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Working Time, Dinner Time, Serving Time: Labour and Law in Industrialization

Douglas Hay

Osgoode Hall Law School of York University, dhay@osgoode.yorku.ca

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Labour and Law in Industrialization.**

Douglas Hay

Table of Contents

Abstract.....	iii
Introduction.....	1
I. Working Time.....	1
II. Master and Servant Law.....	3
III. Dinner Time: Workers and Judges	5
IV. Serving Time: The Impact of Penal Sanctions	13
V. Conclusion	17
References.....	19

Working Time, Dinner Time, Serving Time

Labour and Law in Industrialization

Douglas Hay
Professor Emeritus
Osgoode Hall Law School & Department of History
York University, Toronto
DHay@osgoode.yorku.ca

Abstract

Many economic historians agree that increased labour inputs contributed to Britain's primary industrialisation. Voluntary self-exploitation by workers to purchase new consumer goods is one common explanation, but it sits uneasily with evidence of poverty, child labour, popular protest, and criminal punishments explored by social historians. A critical and neglected legal dimension may be the evolution of contracts of employment. The law of master and servant, to use the technical term, shifted markedly between 1750 and 1850 to advantage capital and disadvantage labour. Medieval in origin, it had always been adjudicated in summary hearings before lay magistrates, and provided penal sanctions to employers (imprisonment, wage abatement, and later fines), while giving workers a summary remedy for unpaid wages. The law always enforced obedience to employers' commands, suppressed strikes, and tried to keep wages low. Between 1750 and 1850 it became more hostile to workers through legislation and judicial redefinition; its enforcement became harsher through expansion of imprisonment, capture of the local bench by industrial employers, and employer abuse of written contracts. More work in manuscript sources is needed to test the argument, but it seems likely that intensification of labour inputs during industrialisation was closely tied to these legal changes.

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Introduction

In recent decades economic historians have been abandoning a half-century of research in national income estimates by which they had hoped to explain why Britain was the first society to undergo an industrial revolution (Mokyr 2004: 1-27; de Vries 1994: 251).¹ Once the weakness of the main statistical series—including the invisibility of huge numbers of female and child workers (Hoppit 1990; Berg and Hudson 1992; Berg 1993; Humphries and Horrell 1995) —became apparent, two other approaches were tried. One is an elaboration of an old explanation: intellectual, technological and institutional change (Mokyr 2017, 2009, 2009a, 2008, 1998, 1990). We revisit the Royal Society and the inventors (Watt, Arkwright, Wedgwood, a host of less-known men), their machines and technical knowledge (spinning machines, steam engines, new ceramics), and the legal order (patents, contracts, ‘the rule of law’). The second approach is an argument by Jan de Vries that an ‘industrious revolution’, an intensification of labour inputs, created a market for new consumer goods and new industries, as workers and their families voluntarily worked much longer hours to obtain them (de Vries 2008, 1994, 1993). But did law have anything to do with the first industrial revolution, beyond ‘rule of law’: secure property protection, patents, and contracts? Master and servant law, that rather peculiar and coercive form of contract law, seems likely to be important. My argument is that its punishments, described below, likely contributed greatly to the growth of labour inputs said to be crucial to industrialization, an intensification demonstrated by the work of Hans-Joachim Voth and others (Voth 2001, 2000; Horrell 2014; Allen and Weisdorf 2011; Humphries, Horrell, Voth 2001).

I. Working Time

Coercive labour contracts are ignored by these economic historians. The main exponent of an ‘industrious’ revolution argues that ‘The intensification of work and suppression of leisure was associated with the (self) exploitation of family members—wives and children...’ There developed ‘the industrious disposition.’ ‘With the right incentives, a large amount of extra output could be squeezed out of the pre-industrial technological complex’ (de Vries 1994: 260, 262; de Vries 1993: 114). ‘Incentives’ suggests encouragements to voluntary labour; ‘squeezing’, something darker. Hints of forces other than happy market exchanges do appear:

¹ But see Broadberry et al. 2015 for a synthesis and summary of recent research.

moralists justifying the subordination of feckless workers, the ‘imperious’ demands of the new factories (said to be rare before 1800), poverty, larger families, taxes, and new technologies (de Vries 1994: 258; de Vries 1993: 110.) But the main conclusion is that ‘acquisitive or maximizing behaviour, understood in the context of its time, was not alien and “unnatural”, and, hence, was not imposed *in the main* by political force on a dispossessed and victimized labour force (de Vries 1993: 116-7, my emphasis).’ Peasant households voluntarily chose labour over leisure. Land-poor households produced consumer commodities; those with more land ‘poured household labour into the production of such labour-intensive and utterly market-oriented crops as tobacco, wine, hops and madder (de Vries 1993: 110-13).’ This summary of important work by Joan Thirsk and others on home production from the seventeenth century made me think of other places, notably Britain’s colonies. From the 1600s to the 1830s Virginian tobacco, and other ‘labour-intensive and utterly market-oriented crops’ from the Caribbean to Mauritius, were produced by *involuntary* labour: slaves suffering extraordinary coercion.²

What of England itself? Voth’s estimates suggest an extraordinary intensification of work at the heart of empire during industrialization. Not longer workdays but rather more days per week and per year are held responsible, as traditional holidays and ‘St Monday’ (when workers made that day a holiday) disappeared. The work week grew from roughly 5 to roughly 6 days, an increase between 1760 and 1830 of +550 to +654 hours per year, or 14% to 32%; most of the increase possibly happened by 1800 (Voth 2000: Fig. 3.15, 132 and preceding pages).³ Voth argues that this huge increase of labour inputs was peculiar to the first industrial revolution: other industrial economies that underwent transformations later had much lower

² The absence of Empire seems strange in a modelling of Britain’s economic growth. This is true also of Voth (2000): he assumes that the output of colonial possessions, especially plantation agriculture, and the size of the imperial market for British manufactures, had nothing to do with the performance of the British economy (e.g. the theoretical discussion of the ‘internal market’ at 261, 265.) In a comparison of England with other economies he notes in passing (but with no reference to British imperial plantation agriculture) the salience of large labour inputs for coffee and bananas (245). Yet if the vast growth of low-cost slave and indentured labour in the Empire had anything to do with British economic growth, it seems odd to omit it, and more recent work suggests its importance. The Empire illustrates many aspects of master and servant law and its place in economic growth, including highly exploitative contracts immediately after slavery and again in the later nineteenth century (Hay and Craven 2004).

³ Recent estimates suggest real wage rates declined 3.6% 1750-1800 while GDP per head increased 19.6%, as work hours lengthened: Broadberry et al 2015, 263, 276-8. See Humphries and Weisdorf forthcoming for a reconstruction of wage rates 1260-1850 from a huge new range of contemporary sources; they show increasing labour input over a longer period, intensifying during the run-up to industrialization, while being agnostic about possible causes.

labour inputs, a fact which he ascribes to the disadvantages (for British workers) of being first. He has less to say about how increased labour was secured. After rejecting a wide range of possibilities,⁴ he simply says that we must ‘*focus on the institutional preconditions such as the legal system that helped to establish a routine of ‘dawn-to-dusk’ schedules.*’ And suddenly (contrasting Weber’s *Protestant Ethic*) he adds that this ‘would shift the emphasis from religious sects, where additional work was “voluntary”, to state-driven intervention in economies as a whole, where additional work was often forced upon an unwilling population.’ For England in this period was a case of ‘Stalinist growth’, state-directed (Voth 2000: 228-29, 271).⁵ How, and why, is unexplained.

Subsequent work suggests that an ‘industrious’ explanation may indeed explain some of the intensified labour by higher-paid male workers: their consumption and emulation increased demand (Humphries, Horrell, Voth 2001). The analysis does not consider the possible effects of the use of the law to break strikes (see below) and such workers were in any case a minority. Industrialization created or expanded a large pool of poorly paid child and female labour in factories and in rural industry, as well as low-wage agricultural and industrial male employment. So far the economic historians have remained remarkably incurious about the terms of the contracts between all these workers and those who employed them, and how those contracts were enforced.

II. Master and Servant Law

The law of the contract of employment in England—what the lawyers called the law of master and servant—dated back to 1349, if not before, when imprisonment was enacted to punish workers in breach of contract. From this time it was enforced summarily by the newly emerging figure of the lay justice of the peace, who heard and disposed of such disputes in a

⁴ His approach is entirely based on inference from estimated curves of supply and demand; his conclusion is that ‘changes in labour supply were probably responsible for the largest part of the increase in labour input.’ As causes he considers and rejects as inadequate explanations nutrition, faster population growth and its pressure on consumption, reductions in illness, urbanization, illegitimacy, and a decline of social authority because the decline of St Monday would suggest an increase in regard for authority. This last suggestion is based on a rather simplistic equation of St Monday with ‘revelry and slothfulness’, but takes us a little closer to the issues of conflict in employment contracts.

⁵ The only example given is from eighteenth-century Austria (274).

highly informal way. Penal sanctions were carried over to the Elizabethan *Statute of Artificers* (1562), the foundation of employment law until the nineteenth century.⁶ It was supplemented by another 26 statutes to 1800, and another 27 to 1875 covering apprentices and almost every kind of adult worker, on annual hirings, written contracts (covenants), day labour, and piece work. Breach of contract by the worker could be punished by loss of some wages, but the statutes also markedly expanded criminal sanctions.⁷ Breach of contract included leaving the master, working for another master without permission, leaving work unfinished, refusing to enter into contracted work, refusing to obey orders, and indiscipline of every kind—from poor work to sauciness to immoral behavior by a house servant.⁸ Until the final repeal of the power of magistrates to fine in 1875, breach of contract by a worker could result in penal sanctions: fine, imprisonment (for failing to give security), and until 1867 imprisonment (with a possible whipping) of one to three months for the breach itself (Hay 2000; Hay 2004: 66-67, 82-91; Frank 2010; Steinfeld 1991, 2001). From the early nineteenth century the courts also enforced a new (or rediscovered) doctrine of ‘entire contract’—no wages were owing until the end of the contract, and breach, even near the very end, led to loss of all wages for the entire period (see below). In Canada, imprisonment for breach continued into the early twentieth century (Hay and Craven 2004: ch 5). In many British colonies it lasted even longer, in jails equipped with treadmills, together with provisions for caning and other criminal punishments (Hay and Craven 2004: *passim*).

My argument is that during the classic first industrial revolution in England, master and servant law, not only by parliamentary enactment, but also through judicial interpretation, and magisterial enforcement, changed in favour of capital. It gave employers the means to compel workers to work harder, longer, and with greater regularity. In his classic article on disciplining workers in the industrial revolution through a revolution in managerial techniques, Sidney Pollard observed ‘The capitalist employer became a supervisor of every detail of the work: *without any change in the general character of the wage contract*, the employer acquired new powers which were of great social significance.’ (Pollard 1963: 259, quoting Kerr et al. 1962: 193, my emphasis). Without discounting the importance of the carrots, sticks, and attempts at moral reformation described in detail by Pollard, on this crucial point he, and Kerr et al., were

⁶ 5 Eliz. c.4 (often cited as 1563, when it was enacted).

⁷ Below, “Serving time”.

⁸ Confusingly, domestic servants were not always within the master and servants statutes in the nineteenth century (Hay and Craven 2004: 66-67, 88-91).

wrong.⁹ Moreover, many of the coercive techniques Pollard describes took place ‘in the shadow of the law’— even when not formally invoked, the threat of legal coercion profoundly conditions the behaviour of parties who know it *can* be used. An employer’s factory rules might impose fines for absence; behind his rules lay his power to have a magistrate impose three months’ imprisonment for the same offence.

Master and servant legislation had always provided imprisonment for resistant or demanding workers, but the regime now became harsher. Bosses used it to control the demands of high-wage workers, not least by crushing strikes—workers on strike left work unfinished, in breach of contract. Master and servant law was equally useful to discipline low-wage workers, including large drafts of women and children in new textile factories, through the threat and reality of imprisonment. Perhaps not ‘Stalinist’, the law increasingly aided capital’s drive to intensify labour input and hence profits.¹⁰ The legislation increased in punitiveness (see below). There were equally significant changes in judicial decisions—which in a common law system can change the law—and in enforcement.

III. Dinner Time: Workers and Judges

In the famous slavery case, *Stewart v Somerset* (1772), Serjeant Dunning, arguing for the proposition that slavery was the law of England, suggested that it was equally important to secure by law the obedience of servants as well as slaves:

It would be a great surprise, and some inconvenience, if a foreigner bringing over a servant, as soon as he got hither, must take care of his carriage, his horse, and himself, in whatever method he might have the luck to invent. He must find his way to London on foot. Helpless [without] his servant, ‘Do this’ [he says]; the servant replies, ‘Before I do it, I think fit to inform you, sir, the first step on this happy land sets all men on a perfect level; you are just as much obliged to obey my commands.’ Thus neither superior, or inferior; both go without their dinner (Lofft 12, 98 ER 506, my emphasis).¹¹

⁹ Pollard did note the continuing significance of miners’ bonds, and their use in other trades in the north-east, and there is one mention, with no discussion, of breach of contract: Pollard 1963: 262, 265. See also Pollard 1965: 181ff.

¹⁰ Steinberg 2016 argues that master and servant directly contradicts the argument (Polanyi 1944) that free markets were wholly disembedded from legal impositions during industrialisation. Orth 1998 argues that master and servant inspired changes in general contract law, rather than the reverse.

¹¹ Lofft 12, 98 ER 506, my emphasis.

Dinner looms large in employment cases, for a variety of reasons: definitions of hirings, issues of obedience and discipline, and (I argue) because the judges were subtly changing the definitions of the relations of master and servant in the early years of the nineteenth century.

Master and servant law was enforced overwhelmingly by lay magistrates, not judges, and magistrates recorded outcomes in private memoranda, if at all. It was the high court judges who interpreted and thereby changed the law. The employment cases that came before them almost always arose as poor law cases about settlement. A hiring of a year or more gave a settlement to the servant (meaning the parish was responsible for her/his support if the servant later needed poor relief), and a general hiring (for which much of the law reached back to the *Statute of Artificers*, or beyond) also gave the master complete control of the servant's time. Explicit exceptions to such control in the contract meant no settlement, but in 1818 Lord Chief Justice Ellenborough observed that otherwise settlement resulted:

There is in every contract of hiring some implied except[ion] of hours for relaxation, food, and rest; I cannot at least suggest to myself any contract in which such exceptions do not exist. The master here has a right to the service of the pauper at all times, but he does not require his services at any other hours than those mentioned...

Mr Justice Bayley concurred, pointing out that when not specifically set out, such issues were 'left by *the custom of the particular trade* to be raised by implication (*R v The inhabitants of All Saints Worcester*: 1 B&A 322, 106 ER 119).'¹²

The custom of the trade (or 'custom of the country' in agricultural occupations) had for centuries been an enforceable part of the contract, if proved in court, or, as in this case, simply presumed by the judges to be part of the contract. The right of the master to obedience 'at all times' was enforceable under master and servant law.¹³ The case, like others in this period, confirmed the totality of the employer's authority, including the right to determine when he ate dinner, absent express language. But an equally strong principle in master and servant law was that hiring contracts (notably the 'general hiring') could only be ended with the agreement of a magistrate. Even in cases of disobedience, the master was not free simply to dismiss the servant. To do so would be to act as a judge in his or her own case. The master also owed duties to the servant, as the servant did to the master. The master owed the servant not only wages for

¹² For a discussion of other exception cases see Deakin 2001: 15-17.

¹³ Ellenborough extended the scope of the law to 'labourers of every class', even to independent contractors: *Lowther v. Earl Radnor and another* (1806), 8 East 113; 103 ER 287.

time served, but care in sickness, until the end of the annual hiring (Hay and Craven 2004: 111ff).

High court judges in the early decades of the nineteenth century encountered the custom of dinner hours and other amenities (what came to be called labour standards) fairly often. The reported cases strongly suggest that they undercut those standards, and strengthened the disciplinary powers of employers.¹⁴ Judges increasingly took the view that the work day had to be intensified, rest and meal times cut, instant obedience secured. Their decisions marked changes in both the law and judicial attitudes. Perhaps even more important is how these cases were reported, absorbed into the professional literature of the law, and eventually understood by justices of the peace and borough justices—the lay magistrates who enforced the law. Many cases can be cited; among them are *Robinson v Hindman* (1800), *R v Hoseason* (1811), *Spain v Arnott* (1817), *Lilley v Elwin* (1844). All concerned waggoners' dinners in harvest time, and they are examples, for the purposes of this paper, of a much wider range of cases that changed master and servant law.

Failure to work at harvest had always been punished by heavier penalties. The year's produce was at risk of weather; all servants had to participate. The relevant statute law (5 Eliz c.4 (1562) s 22) was printed in all the JP handbooks.¹⁵ Servants not turning up were likely to be sentenced by JPs to imprisonment in the house of correction (Hay 1998: 39; Hay and Craven 2004: 99). Waggoners were particularly crucial to the smooth operation of reaping and stacking the harvest.¹⁶

Hoseason was an unsuccessful attempt at prosecution in King's Bench, the highest criminal court, of a Norfolk justice of the peace (Hay 1998: 40-44 for sources). Hoseason, the JP, had assaulted his own servant for trying to take a full hour for dinner, convicted him of disobedience and sentenced him to a month's imprisonment and a whipping, which he insisted be carried out. Lord Ellenborough criticized Hoseason for being judge in his own cause, and gave the plaintiff costs, but refused to allow a prosecution because friends and fellow-JPs testified that

¹⁴ The duty to care for the servant in sickness also came under attack in the early nineteenth-century English courts (Tomlins 1988: 397ff).

¹⁵ It provided that to prevent loss at harvest magistrates and constables could compel artificers and labourers 'to serve by the day for the mowing, reaping, shearing, setting or inning of corn, grain and hay, according to the skill and quality of the person'; refusal to be punished by two days and a night in the stocks and a negligent constable to be fined forty shillings.

¹⁶ Information in 2005 from Mr Vivian Church of Northampton and Dolanog, UK, farmer and former agricultural instructor.

they too would have convicted and given the same sentence. They also cited the ‘peculiar state of the labouring part of the inhabitants’ of East Anglia (they were getting insolent), and Luddite machine-breaking, which began a few months earlier not far away. Ellenborough’s determination to protect JPs like Hoseason from legal harassment was also a long-standing practice of the high court (Hay 2002). What I want to remark here is the emphasis on labour discipline, including time.

For this case was also about dinner. The testimony of General [*sic*] Batterbee, the abused waggoner, was that he was hired (probably by verbal agreement) for six weeks of harvesting, at ‘18 shillings a week and a quart of beer a day, and to board himself.’ On 3 September 1811 he went to work at the usual hour of 6am, and worked until 12 when he had dinner, ‘at which meal it was usual for all the men to take an hour.’ The bailiff told him to cut it short, ‘as the men on the stack were waiting’; he refused, having had barely half an hour and still eating. Or so Batterbee swore; the bailiff in his affidavit swore rather that Batterbee had finished, was sitting idle, his cart obstructed other carts, and that

the labourers during the time they are carrying corn are not accustomed to consume an hour at their dinner but return to their work as soon as they have eaten their meal and taken their beer but the said General Batterbee positively refused to obey this Deponent and continued to sit saying he would get up when he was ready.

He swore that he gave Batterbee a gentle nudge with his foot. Batterbee swore that as he was getting up the bailiff ‘kicked him very severely on the breech, ... struck ...[him] with his fist on his...head, and then took hold of him and threw him down between two wheat stacks, and again kicked him on the breech when he was down.’ When Batterbee was brought before Hoseason, the employer/magistrate struck him in the face. It is worth noting that before the constable took Batterbee off to Swaffham House of Correction to be imprisoned and whipped, Hoseason paid him for the work already done.¹⁷ The magistrate swore he would have so punished any servant, not just his own, who behaved thus during harvest season.

Batterbee’s affidavit did not give detailed evidence about dinner, beyond that ‘it was usual’ to take an hour; he may not have thought it necessary to do so. The *Statute of Artificers* 5 Eliz. c.4 (1562), s.12 provided that artificers and labourers hired by day or week should work from 5am to 7 or 8pm, and have at most two and a half hours a day for ‘breakfast, dinner, or drinking’: ‘that is to say, at every drinking one half hour, for his dinner one hour, and for his sleep when he is allowed to sleep, the which is from the midst of May to the midst of August,

¹⁷ See the next case.

half an hour at the most, and at every breakfast one half hour.’ Although this was a maximum specified for day labourers, this standard came to be expected as the minimum, for day labourers but also for servants hired by the year. It was sanctified by the ‘custom of the country’, the implied terms of labour contracts, which also had the force of law.

Six years later dinner featured in what became a leading case. *Spain v Arnott* (1817), heard before Lord Ellenborough sitting alone, is usually cited as the authority for the nineteenth-century doctrine of the entire contract: that no wages were due, even for months of work already performed, if a servant failed to complete the contract (Hay and Craven 2004: 113n202; Deakin 2001: 21-22).¹⁸ The usefulness in labour discipline of the entire contract doctrine is evident, and in fact it became most important in the United States, which rejected imprisonment, the common punishment in England, for breach of contract (Steinfeld 1991: 149-52; Steinfeld 2001: 291-97). *Spain v Arnott* was interpreted to give masters an absolute right of dismissal for disobedience, making the doctrine of entire contract hugely important.

The case was actually between Jonathan Spain, a waggoner, and Henry Harnett (not Arnott, as reported), the Middlesex farmer who hired him at servant’s wages (they had agreed 10 guineas for the year) for the year commencing 29 Sept 1816.¹⁹ But on 21 July Harnett turned Spain off (or Spain quit). Spain had been out with the team from 6am until 2pm, wanted his dinner, and was told by Harnett, who himself ‘had had his ale’, to first take the waggon to the marsh, a mile away. Spain insisted on dinner, Harnett replied that he could leave the premises if he did not do as he was told, and Spain left. The published report leaves out some of this detail, concentrating instead on Ellenborough’s dicta: that the master could dismiss the servant without going to a magistrate, and that the failure to obey meant that Jonathan Spain was owed nothing for the time he had already worked (wages beyond board were usually paid at the end of the year). Counsel suggested this was a harsh outcome, losing ten months’ wages for what was (according to testimony) a lapse by a man who ‘worked hard and did his duty’ with no other complaint against him. Ellenborough conceded, ‘it may be hard upon the servant, but it

¹⁸ Older roots can be found in sixteenth-century abridgements and seventeenth-century JPs’ handbooks, but the only eighteenth-century high court evidence for it appears to be an angry comment by Viner, author of one of the leading abridgements, that the judge at Guildhall nisi prius had ignored the doctrine when Viner attempted to use it against one of his own servants: *Worth v Viner* (1746), (Viner 1791-1794: viii, 8-9). This is actually Viner’s 18 June 1747 letter to Sir John Strange (counsel against him) requesting a copy of the case so that he can print it in his Abridgement, and his comments on the case, to the effect that the old books (he cites Brooke, etc) and all subsequent reports do not allow for apportionment on an agreement for a year’s service.

¹⁹ Notebooks of Edward Law, 1st Baron Ellenborough, Chief Justice of the King’s Bench 1802-1818 (microform copy, Osgoode Hall Law School Library), Trin 1817.

would be exceedingly inconvenient if the servant were permitted to set himself up to control his master in his domestic regulations, such as the time of dinner. After a refusal on the part of the servant to perform his work, the master is not bound to keep him on as a burthensome and useless servant to the end of the year.... the question really comes to this, whether the master or the servant is to have the superior authority.’

Custom was not specifically pleaded in either this case or in *Hoseason*, which meant that the judges did not have to deal with the issue. Other cases (below) suggest they would have made short shrift of it. The case also made clear for the first time that a master faced with what he considered disobedience was entitled to dismiss the servant *without* adjudication by a JP.

Yet *Spain v Arnott (Harnett)* is a curious case. It was not reported in the press, perhaps because it was a Middlesex nisi prius case, heard by a single judge. A juror was withdrawn by consent, and hence no formal verdict entered: this was done when a winning party was willing to pay his own costs, but it also meant that the judgement could be regarded as much less compelling as a precedent.²⁰ The report (for such an important issue as the entire contract, and dismissal at will for disobedience) is very short, and in it Ellenborough cites no precedents at all. It appears there were none in the eighteenth century, and the most recent case on point was not helpful to him.

This was *Robinson v Hindman*, a lawsuit for wages owing, heard before Lord Kenyon in 1800 (3 Esp 235; 170 ER 599; *Times* 10 Dec 1800). The case was cited in Archbold’s 1811 edition of Blackstone, and thereafter in justices’ handbooks and in treatises for a quarter of a century for the proposition that a servant dismissed without warning would get all the wages due at the time of discharge, *even if there was misconduct*; if there was no misconduct, she or he would also deserve a month’s wages beyond those due for actual service. Archbold specifies a domestic servant, not one under 5 Eliz c.4, but by 1820 the distinction disappeared, and the inclusion of the case in the 1825 edition of Burn thus gave JPs two different doctrines: Ellenborough’s of the entire contract in *Spain v Arnott*; and *Robinson*, in which Kenyon was cited for what might appear the opposite finding: ‘A master may discharge his servant at a moment’s warning for misconduct, (e.g. for being absent when wanted, sleeping from home at night without his master’s leave, etc.) and in such case the servant will only be entitled to such wages as are due at the time of his discharge.’ (Blackstone 1811: i, 123a n.90; Selwyn 1820: ii, 1054; Selwyn 1824: ii, 1090; Selwyn 1827: ii, 1099; Burn 1825: v, 162). It seems likely that *Robinson* was more appealing to many justices of the peace than the doctrine of the entire

²⁰ An aspect of the case referred to by counsel in *Lilley v Elwin*, cited below.

contract, which could throw families on to the poor rates, to be supported by taxpayers.²¹ But by 1829 *Robinson* was unimportant: *Spain v Arnott* was established as the leading authority on the entire contract and on the duty of continuous obedience to the master (J. Comyn 1822: v, 572; S. Comyn 1824: 530; Starkie 1824: iii, 1766; Espinasse 1825: 105; Saunders 1828: ii, 959; Petersdorff 1829: xii, 611).

Finally, in *Lilley v Elwin* (1848) the worker's offence was part of a collective refusal by farm servants in Kent to finish a harvest (11 QB Rep 742; 17 LJR (n.s.) QB 132; 116 ER 652). They said their customary wage included strong beer, but they got only 'very bad small beer, not so good as water'. Again, the judges at Westminster can be seen to be initiating change, or at least powerfully ratifying change being attempted at the local level. The servant had originally been dismissed by a justice of the peace, although the men had apparently gone to him with the farmer and asked him to mediate their differences. When the servant then sued for unpaid wages at Kent spring assizes in 1847, Lord Chief Justice Denman left it to the jury to decide whether that dismissal had been justified.²² The jury found for the worker on all the issues at trial, apparently accepting the claim that strong beer was a term of such contracts by the custom of the country, and that he therefore left work for cause.

This outcome was what might be expected in 'traditional' contract in trial courts: the jury decided.²³ The recourse to a JP as a mediator in his summary jurisdiction was also traditional. And Denman was perhaps particularly likely to leave such a workingman's case to local wisdom. He had represented popular causes when a barrister: Luddite machine-breakers and Queen Caroline, the popular estranged wife of the King; as an MP he had supported repeal of capital statutes and the abolition of slavery. But he apparently agreed with the other judges when the case was reconsidered in Queen's Bench, although the judgement of the court was given by Sir J. T. Coleridge (who had been editor of the *Quarterly Review*, the major Conservative journal, in 1824-5). The judges held that a man hired as a waggoner could be considered in law as a servant in husbandry, and therefore expected to work at harvest; they also rejected the jury's finding that it was a wrongful dismissal, as the custom of strong beer was not proved. It seems highly likely that Coleridge and the rest of the court thought that

²¹ Wages for service were in law due only at the term of the contract, but lay justices (who were charged with a broadly equitable jurisdiction) would be encouraged by this statement in Burn to give the equivalent of quantum meruit—payment for time actually worked (which we know they did: Hay and Craven, 113n202; Hoseason, above; and Hay, unpublished.)

²² Workers in the 1840s were making significant use of the high courts with the help of radical lawyers: see Frank 2010.

²³ See Atiyah 1979.

strong beer was not compatible with diligent work, however traditional it may have been. It is interesting, too, that the ‘ignorant men’ (according to their counsel) apparently first went to the JP ‘as a mediator’, who ordered the discharge ‘as the best termination of their differences’ without an intention of denying wages.

This appeal to the mediating JP, like the custom of strong beer, was an image from the past: a reality in the eighteenth century, disappearing rapidly in the early nineteenth, and in this case utterly repudiated by Queen’s Bench. A discharge from service by a JP was, the court held, the equivalent of a dismissal by a master: it necessarily implied misconduct, hence mandatory loss of all wages under the doctrine of the entire contract. Their attitudes to attentiveness in service, so often expressed in these cases, are also manifest. Wightman J suggested that ‘in an ordinary case’ an absence of a few minutes would not be unlawful absenting, but Coleridge J instantly disagreed: ‘It might, at a particular time, be a great misconduct. For example, the waggoner’s leaving his horses might cause the upsetting of the waggon. You cannot maintain that the “misconduct” must be strictly a misfeasance.’

These cases, with others, constituted a new judicial doctrine that virtually any absence, however short, for however pressing a reason, could not trump the command of the master for service at that moment. In the background were industrial cases where the exigencies of industrial processes motivated similar arguments by industrialists to those of harvesting farmers, insisting that their works required a constantly obedient workforce (Hay 2000, 2004: 95-116; Steinfeld 2001: 39-84; Steinberg 2016: 51-78). Suddenly, over a few decades, the high court emphasized in the strongest terms that a command by a master to do anything (virtually any lawful and not immoral action) was, simply, to be obeyed.²⁴ And when so many traditional contracts of employment relied on understood terms, the exigencies of proving a ‘custom of the country’ could be used to discountenance customs of which the judges disapproved. The decision in *Lilley*, combined with statements about unproved custom, could subsequently assist

²⁴ Deakin 2001: 23 suggests that ‘the statutory context [repeal of settlement in 1834, the master and servant statutes] ... propelled the common law in the direction of a strict rule against recovery in either contract or quantum meruit.’ My argument tends to the opposite conclusion: that the judges played a major role in initiating and ratifying a revived doctrine of entire contract, long after most master and servant legislation had been passed and administered for generations in a very different way, and over a decade before the repeal of settlement by hiring in 1834. It is true that repeal of the apprenticeship clauses (1814) and other statutory abrogations of the ancien regime emanated from parliament, but the judges had led the way there as well.

judges at trial to nonsuit such claims even before they came before the jury, if the custom had not been adequately proven in pleadings.²⁵

In summary hearings magistrates in the eighteenth century might not follow the judges, might not even know about recent relevant high court decisions. Thus some magistrates continued to ignore the entire contract, giving *quantum meruit* rulings.²⁶ But as the decades passed far better reporting of high court cases in *The Times*, the spread of organized petty sessions with solicitors acting as clerks, and local press reporting of ‘police court’ proceedings made judicial doctrine far better known. Ironically, the activity of radical lawyers hired by the unions in the 1840s made high court doctrine notorious, and prompted new legislation that made it more difficult to contest convictions (Frank 2010).

IV. Serving Time: The Impact of Penal Sanctions

If the judges wanted to strengthen masters’ powers to intensify work, reduce meal times, and insist on instant obedience at any hour of the day or night, did that make any difference on the ground: that is, in petty sessions and individual magistrates’ justicing rooms? Can we show that state *intention* (expressed in statutes and case law) actually led to increased *compulsion*? The Imperial evidence suggests that an intensification thesis during this period is entirely plausible when new terms are introduced into employment contracts, from both the statistical and qualitative evidence (Hay and Craven 2004: *passim*). It is more difficult to make the case for England itself during primary industrialization, at least in statistical terms, largely because of the nature of the sources. There are no published statistics before 1858, and so far only soundings in the papers of magistrates and petty sessions, where several JPs sat together, before that date (Hay 1998, 2000, 2004; King 2006).²⁷ The only longer runs of numbers are those of prisoners committed to houses of correction for master and servant offences. Unfortunately, most do not begin until the last decade of the eighteenth century, or first decade of the nineteenth. They also record only those sentenced to imprisonment, not those workers punished by fine or abatement of wages, and of course not the total numbers accused.

²⁵ This seems to me a close analogy to the ‘on-off’ switch provided by evidence of common employment in the doctrine of fellow servant, which similarly enable judges to avoid putting a case before a jury.

²⁶ Above, note 22.

²⁷ See also note 39.

But the house of correction looms large in enforcement.²⁸ Between 1720 and 1792, ten Acts of Parliament specifically provided imprisonment for leaving work and/or misbehaviour.²⁹ Two of the four earliest ones, in the 1720s, marked an important departure: two and three months in the house of correction, rather than the traditional maximum of one month derived from one of the clauses in the Statute of Artificers.³⁰ Moreover, almost all the eighteenth-century master and servant statutes introduced a new requirement that the imprisonment was to be with ‘hard labour’;³¹ and two, an important act of 1747 and another of 1792 added that the prisoner, once in the house of correction at hard labour, was there ‘to be corrected.’ That is, whipped, as Batterbee was in 1811.³²

The argument for increased coercion rests in large measure on the evidence that the carceral capacity of houses of correction greatly expanded in the last decades of the eighteenth century, as industrial production suddenly began to rise. Gloucestershire, Staffordshire, and Bedfordshire, among other counties, built new and bigger ones. Bedford announced its intention to incarcerate more ‘servants in husbandry and other labourers for misbehaviour in their employment’ (Hay 2004: 95). The cumulative effect of enactment, combined with the cumulative effect of the provision of new places of incarceration, made master and servant law much more penal. A week was the common sentence in London bridewell around 1700, with or without hard labour and a whipping; most counties outside London lacked accommodation for more than a few prisoners. A century later in industrial and agricultural counties the average sentence passed, and served, was about a month for most master and servant offences (absconding, absence, refusing to work, neglecting work, disorderly apprentices), although individual sentences ranged from one week to three months (Hay 2004: 244-47). For the offence of refusing to enter into work on an agreed contract, the average sentence served was two weeks, probably ended by an agreement to perform. In Gloucestershire two of the four houses of correction built in 1791 received increasing numbers of convicts, a high proportion of them workers in breach. In seventeen years between 1790 and 1810 there were 835, 32% of all cases, an average of 49 a year.³³ The increase to 1828 in inmates at Littledean in the Forest

²⁸ The following paragraphs draw on Hay 2000.

²⁹ 9 Geo. I c.27 (1722); 12 Geo. I c.34 (1725); 7 Geo. I st. 1 c.13 (1726); 2 Geo. II c.36 (1729); 13 Geo. II c.8 (1740); 20 Geo. II c.19 (1747); 22 Geo. II c.27 (1749); 6 Geo. III c.25 (1766); 17 Geo. III c.56 (1777); 32 Geo. III c.57 (1792).

³⁰ 12 Geo. I c.34 (1725, woollen trade); 7 Geo. I st 1 c.13 (1726, tailors).

³¹ 6 Geo. III c.25 (1766).

³² 20 Geo. II c.19 (1747); 32 Geo. III c.57 (1792).

³³ Gloucs. R.O., Q/Gli 16/2 (Littledean), Q/Gn4 (Northleach). Horsley house of correction, in the middle of the county’s textile district, probably had a larger population, but records do not survive before 1825.

of Dean, a mining and forestry region, was at least ten times greater than what might be expected from population growth.³⁴ A similar pattern can be seen in Staffordshire. In that rapidly industrializing county (including the Potteries and much of the emerging Black Country), a new house of correction within the new county jail incarcerated 930 men, women, and children between 1792 and 1814 for breach of contract, an average of 40 a year, and 39% of all those imprisoned.³⁵ Between 1792 and 1798 master and servant cases in Staffordshire never accounted for more than a third of the incarcerations in the house of correction, and often far fewer, and the total number ranged between 2 and 23 a year. A marked change in 1799, 73 cases, or almost 60% of the total, was thus unusual, but it also was the beginning of a longer period of generally higher totals, in which every year except 1801 was higher than all the years before 1799, often by a large margin. In some years more workers were actually imprisoned for breach than thieves were even prosecuted, let alone convicted (Hay 2004: 108-9).³⁶ From the 1820s ‘hard labour’ also meant punishment on the treadmills installed in more and more houses of correction. Staffordshire erected its first one in 1822; by 1834 it had eight (Hay 2000: 246-47; Hay 2004: 106; Greenslade and Johnson 1979: 205). As carceral capacity increased strikes were more easily broken. Master and servant statutes penalized leaving work unfinished, and such charges were usually used, rather than the Combination Acts. Multiple charges on the same day in the same trade show how common was such use of the law: between a tenth and a fifth of committals to the Stafford house of correction between 1792 and 1814 were such (Hay 2000: 257ff). In 1818 during a Staffordshire strike 116 coal miners at Tipton were arrested and sentenced to 2 to 3 months for leaving work.³⁷

An intensification of legal coercion seems clear, although much more work on houses of correction and magisterial activity needs to be done to prove beyond doubt that enforcement grew much harsher in industries and areas at the heart of industrialisation. Because of the various purposes served by master and servant prosecutions—preventing skilled workers from leaving to work for competitors, and breaking strikes; disciplining low-wage female and child factory workers to better performance or more intensive effort, and deterring absence or

³⁴ The population at risk cannot be accurately estimated, but the hundred of St. Briavells, where Littledean house of correction was built, had a population increase of 64% between 1801 and 1831; the county population increased by 49%. The number of prisoners held for breach of contract in Littledean increased from an average of 1 a year 1792-1802, about 5 a year to 1811, then an average of 20 a year to 1828, rising as high as 33 in 1825. Wrigley 2011, tables A1.1, A1.2; Gloucs. R.O., Q/Gli 16/2 (Littledean).

³⁵ Staffs. R.O., D(W) 1723/1, 2.

³⁶ See below for a post-1858 comparison with vagrancy, begging, and petty larceny by Naidu and Yuchtman 2013.

³⁷ Staffordshire Advertiser 4 and 11 July 1818.

absconding—it is unlikely that a rise in master and servant prosecutions will show, in any simple way, an intensification of labour. Preventing absconding (unless the new position was less work) does not in itself change labour inputs, but it can force workers to fulfil exploitative contracts; breaking strikes holds down the real wage and may thereby force workers to work longer hours. Disciplining recalcitrant or absentee lower-wage workers, whether day labourers, farm servants, or factory hands, almost certainly does mean intensification. It is probably significant that young women working in the new spinning and calico printing mills were particularly targeted, and served longer sentences without early release.³⁸

Prosecutions later in the century suggest a continuing link with industrialization. Prosecution patterns in Berkshire and Staffordshire in the period after 1858 show that as the first de-industrialized, master and servant cases greatly diminished in magistrates' caseloads; in industrializing Staffordshire they surged (Hay 2000: Fig.6, 261-62). Analysis of the published 1858-1875 statistics has shown that in broad terms, the use of master and servant increased during periods of strong economic growth that lead to wage demands, and greatly declined in periods of trade depression and unemployment. (Woods 1982: 93-115; Hay 2000: 257ff; Steinfeld 2001:72-82; Naidu and Yuchtman 2013: 108, Fig.1c). By this period master and servant prosecutions were as common as those for vagrancy and begging, and exceeded those for petty larceny. Closer statistical analysis suggests that employers indeed succeeded in suppressing wages in these last decades of the long history of penal sanctions, and it is not surprising that repeal was a priority for the trade unions from the 1860s (Naidu and Yuchtman 2013: 107-8, 112, 131ff). There were also frequent complaints that servants' claims for wages under the statutes were often unsuccessful compared to the mid-eighteenth-century experience of workers (Hay 2000: 257). The economic indicators for the late eighteenth and early nineteenth century are less complete, and without more work on unpublished sources we cannot prove by quantitative analysis that the law effectively suppressed wage rates then too, although that was one of its avowed purposes. It will be important to disaggregate individual trades. In the industrial Midlands, for example, the effect of war had opposite effects on the iron and pottery industries (Hay 1982: 136-37). Areas with concentrations of particularly high-wage skilled industries with a multiplicity of shops (as in the Black Country and the Potteries) showed most use of master and servant after 1858 and probably long before, but colliers, poor agricultural labourers, women and children in textile factories and skilled farm workers were equally kept to their tasks. By the 1820s it also appears that written contracts were becoming common, and abusively used by some employers to make prosecution easier (Hay 2004: 68,

³⁸ Madeleine Chartrand, 'Gendered Justice: Women Workers, Gender, and Master and Servant Law in England, 1700-1850', unpublished PhD dissertation, York University (Toronto), September 2017, 389ff.

102ff). A range of petty sessions and other evidence suggests to me that the 1820s to 1840s may have been decades of particularly punitive contract enforcement.³⁹

In a pioneering article Daphne Simon conjectured that the typical industrial employer using master and servant at mid-century was a marginal man running a small shop, squeezed by bigger competitors (Simon 1954). Staffordshire, with a very high rate of prosecutions from 1858, was a county of high wages in many of the new industries, but also of small workshops where there were probably many marginal employers, competing against precisely such high wage competition. But recent work shows that the biggest employers in the Potteries were using the penal sanctions as enthusiastically as smaller masters; moreover, they now sat as magistrates. Between the 1780s and the 1830s this move of manufacturers onto borough and county benches occurred in many industrial areas, and probably contributed greatly to harsher application of the penal sanctions. Some eighteenth-century statutes expressly forbade men in the woollen trade (long the dominant English industry) from acting as magistrates in master and servant disputes, and in most areas of traditional rural industry employment cases were heard by landed gentlemen, who were not employers of such labour. This prohibition was not repeated in the most important acts after the mid-eighteenth century. The most active magistrates in the early decades of the nineteenth century were clerics, with close ties to manufacturers as well as gentry. By the 1830s the county bench, and even more often borough justices in industrial areas, were highly likely to be masters in the trades whose men they were judging on breach of contract charges (Phillips 1977: 48-49, 191; Hay 2000; Hay 2004: 99-100, 105; Steinberg 2016: 69).

V. Conclusion

Was the first industrial revolution the outcome of an ‘industrious revolution’, a voluntary self-exploitation by working people wanting more consumer goods? Or the consequence of a coerced intensification of labour? If the key to industrialization in Britain was either of these, the changes in master and servant law suggest it was the latter. The longer history of master and servant in Scotland was different from that of England, built on a different set of laws, with its own forms of intensification. The employment laws of Scotland, which was industrializing even more quickly than England, converged with the English pattern by the

³⁹ I plan to publish this evidence, and hope others will explore more of the manuscript sources to make national estimates possible.

1820s.⁴⁰ We also know that master and servant coercion of ‘free’ labour in the British Empire after the abolition of slavery was perhaps more exploitative than slavery itself, and coincided with the simultaneous growth of industry in England and Britain’s greatest imperial expansion (Hay and Craven 2004: *passim* and Turner 2004).

In industrializing England the evidence seems to point clearly to increased coercion of workers under master and servant law. Legislation became more punitive. Judges conferred on masters the right to fire servants without a magistrate’s approval, and revived the disused doctrine of the entire contract. There was a dramatic expansion of capacity in houses of correction, sometimes explicitly justified as necessary to control labour, imprisoning unprecedented numbers of workers for breach of contract, particularly in industrial areas, and intensifying punishment with the treadmill. Finally, the alignment of the magisterial bench with masters’ needs by clerical magistrates evolved into dominance of the office of magistrate by industrial employers in many parts of the country. So far the evidence suggests that a more traditional, paternalist, interpretation and application of the law in the mid-1700s was transformed by parliament, judges, magistrates and employers in the years 1750 to 1830, and beyond, to help capitalists extract more labour from workers, more cheaply, for greater profits, in the first great burst of sustained industrialization in the history of the world.

⁴⁰ D. Hay, ‘Master and Servant in 18th-century Scotland’, unpublished. Ireland had yet another history, with the much-reviled stipendiary magistrates constantly making wage orders on behalf of workers but very rarely (my research to date suggests) locking anyone up: Hay, unpublished, given as the Hugh Fitzpatrick Lecture in Legal Bibliography, Dublin, Nov 2006.

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