacturer not a lawyer, although he was later to describe himself as acting for 'a class of gentlemen - mercantile men and solicitors of eminence'. What Westhead objected to was the inconvenient and centralising nature of a provision which seemed intended 'to take business out of the hands of proctors in the country and transfer it to Doctors' Commons', a simple anti-centralisation argument. It was a cry which had been first heard in the early 1830s in the self-serving pamphlets of Swan and Barnes, but it was now being uttered in the Commons by Westhead and by several other North Country MPs, Cayley, Mowbray and Roebuck. It also came at a time when such local feelings about central government generally were reaching their height; and the lawyer-antiquarian, Joshua Toulmin Smith, had launched his idiosyncratic but powerful polemic against the idea of centralisation as recently as 1851.

Joseph Henley was challenged, as a former member of the Chancery Commission, to explain how such a limit had been determined but was unable to do so. It was only later in the committee debate, on 20 July and after a tactful silence on his part, that Graham revealed that the Chancery Commission had recommended the limit of £1500 not as a matter of principle or precise calculation but purely as a compromise between £1000, which some Commissioners had wanted, and £3000, which others had wanted.

Bethell's response to Westhead's dangerous amendment was to remind the Commons that the evidence given to the Chancery Commission had stressed the need for a central court which would impose uniformity upon testamentary jurisdiction and prevent the kind of fraud and mistakes which could arise from a 'comparatively insufficient examination' carried out locally. With that remark Bethell succeeded in uniting a Radical and a landed Tory, but both with constituencies far from London. Roebuck, MP for Sheffield, thought Bethell was being offensive towards country officials, and Sir John Trollope, Conservative MP for Lincolnshire South, went back to questioning the Chancery Commission's reliance upon evidence from witnesses who were almost all London practitioners.

The loose alliance of MPs in favour of the provision of decentralised justice was so
powerful that, at the close of the committee stage on 6 July, two vital divisions went against a Government which should have been able to command a large majority. The first amendment removed the limit of £1500 on country probates by 162 votes to 131, and, to complement that, the second amendment made country probates in personal property valid throughout the Kingdom by 141 votes to 139. 'The announcement of the numbers was received with great cheering', said The Times, and the MPs who had taken part in the debate were reported as feeling that the measure would thus become 'more widely useful'.

As Sir John Trollope later put it, these were decisions taken on a matter of principle by the Commons, and taken in the face of Bethell's warning that the Bill could be destroyed if the Government was not allowed to persevere with it. Despite that risk, the Law Times greeted such a 'formidable blow at the principle of centralisation'. It also told its readers, shrewdly, that the enforced surrender of so much more non-contentious business by the proctors at Doctors' Commons would also have the effect of strengthening the case for them to be compensated for loss of profit. That concession could, in turn, 'only be on condition of the whole business being thrown open to the whole Profession'. But the increased prospect of the proctors being compensated, whatever the other benefits might be, was still much regretted in the Solicitors' Journal.

Meanwhile, Bethell put a brave face on things, telling Trollope on 10 July, in advance of the resumed committee stage on that day, that he thought the Commons 'would not obstinately adhere to the error into which it had fallen'. What he then offered in committee, after warning MPs again about the dangers to uniformity in accepting Westhead's amendment, was the raising of the local probate limit to £3000. He was immediately informed by Westhead, who had the backing of Trollope and of Colonel Smyth, the other York MP, that the Yorkshire business and professional interests he represented would regard that offer as 'utterly preposterous'. Westhead questioned the basis of Bethell's alarums about fraud and suggested that the Government could easily afford to have the District Registries competently staffed. He also produced statistics from 1851 to 1855 to show that 4500 of the wills proved at Chester and York alone had an individual value in excess of £1500, and he made it clear to Bethell that the 'persons having such weighty interests in those courts would never consent' to what was now being offered. Some MPs, such as Hudson and Collins who both had Northern interests, dismissed the
Government's attempts to defend such a limit as no more than 'a device to bring the practice of the country up to London'.

Bethell had just begun to complain again that the Government was being forced to depart from the principle of subjecting all wills to the kind of 'perfect examination' available only in London, when he was interrupted by Palmerston. The Prime Minister noted briefly that the sense of the House was against the imposition of any limit; he did not think that such a detail should be allowed to delay the Bill for yet another year; and he accepted on behalf of the Government that Clause 40, as amended on 6 July, should be allowed to stand. 74

The effect upon Bethell of that public humiliation can be deduced from a bitter remark he made before the committee stage was adjourned, namely that the evening's proceedings had provided evidence of 'the singular power of the country attorneys over certain Hon. Members of that House'. That charge was promptly denied by three different MPs. 75 And for the Law Times, with the interests of its country readership at heart, it was enough for the moment at least to savour the fact that 'centralisation staggers under the blow that has been inflicted upon it'. 76

But Bethell's difficulties were not over. On 20 July, the MPs turned their attention in committee to yet another restrictive clause introduced by the Attorney-General. That clause insisted upon the transfer of stocks and shares by a testator being removed from the jurisdiction of the District Registries and sent to London for 'a metropolitan probate'. The clause was opposed not only by Trollope, Salisbury, 77 Henley, Malins and Kelly, but also, eventually, by Graham. He emerged from a long silence to argue that if the House had been convinced that there were good grounds for giving unlimited non-contentious jurisdiction to the District Registries then there were equally good grounds 'for extending the same power to the country registrars in regard to stock'. Confronted with that weight of opposition, Bethell's tactic was, first, to repeat his argument that giving any testamentary jurisdiction to a local tribunal was a departure from principle; secondly, to question the competence of country officials to handle so much responsibility; and, thirdly, to suggest that the Bill was once more at risk. He succeeded only in making matters worse. 'Anxiety', 'surprise', 'embarrassment' and 'astonishment' were terms used by Graham, Henley, Russell and Malins successively in reaction to Bethell's remarks, and the result was a second intervention by Palmerston in order to rescue the Bill. The Prime Minister accepted that a metropolitanprobate would be needed in the case of Bank
of England and East India Company stock, but not otherwise. Bethell, again humiliated, was obliged to withdraw his clause.

By this stage, the *Law Times* was in no doubt about what was at stake and where loyalties lay. 'The real fight is for the business itself; whether it shall be sent to London or kept in the country. The Attorney-General is in the interest of the London proctors; the majority of the House of Commons is for the Profession in the provinces'. Not surprisingly, in view of Palmerston's overriding interventions, the *Law Times* also found that 'The strangest part ... was the cavalier treatment by the Premier of his own Attorney-General'.

Greville, in his highly readable account of the latter stages of the Divorce Bill about that time, described Palmerston's similar preparedness to agree 'certain amendments in order to carry the Bill', and Bethell's evident 'disgust' at being forced to consent to concessions on that measure also.

The final aspect of local jurisdiction to be discussed in committee was the distribution of the District Registries, as listed in Schedule A to the Bill. A number of rank and file MPs, most but not all from Yorkshire and armed with competing petitions from their constituents, argued amongst themselves about which towns should be allowed to benefit from having a local registry. York, Wakefield and Leeds had their supporters, for example, as did Bury St Edmunds and Ipswich. Even one of the protagonists, Beckett Denison from the West Riding, was moved to comment that 'every Hon. Member appeared to be anxious to make the place he represented the place of registry'.

Compensation was the third main issue to be considered by the Commons. Bethell, speaking about those appointed to offices in ecclesiastical courts after 1836, admitted that 'one could not bear to turn them adrift'. In line with what Cranworth had said earlier about that group, he announced that the Government intended to treat such men as holding office during pleasure so that they could be placed in a second category of entitlement to compensation for loss of office if need be.

However, the Bill had firmly denied any right to compensation for loss of profit. Quite apart from the principle involved and before Westhead's amendments were carried, it was already being generous, in its original form, to the proctors at Doctors' Commons. They were to be allowed to retain a monopoly of the non-contentious business in London; they would receive some business by direct application from the country; they would benefit from the higher value probate
business denied to the District Registries; and they would secure a share of the valuable contentious business reserved to the new court.

The prospects for the relatively few country proctors were markedly different, however, because they were to be excluded from practising in the new District Registries unless they were also solicitors. At second reading, Henley mentioned the plight of the proctors at Chester, Exeter and York, and both Westhead and Headlam asked for fair treatment for the eight proctors and their clerks at York.

Malins, however, who was in regular communication with the London proctors, was concerned not just with individuals and matters of detail but with the more general principle of compensation for loss of profit. He said at second reading on 26 June that he thought it inconsistent on the part of the Government to make any distinction between office and practice, and asked 'was the House prepared to annihilate...120 families and send them destitute into the world'. His calculations, although the figures fluctuated within the space of a single speech, were that the London proctors would be left with between a quarter and an eighth of the income they had enjoyed, close to what they themselves had claimed. He threatened Bethell that, if the Government did not concede the principle of 'fair and just compensation' for practitioners, it would 'yet meet with difficulties in passing the Bill', a threat he repeated in committee on 6 July.

Many other MPs had been anxious to speak on the subject at second reading, rather than waiting until the committee stage. Cairns was the most cogent speaker on this and other aspects of the Bill. He taxed Bethell for failing to recognise that the imposition of the £1500 limit, as it then was, would considerably reduce the income of the country proctors. Others were divided in their views. Napier and Sykes were already sympathetic to the idea of compensation for proctors, and Adams, who was much identified with local affairs in Lincolnshire, was concerned about the imminent destruction of the careers of diocesan proctors. On the other hand, Perry was hostile, as the Solicitors' Journal continued to be, to the idea of offering any compensation to the London proctors in addition to their monopoly of non-contentious business, and he hoped that Palmerston would resist any such concession. Ayrton regretted the absence of detailed estimating of what compensation might cost and how the money would be found, and later both Willoughby and Smyth took a similar line.

The argument about compensation continued into the committee stage. On 6 July, in
a debate on the order to go into committee, Hadfield deplored Malins' repeated threats to scupper the Bill over compensation for 'a class of monopolists'. Once in committee, Bethell refused to be pinned down to precise and detailed figures about fees and compensation until the likely volume of business in the respective courts could be established, and MPs were irritated by his wish to postpone discussion about compensation for the sinecurist Moore family and about compensation amendments, tabled by Malins and Goderich, which were intended to benefit the London proctors and those at Chester and York.

Meanwhile, there had been indications at the end of June that the Metropolitan and Provincial Law Association was preparing its own encompassing petition to the Commons, suggesting that all the testamentary business be thrown open to solicitors and all the proctors compensated, although the timing of the petition was complicated by doubts about whether Bethell would even be continuing with the Bill.

Then, on 3 August, the Commons in committee conducted a further, sustained and conclusive scrutiny of aspects of compensation for loss of office and loss of profit. Bethell's rough figures were questioned, and Tatton Egerton and Barrow wanted to see a proper schedule of compensation for named officers. However, the attention of MPs in committee was distracted by a personal attack made upon the registrar at Chester, Henry Raikes, by Hadfield and Roebuck. Raikes had been appointed to that profitable and relatively busy post just after 1836 and was due to continue as registrar under the Bill. The fact and manner of his demand to be compensated, nonetheless, made in a petition presented by Gladstone early in July, had angered some MPs. The ensuing debate about Raikes and his individual circumstances was unwelcome to Bethell who had badly wanted to confine the discussion to the class of persons to be compensated. Raikes retaliated later with a pamphlet in which he asked for a substantial period of grace for existing officials, exonerated the Government itself from the 'silly restlessness' of rival factions in the Commons and ridiculed Hadfield and Roebuck, respectively, as 'the great northern champion of nonconformity and unaspirated vowels, and his little lieutenant'.

On that same day, 3 August, Malins moved for a clause to compensate proctors for any loss of profit. By that stage, Westhead's amendments had made the position of the London proctors more perilous and had made Malins' present intervention and public bargaining the more necessary. The startling news he gave to the Commons
was that 'the proctors unanimously felt that...the privileges now enjoyed by them were not worth preserving; and, therefore, if compensation were given, they were ready to surrender all their exclusive privileges'. What then became clear was that the proctors at Doctors' Commons were offering to give up two monopolies, in testamentary jurisdiction and in matrimonial causes, in return for compensation for loss of profits and for the opportunity to practice as solicitors. Malins referred to the petitions he had received, and proceeded to demand that the 120 or so London proctors should be granted 'annuities for their lives equal to one-half of their emoluments'. The money could be found out of probate fees and would amount to £50-£60,000 annually, according to Malins' calculations.

Roebuck was not sympathetic to the amendment, contrasting the proposed treatment of monopolist proctors with the rejection of the plight of unemployed handloom weavers. On the other hand, Russell was prepared to treat the proctors as a special case because their profession made them quasi-public officers. The Commons also knew by then that even Graham, in his contribution on 20 July, had accepted the idea of fair compensation if any further changes 'operated detrimentally to the London proctors'. And, once Bethell properly understood what it was that Malins was offering him across the floor of the House, he responded by saying that 'it would not lie in his mouth to refuse them compensation'. He invited a choice between Malins' amendment and his own 'more elastic plan', a formula whereby each proctor would present a statement of his profits over the next three years and would be compensated if the profits were less than over the previous three years. As a plenipotentiary for the London proctors, Malins chose what he had demanded, but left to Bethell the detailed wording of the required clauses. Similarly, Smyth from York said that the country proctors, for whom he claimed to speak, would also prefer the choice made by Malins. The deal that was done was intended, therefore, to include all proctors, in London and elsewhere, whose profits would be damaged by the Bill.

Curiously, the parallel circumstances of the London advocates were never debated at all, let alone at such length. Without the bargaining power of the proctors but with a lucrative option in its grasp, the College of Advocates seems to have resigned itself, institutionally, to the inevitability of change from as early as 1854. In March of that year, the College had petitioned to be allowed to dispose of Doctors' Commons in the event of legislation and that provision had been made in the 1857
Bill. Squibb has charted the subsequent dissolution and sale of the premises, and then the division of the proceeds between the individual advocates as a form of compensation. 94

Meanwhile, the last word in the Commons rested with Malins. At third reading on 12 August, he thanked Bethell for 'the fair and candid spirit' he had shown over compensation, but wondered if any real benefit would be achieved by a total annual expenditure of approximately £100,000. 95

However, the legislative process did not quite end there because the Commons' amendments needed to be considered by the Lords.

There were signs that Cranworth was uncomfortable with a Bill so different from what had been introduced early in the session, but his pragmatic test of the acceptability of the Commons' amendments was that they had been 'essential to the passing of the Bill', and, besides, had been made because 'the guardians of the public purse thought differently'. He received qualified support from St Leonards and Campbell, both of whom had reservations about the principle and scale of compensation, whilst Wynford, himself a barrister, blustered about the conceding of unlimited jurisdiction to the District Registries. The House appointed a Committee consisting of Cranworth, St Leonards and Campbell to prepare a report, and that report set out a number of minor amendments and drafting details. For example, it made the decisions of the Court of Probate final on appeal from the county courts and it reduced the qualifying period for those eligible to serve as registrars. 96

Those changes were accepted without question by the Commons, 97 and so a measure which had been some twenty-five years in gestation, and which had previously been described by a despondent back-bencher as a 'bantling...known only to the midwives of the Home Office', 98 eventually saw the light of day and received the royal assent on 25 August 1857. 99

Put briefly, the Probates and Letters of Administration Act, 20 & 21 Vict. c.77, consisted of 119 sections and two schedules and it took effect from 1 January 1858. Departing from what had been recommended in the General Report of 1832 and following instead the Chancery Report of 1854, the Act abolished the non-contentious and contentious testamentary jurisdiction of all the ecclesiastical courts and vested it in a new and centralised Court of Probate in London (Sections 3, 4). The new court was to have a Principal Registry, to be a court of record, to follow the practice of the former Prerogative Court and to be staffed by qualified persons from
that court (Sections 13-16,23,29). The judge of the new court, ranking with the puisne judges, was to make rules of practice, together with the Lord Chancellor and the Chief Justice, to hear evidence viva voce and under common law rules, and to have power to try questions of fact or cause them to be tried (Sections 30-35). In certain circumstances the decree of the court would bind persons with an interest in real property (Sections 61-63). Appeals from the Court of Probate were to lie to the House of Lords (Section 39).

At a decentralised level, there were to be forty District Registries, part of the Court of Probate and staffed by qualified persons from the former diocesan registries. Among the additional locations were such centres of industry and population as Birmingham, Liverpool, Manchester, Newcastle and Wakefield. The new District Registries were to have an unlimited non-contentious jurisdiction, but were required to take direction in cases of doubt (Sections 15-21,35,46 50, Schedule A). Parties were not, however, obliged to apply to the appropriate District Registry and could apply direct to London (Section 59). The District Registries were also to preserve original wills in secure and accessible accommodation provided by HM Treasury and to transmit lists and copies to the Principal Registry (Sections 51,52,118). Also at a local level, the county courts were to have a contentious jurisdiction where personal property was under £200 and real property was under £300, and appeals were to lie to the Court of Probate (Sections 54,58).

Finally, there were compensation arrangements for proctors (Sections 105,106), and provision was made for the College of Advocates to surrender its charter and sell Doctors' Commons (Sections 116,117).

The process which brought about this 'fundamental change', as Holdsworth has described the Act, had begun and ended during the administrations of two Prime Ministers who were hardly noted for their reforming tendencies, Wellington and Palmerston. Yet it was Wellington who had initiated the original inquiry and had done so with some determination, whilst Palmerston, regarded by Greville as the only man 'capable of leading the House of Commons', had shown himself to be capable of reading its mood at critical points.

At the end of a session marked by 'growing symptoms of independence on the part of the House', those MPs who had fought Bethell to achieve an unlimited non-contentious jurisdiction for the District Registries would have been well pleased with the outcome, especially when rewarded with a registry in their own constituency. So
too would those MPs who had represented the compensation claims of the proctors.

However, the most easily measurable reaction came from the legal press, commentators who had closely followed the progress and misfortunes of earlier bills. There was pleasure at the outcome; criticisms of the Government's handling of the Bill; triumphalism at such a victory over the metropolitan civilians; assessments of the business gained by solicitors; an acceptance of the compensation arrangements; and signs of an awareness that solicitors would need to learn new skills.

The Law Magazine was not disposed to 'keen over the grave of the Ecclesiastical Court'. The Law Times welcomed such a 'great triumph of provincial over metropolitan power', and soon turned to calculating that the costs involved in non-contentious business alone amounted to £100,000 annually and that most of that sum would pass to provincial solicitors. The Solicitors' Journal, although not happy with the 'uncertainty and vacillation' exhibited by Cranworth and Bethell, greeted the Act as 'this great legal reform' and even accepted the compensation to be given to the proctors as the necessary price to be paid for ending the ancient system of testamentary jurisdiction. It is undoubtedly better policy to pay them off in hard cash, than to cripple the machinery of the new courts by retaining any trace of the old exclusive system.

The Law Times was quick to give the profession advance notice of the publication of C.W. Goodwin on The Testamentary Jurisdiction Acts [sic]; the Law Magazine was soon drawing attention to two guides to the practice of the new Court of Probate, by Weatherly and by Coote, both aimed specifically at solicitors; and the usefulness to solicitors of all three manuals of practice was assessed later in the Law Magazine.

There was, though, setting aside all those special interests, a general sense that the eventual legislative outcome, the basis of what is now enjoyed and taken for granted as an administrative process, gave to the general public the cheap, efficient, accessible and temporal form of local justice which the average citizen was most likely to need. That sense of what seemed to contemporaries to be just about the outcome was best expressed at the time in the Annual Register, where the Act was described as one of 'the most valuable legislative fruits of 1857' and as having 'an important bearing on the social life and interests of the community'.
Notes to Chapter 21.


4. LT, xxviii, 11 Oct.1856, p.39. In August 1856, Lord Wensleydale, formerly James Parke, was so alarmed by what he felt to be the financial implications of the 'Sol.Gen. & Kelly's Bill' that he considered reviving Sir James Graham's Bill, see GP, 17 Aug.1856, Wensleydale to Graham.

5. LT, xxviii, 1 Nov.1856, p.70.

6. Ibid., 8 Nov.1856, p.83.


8. Ibid., 22 Nov.1856, pp.106-07; The Times, 4 Dec.1856.


11.LT, xxviii, 22 Nov.1856, p.105.


16. LT, xxviii, 29 Nov. 1856, pp. 118, 120.


20. LT, xxviii, 24 Jan. 1857, pp. 233-34, 245; 'A Country Solicitor' interpreted the resolutions quite differently, thought they represented 'a huge stride on the road to centralisation' and recommended that they be ignored by the Government, see LT, xxviii, 31 Jan. 1857, p. 252; 7 Feb., p. 265.


27. The Solicitors' Journal acknowledged and explained the delays in the reformed Court of Chancery but resented it being described by The Times as 'an intolerable place of torment', see SJ, i, 14 Feb. 1857, p. 153; 4 July, p. 593.

28. P.P. 1857 (10) ii. A Bill... to amend the Law relating to Probates and Letters of Administration in England; Hansard, 3d. ser., cxliv, 10 Feb. 1857, cc. 421-51; Cranworth's statement was welcomed by 'A Country Solicitor' precisely because it proposed to make use of diocesan registries and to avoid compensation, see LT, xxviii, 14 Feb. 1857, p. 283; 21 Feb., pp. 293-94.


30. LC, iii, 1 April 1857, p. 346.


32. Hansard, 3d. ser., cxliv, 9 March 1857, c. 2026.


34. LT, xxviii, 7 March 1857, p. 313.


38. Hansard, 3d. ser., cxlv, 7 May 1857, c. 18.
39. It was rumoured in the *Daily News* that Cranworth was to be replaced by 'a more vigorous and efficient Chancellor', see SJ, i, 2 May 1857, p.415.

40. *Hansard*, 3d.ser., cxlv, 11 May 1857, cc.104-05; 18 May, cc.384-98; 22 May, cc.703-11; 28 May, cc.906-12; 5 June, cc.1195-99. Between 11 May and 13 August there were five printings of the Bill in the Lords, including the amendments made by the Commons, P.P.1857 (3,18,18a,22,177) vi.


42. One anonymous pamphleteer was particularly severe upon the Court of Chancery and upon Cranworth's 'infatuated hallucination that the Lord Chancellor is the embodiment of all legal erudition', see *Reform of the Ecclesiastical Courts*. London, [c. April 1857].

43. It is not surprising that St Leonards should have been so exercised about the risk of probate over real property. The study of real property was an early interest of his and it remained so throughout his life, see H.E.L., xvi, p.39.

44. SJ, i, 6 June 1857, pp. 516-17.

45. LT, xxix, 9 May 1857, p.81; 16 May, p.93; SJ, i,16 May, p.458.

46. LT, xxix, 30 May 1857, p.121.

47. SJ, i, 30 May 1857, p.495.

48. LT, xxix, 6 June 1857, p.133.


50. Ibid., pp.217,238.


53. Ibid., pp. 420-22, 425.


55. The advice given by Sir John Coleridge to Roundell Palmer was that 'the lawyer in Parliament, after due attention to the local interests of his constituents, will do most good by limiting his actual interference pretty much to certain specified classes of subjects - the law, the church and constitutional matters, seem to be his province', see Heward, Edmund. *A Victorian Law Reformer: A Life of Lord Selborne.* Chichester, Barry Rose, 1998, pp. 53-54.

56. Petitions to the Commons, both for and against the Bill, appeared as early as 14 May 1857, whilst it was still in the Lords, see HLRO, Appendix to Reports of Commons Select Committee on Public Petitions, 1857, p. 145.

57. John Rolt, a Chancery barrister and a former member of the Chancery Commission, had been returned for Gloucestershire West in 1857, see Stenton, op. cit., i, p. 332.

58. LT, xxix, 4 July 1857, p. 185.

59. Acton Smee Ayrton, a barrister, had been returned for Tower Hamlets in 1857, see Stenton, op. cit., p. 15.


61. H.E.L., xvi, pp. 105-112.

62. William Adams, a barrister, had been returned for Boston in 1857, see Stenton, op. cit., p. 3.
63. For Westhead's Parliamentary career, see Stenton, op. cit., p.404.

64. Edward Stillingfleet Cayley and John Robert Mowbray, a barrister, were MPs for the North Riding and Durham City, respectively, see Stenton, op. cit., i, p.71; ii, p.260. John Arthur Roebuck, QC, the noted radical, was MP for Sheffield, see Stenton, i, p.331, and DNB, xvii, pp.95-97.


66. Graham's version of how the limit was arrived at does not tally with what Cranworth told the Lords in 1854, see Chapter 18, n.27.


69. SJ, i, 11 July 1857, p.613.

70. LT, xxix, 11 July 1857, pp.197-98.


73. George Hudson, Conservative MP for Sunderland, had a variety of business interests in Yorkshire, see Stenton, op.cit., p.203. Thomas Collins, a barrister, had been returned for his home constituency of Knaresborough in 1857, see SJ, i, 18 April 1857, p.379, and Stenton, op.cit., i, p.87.

74. Clause 40, which would have restricted the local probate jurisdiction, became Section 46 in the Act.
75. Bethell's remark may have had as its target the support described by Westhead, although the Liverpool Law Society had petitioned in early July to have the business thrown open, see HLRO, op.cit., 1857, p.325.

76. LT, xxix, 18 July 1857, p.209.

77. Enoch Salisbury, a gasworks proprietor, had been returned as Liberal MP for Chester in 1857, see Stenton, op.cit., i, pp.399-400.

78. LT, xxix, 25 July 1857, p.221.


80. Between 18 June and 29 July 1857, a number of petitions were presented on behalf of inhabitants, boroughs, chambers of commerce and professional men who wanted to have District Registries located in Wakefield, Leeds, Richmond, Knaresborough, Beverley, Bury St Edmunds and Brecknock, see HLRO, op.cit., 1857, pp.264-372, passim.

81. Beckett Denison was MP for the West Riding, see Stenton, op.cit., i, p.106.

82. Sykes had been returned in 1857 as MP for Aberdeen, see Stenton, op.cit., i, p.371.

83. SJ, i, 4 July 1857, p.595.

84. Sir Henry Willoughby was Conservative MP for Evesham, see Stenton, op.cit., i, p.41.

85. Viscount Goderich, later Marquess of Ripon, was Liberal MP for the West Riding, see Stenton, op.cit., i, p.158.

86. SJ, i, 18 July 1857, pp.633-34, 640-41.
87. Tatton Egerton was MP for Cheshire North, see Stenton, op. cit., p.125, and William Hodgson Barrow was MP for Nottinghamshire, see Stenton, op. cit., p.23.

88. HLRO, op. cit., 1857, p.303.


90. 'As Sir R. Bethell quaintly expressed it, proctors will henceforth be reduced to the level of solicitors', see SJ, i, 8 Aug. 1857, p.701.

91. The petitioners had included the registry clerks at Doctors' Commons and the proctors at Lichfield, see HLRO, op. cit., 1857, pp.275, 325.

92. The two compensation clauses dealing with the profits of individual proctors and those in partnership became Sections 105 and 106 in the Act.

93. P.P. 1857 (175) iv, 'as amended in committee and on re-commitment'.


98. BRO, D/RA/3E/22 f.38, commonplace book of Edward Horsman, MP, [c. 1850].

100. Sir Cresswell Cresswell from the Court of Common Pleas was the first head of the new Court of Probate and Divorce. He has been described as 'an utter despiser of all shams' but possessed of a supercilious manner, see Ballantine, William. *Some Experiences of a Barrister's Life*. London, Richard Bentley, 1890 ed., pp. 171-72, 214; see also LM, IV, Feb. 1858, p.391.


103. Ibid., p.295.


105. LT, xxix, 8 Aug. 1857, p.245.


111. Ibid., V, May 1858, pp.129-41.

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