

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1974

Book Review (reviewing J.S. Cockburn, A History of English Assizes 1558-1714 (1972))

John H. Langbein

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

John H. Langbein, Book Review (reviewing J.S. Cockburn, A History of English Assizes 1558-1714 (1972)), 18 American Journal of Legal History 88 (1974).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

activity but psychologically and economically unready—this in an era when most people thought it rude to mention birth control in polite company. He was also strongly for female suffrage.

After having worked through the mountain of Lindsey papers in the Library of Congress, and having dug through many other sources, Charles Larsen has reconstructed most of Lindsey's life for us. His book succeeds as political and social biography, in that the reader achieves an excellent sense of the dynamic little man who came to be known in the 1912 campaign as the "Bull Mouse." Lindsey was a friend of Jane Addams, Theodore Roosevelt, Lincoln Steffens, and many other progressives, and thanks to Larsen we come better to understand and fit into place the branch of the Progressive Movement that focused on humanitarian measures, on warmth, love, and trust as ways of freeing the human spirit rather than (as with the majority of Progressives) on science, efficiency, institutional reform, and the regulation of big business.

Unfortunately, much more is needed to make *The Good Fight* good legal history. There is no attempt to trace the varying legal sources, in the laws and codes of other jurisdictions from which Lindsey drew his ideas and proposals. There is no indication of how Lindsey, a judge, managed to lobby so successfully at the state legislature. There is almost no indication of how Lindsey ran his courtroom, or the manner in which he established institutional procedures with his probation officers. There is no attempt to trace the legal impact of Lindsey's reforms upon the law of other jurisdictions. Willard Hurst postulates that legal history must concern both the impact of law upon society and the impact of society upon the law: Larsen's book performs the latter half of this task very well.

Ben Lindsey came as close as any Progressive to a deep sense of the essential equality of all people. Typically, while as a judge he continued to mete out even harsh punishment as sometimes necessary, he always stressed that its purpose was to cure, not to punish, hurt, or degrade. He understood clearly that the chief source of the ills of society was the greed of entrenched economic privilege. He was among the best of American lawyers and judges.

WYTHE W. HOLT, JR., *Associate Professor,*
University of Alabama School of Law

J. S. Cockburn, *A History of English Assizes 1558-1714*. Cambridge, England. Cambridge University Press, 1972. xviii, 372 pp. \$27.50.

The circuit system for the administration of justice reconciled two characteristics of English civil procedure which were funda-

mental from the Middle Ages into this century. On the one hand, the instigation of civil litigation was centralized. No matter where the parties lived or the events took place, the originating writ issued from Chancery and was pleaded to issue in the royal central courts. A tiny bench and bar were thus enabled to develop a unitary law, "common" to the realm. On the other hand, the jury system with its vicinage requirements inclined English justice toward decentralized administration. Of course juries might occasionally be brought hundreds of miles to Westminster, but it was generally simpler to return the litigation to the localities. The *nisi prius* system arranged that civil litigation would be pleaded to issue in Westminster but tried at local assizes (literally, sittings) before royal judges travelling regularly to the counties. Criminal litigation ultimately became an adjunct to the assize system, although that was not foreordained.

In 1959 Professor T. G. Barnes published his pathbreaking essay on the early modern assize courts.¹ In some 25 pages he outlined the statutory history of the jurisdiction and described the organization and staffing of the circuits and something of the civil and criminal procedure. Barnes gave new prominence to the extra-judicial and administrative aspect of seventeenth-century assize courts, their use as a conduit between Council and magistracy and their importance as a source of guidance for the JPs and other local officers. Barnes used central and local archive material which historians had never before consulted, and he brought into prominence printed sources of particular utility, among them the anonymous *Clerk of Assize* manual and the Star Chamber charges to the assize judges.

Whereas Barnes' point of perspective was Somerset assizes in the reign of Charles I, Dr. Cockburn's new book treats the assize courts of the realm for a period of more than 150 years. Dr. Cockburn has been resourceful in unearthing printed sources—diaries and correspondence of judges and JPs, and other records which have come into print. Many of these are collected with various secondary works in a valuable bibliography (pp. 345-57). Dr. Cockburn has also sampled a range of archive material and summarized it in a bibliography of manuscript sources (pp. 333-45). Elsewhere in the appendices are two compilations which will guarantee for this book a place as a reference work: a table of assize judges constructed by term and circuit and supported with biographical summaries (pp. 262-93); and a compendium of the clerks of assize and their associates by circuit (pp. 314-21).² Passages of the text

1. T. G. Barnes, Introduction, *Somerset Assize Orders 1629-1640* (Somerset Record Society, 1959).

2. Although these appendices add to the length and production cost,

proper stitch together novel, sometimes surprising, occasionally entertaining material. There is a wonderful account of the physical hazards of some assize venues ("At East Grinstead in March 1684 the floor of the courtroom collapsed, precipitating all except the judges into the cellar below") (p. 53). Dr. Cockburn has gathered interesting data on the compensation of assize clerks and judges (pp. 72, 54-56). He appears to have documented (pp. 77-79) a phenomenon only hinted at by Barnes:³ that the clerk of assize, himself a barrister, occasionally substituted as a commissioner of gaol delivery in the absence of a second judge or serjeant.

On balance, however, the striking thing about Dr. Cockburn's book is how little it adds to the picture of assizes which Barnes supplied a decade before in an essay a tenth as long. New details have been brought out, new data cumulated, but the major and difficult questions connected with the history of the early modern assize courts have been avoided or as good as avoided. The essential reason the book miscarries is that it has been written in substantial disregard of the history of civil and criminal procedure. That has thrown the author into a perpetually mistaken and conjectural search for social and political explanations of developments which have their true context in the internal life of the legal system.

Dr. Cockburn's chapter on *nisi prius* proceedings (pp. 134-50) best illustrates the failing. It contains no discussion of how civil litigation originated and was shaped, no word of the relationship of local attorney, central pleader and circuit advocate. A third of the chapter chronicles the corruption and sharp practices of attorneys (pp. 145-49), but nothing is said of what the attorneys did when they were not being sharp. Dr. Cockburn's sole interest in *nisi prius* counsel is in the extent of nepotism on the circuits (pp. 141-42) and the later eminence of a handful of circuit barristers (p. 143). That evidence hardly justifies the supposition "that the presence of respected, if junior, members of the profession . . . restrained to some extent . . . authoritarian judicial tendencies . . ." (p. 143). Dr. Cockburn continues: "The rapidity with which assizes processed civil actions in an age notorious for the slowness of civil litigation probably also owed something to the participation of counsel" (p.

it is difficult to imagine how the Cambridge University Press can justify charging \$27.50 for this book. The same press has recently announced a revision of Jolowicz' *Historical Introduction to the Study of Roman Law* to replace the 1967 edition which cost \$16.50; the new price is \$47.50. One wonders whether a leading publisher of legal history has adopted a pricing policy of gouging institutional purchasers and abandoning the rest. We may be nearing the day when only institutions can afford to buy monographs.

3. Barnes, *supra* note 1, at xvi-xvii.

143). Here he has failed to distinguish the pleading stages of civil litigation where delay inhered from the trial at *nisi prius* where a jury verdict was taken. It is baseless to suppose that the growing participation of counsel in jury trial, which has ever since operated to protract the proceedings, should have been accelerating them in those years.

Although there is more substantial data elsewhere in the chapter, the same fundamental mistake of method persists. Dr. Cockburn has tabulated the civil causes tried on three circuits in the seventeenth century and established that “[b]y the 1690s, . . . civil business on all circuits for which records have survived was falling off rapidly” (p. 138). Why? “Economic changes . . . ; the population . . . levelling off; . . . communications were improving[;] . . . the gradual emergence of political stability . . .” (p. 139).⁴ I find peculiar the attempt to explain significant shifts in the pattern of litigation without any attention to the factors characteristically associated with such shifts: changes in legal procedure and legal doctrine. In this instance, for example, the author has never considered what impact the Statute of Frauds of 1677 may have had in diminishing the incidence of civil jury cases.

The other interesting discovery reported in Dr. Cockburn’s *nisi prius* chapter has also been smothered for want of procedural explication: “an increasing number of *nisi prius* cases were referred by the [assize] court to one or more local arbitrators, whose findings, and award of damages, if any, were apparently authenticated later by a judicial signature given in chambers or elsewhere before being returned at Westminster as the official *postea*” (p. 136). Dr. Cockburn gives no information about the quantity and type of such cases, nor does he date the practice, nor has he investigated whether it was consensual. If it were, and unless the litigation were collusive, why would the parties put themselves to the expense (discussed at pp. 135-36) and hazard of suit in Westminster in order to go to arbitration back in the county? It may be that Dr. Cockburn’s records are instancing the device called submission (to arbitration) by rule of court, whereby the parties to an arbitration agreement also agreed that the arbitrator’s award would be assimilated for purposes of execution and the like to a common law judgment. This practice, which resembles the familiar mode of

4. Cf. Dr. Cockburn’s psycho-social explanation of “a massive increase in civil litigation” after the Civil Wars: “the tensions generated by Charles’s ‘personal rule’ followed by a partial breakdown in local government exaggerated inherent weaknesses in local administration and the traditional factionalism of county society and played a significant part in fomenting the nervousness and hostilities of which litigation is a logical expression” (p. 136).

enforcement of contracts of record, was approved by the statute of 9 Wil. III c. 15 (1697-1698). Contrary to Dr. Cockburn's implication, the decision to delegate the case to arbitration was made by the parties, not by the court to which the arbitrator's award was reported.⁵ Having ignored *nisi prius* procedure, Dr. Cockburn is unable to relate this arbitration practice to it. Instead he broods that "consistent delegation of judicial powers to local arbitrators throws considerable doubt on the unity and impartiality with which the *nisi prius* system is traditionally credited" (p. 136).

In part because of the preoccupation with the externals of the subject, Dr. Cockburn lacks a sense of proportion in the selection of historical evidence. The reason that one-third of the *nisi prius* chapter deals with corruption among attorneys is that in the sources which have come into Dr. Cockburn's hands such complaints lie close to the surface. The great events which seem to have transpired in the *nisi prius* courts of the period (for example, the formation of the law of civil evidence and the development of jury advocacy as a dominant function of the bar) require more directed research.

Other chapters suffer the same deficiencies. A chapter on assize clerks (pp. 70-85) has one paragraph (p. 83) about what records the clerks were making and nothing about why. The lengthy chapter on criminal proceedings (pp. 86-133) outlines the public ritual of impanelling the grand jury and arraignment and trying the accused, but ignores the deep issues which a student of the assize records should have faced: the composition of the two juries and the decisive development in the later part of the period of evidentiary and procedural safeguards for criminal defendants.

Dr. Cockburn's concentration on the externals of his subject has led him to a pervasive confusion between the history of assizes and general "judicial history" (pp. 4, 5). The chapter on "Assizes and Politics" (pp. 188-261) is misconceived, not only because it rehashes well-known events (even Coke versus James, pp. 227-30), but also because assizes are but an incidental and not very helpful point of perspective on the grand constitutional issues. Hence for the most part Dr. Cockburn is merely embellishing with assize court sources themes taken over from the work of Collinson, Havighurst and others. He avoids the one issue he raises (pp. 186-87) which it seems would have been illuminated by a determined piece of political history: a decline in Restoration times of the assize judges' supervisory role over the JPs and local government.

It is necessary to say that the book exhibits some negligence with the sources. Because Dr. Cockburn's research was not guided

5. For later *nisi prius* practice under the statute, see S. Kyd, *A Treatise on the Law of Awards* 214-20 (Dublin 1791); cf. M. Bacon, *The Compleat Arbitrator* 205-15 (London 1770).

by well-formulated questions, his results have too often the look of undigested gleanings pasted together with conjecture. And the gleanings are too often misread: consider some samples drawn from Dr. Cockburn's handling of matters affecting the JPs. "Lambard hinted that [the JPs] connived at the whittling away of their criminal powers so that they could find time to execute the 'stacks of statutes' with which they had been loaded by the Tudors" (p. 90). Lambard in fact said no such thing, but was explaining why the number of JPs had grown.⁶ "By 1610 he [Lambard] could assert categorically that the [JPs] 'are not nowadays much occupied' with the trial of felonies, though in the same paragraph he hastened to reassure them that their power was 'no whit restrained to proceed before the coming' of the [assize] judges" (p. 91). Lambard in fact died in 1601. The passage Dr. Cockburn quotes originated in Lambard's 1581 edition, and the proviso was added in the 1599 edition.⁷ "[P]iecemeal weeding" gave "the commissions of the peace an ephemeral quality uncondusive to systematic government" (p. 162). In fact Gleason has shown that there was remarkable continuity in the commissions,⁸ and Dr. Cockburn himself is inconsistent, claiming "[g]rowing stability in the composition of the commissions" (p. 178) in support of another argument. Dr. Cockburn's footnoting is often opaque: references like "Asz. 35 *passim*" (p. 97) to an entire class of documents are all but worthless when cited for specific points of fact. Finally, Dr. Cockburn has not always been generous in acknowledging the contributions of his predecessors.⁹

Legal historians can overlearn the lesson that law and society are not divorced. It is hopeless to address the relations between the law and other spheres before the law itself is understood. Of the

6. The reference is from Book One, Chapter 7 ("How manie *Commissions* of the Peace there ought to be in each *Countie*."). W. Lambard, *Eirenarcha* (1581 [o.s.]) 36. The text (*id.* at 38):

how many [JPs] (thinke you) may now suffice (without breaking theyr backes) to beare so manie, not loades, but Stacks of Statutes, that have since [the reign of Henry VII] bene laide uppon them. To dispute, whether it be better to have manye, or few Justices of the Peace, in each *Shire*, (if all putte in were able for the place) is a noble question, & worthie of a higher consideration, and therefore it becometh not mee to enter into it.

7. *Id.* at 452; W. Lambard, *Eirenarcha* (1599) 534.

8. J. H. Gleason, *The Justices of the Peace in England: 1558 to 1640* (1969) 65, concluding "that only infrequently were J.P.s dismissed from their office."

9. Compare Cockburn, at 312-13, with Barnes, *supra* note 1, at 54-55; Cockburn, at 188, with Havighurst, "James II and the Twelve Men in Scarlet," 69 *L.Q.R.* 522 (1953), at 522.

fundamental developments in English legal history which occurred in Tudor-Stuart assize courts, our scholarship has so far removed only the least few from obscurity. When unsupported by disciplined inquiry into the internal life of the legal system, generalization about the external connections and significance of the legal system can only be conjuring.

JOHN H. LANGBEIN, *Associate Professor,*
University of Chicago Law School

American Society for Legal History Student Article Prize

The Board of Directors of the American Society for Legal History announces a prize of \$50.00 to be awarded to a student who has submitted the best article accepted for publication in the *American Journal of Legal History*. All articles published in issues of the *Journal* commencing with the January 1974 issue, will be eligible for the 1974 award.