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# Dawson: A History of Lay Judges

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# RECENT BOOKS

A HISTORY OF LAY JUDGES. By *John P. Dawson.* Cambridge, Massachusetts: Harvard University Press. 1960. Pp. x, 310. $6.50.

Research and writing in English legal history has tended to concentrate on the common law, *i.e.*, on the law that developed in the royal courts at Westminster. This is natural enough, for out of the activities of those courts evolved our present legal system and substantive law. Moreover, they were "professional" courts and their activities are fairly easily reducible to patterns meaningful and interesting to researcher and reader alike. But this concentration of scholarly effort has led to distortions in our understanding of the earlier judicial system of England. An example is a widespread failure to appreciate the substantial importance of the local courts in the total administration of English justice. More specifically, erudite inquiry into the technical process by which debt and assumpsit, among other royal writs, led eventually to a systematic common law of contracts has tended to conceal the considerable extent to which informal contracts were enforced by the local courts, by the canon law, and to some extent by the chancery, long before the common law courts had managed to extend assumpsit to cover this field.

A failure to give due weight to the local courts in investigating the judicial system of earlier centuries has also led to a failure to appreciate fully how long these courts lasted as working, effective courts. The central courts were victorious quite early in the competition for jurisdiction with other court systems, but this does not mean that they excluded the other systems altogether. Rather they subjected them to control, appropriated from them the more desirable classes of business, and, having reduced them to a position where they no longer challenged the primacy of the central courts, left them to handle, essentially unhindered, a substantial amount of small claims and other legal business.[1] The long duration and considerable importance of the local courts is underscored by the 1846 purchase by the town council of Manchester of the lordship rights to the Manor of Manchester from Sir Oswald Moseley, for the sum of 200,000 pounds. Thereafter the manor court, exceedingly active until then, was permitted to disappear.[2] Even more recently, in 1948, the homage jury of the manor of Fulham, formerly embracing the whole of Fulham and Hammersmith, now a wilderness of brick and asphalt in the west end

1 Professor Dawson tells a similar story for the French legal system. As late as the eve of the revolution there may have been as many as 70,000 to 80,000 judges in all the seignorial courts of France (p. 79). "The truth seems to be that the seignorial courts had acquired not so much a corps of judges as an army of predators" (p. 80).

2 Pp. 253-54, relying on WEBB & WEBB, ENGLISH LOCAL GOVERNMENT FROM THE REVOLUTION TO THE MUNICIPAL CORPORATIONS ACT (1906). Of course it is true that such long duration at such a high level of activity was not common.

of London, finally ceased to exist and disposed of its remaining assets.[3] Recent researches have thrown some light on the extent to which the law of certain manorial courts, still active and important in the seventeenth century, influenced markedly the development of the law of Massachusetts. They did so because they were more familiar to the Puritan migrants from the outlying counties of England than were the central courts far away in Westminster.[4]

It is the great merit of Professor Dawson's very learned book to correct some of these misconceptions and to help give balance to our thinking about some aspects of the history of English law. In describing the participation of laymen in the administration of English justice, he makes it clear to us how important were the various local courts in the overall administration of justice. The failure of most writers to deal adequately with this subject has not resulted from a lack of material. As the author remarks: "In trying to discover the stage that the manorial courts had reached by the sixteenth and seventeenth centuries, one soon discovers the main problem to be an oversupply of information" (p. 208). The best one can do, and what Professor Dawson does particularly well, is to engage in limited explorations of part of the data, generalizing cautiously and giving a factual basis for some new hypotheses to be tested in further research. He has looked in some detail at parts of the papers of the Redgrave Manor in Suffolk, which was owned first by the Bacon family and then by Lord Chief Justice Holt and his descendants (pp. 208-55). This part of the study is the most original, and in my opinion the most interesting.

These contributions alone would make Professor Dawson's book a valuable addition to the literature of English legal history. But the book does more. The author brings his remarkable knowledge of comparative legal history to bear on the history of the lay courts which occupied such an important place in English legal history. He finds that the comparable courts in France were far more extensively professionalized than in England. The factual description of the development of French (as well as German) judicial institutions is highly illuminating to the novice in these matters. And when he goes beyond mere description to seek explanations for the great divergence in the evolution of these neighboring legal systems that once had so much in common, the writing becomes exceptionally fruitful. He suggests that the immediate cause of the diver-

3 London Times, Jan. 3, 1948. No doubt there are many more such examples.

4 See, *e.g.*, HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 163-80 (1960); Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931); Haskins, *A Problem in the Reception of the Common Law in the Colonial Period*, 97 U. PA. L. REV. 842 (1949); Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U.L. REV. 281 (1941).

gence was the adoption in France, but not in England, of the Roman-canonist procedure, involving proof by individual witnesses given under oath. According to the author, this rational and modern system of procedure was a voracious maw which devoured trained and experienced personnel in ever increasing numbers to shuffle the mountains of paper that appeared in the course of natural evolution. On the other hand, the English system, far less rational and refined, made maximum use of lay personnel. It called upon a group of citizens of the vicinage to decide fact questions, relieving the trained justice of the task. It developed pleading techniques that reduced the legal issues within a narrow framework and thus lessened the work of the justices. Finally, its appellate procedure concentrated on the correction of formal errors on the record, rather than the correction of substantial errors through a reconsideration of the case. Through all these labor-saving devices, the English system could operate with but a handful of professionals, by comparison with the French system. In France, in the early decades of the eighteenth century, the number of royal judges must have exceeded 5,000, while in England during the whole period from 1300 A.D. to 1800 A.D. the judges of the central courts of common law and of Chancery seldom exceeded fifteen, so effectively had the English Government made use of lay and local personnel in the administration of justice (p.71).

Although this thesis is provocative, it is hard to concede so much effect to the mere adoption of the Roman-canonist system of procedure. It, like the jury system that was the other main available alternative, does not exist in a single unalterable form. There are many possible variations on either system and the variations would change the pressures of the system with respect to the professionalization of the judiciary. More fundamental factors and forces in society must have accounted for the fact that the particular variation of the Roman-canonist system of procedure that developed in France was so insatiable of professional lawmen, or, perhaps more appropriately, that the jury system in England operated with such an astonishingly limited use of professionals. Professor Dawson recognizes the existence of these more basic forces, pointing to the early centralization of power in the English crown, and the early determination of the vigorous Anglo-Norman kings to govern intensively and pervasively and with a firm hand, as decisive causes of the extensive use of laymen in the judicial process. Few professionals existed and in the earlier centuries there was little prospect of preparing more. The unpaid amateur must be dragooned into service to get the job done. "Beginning so early and attempting so much, their only recourse was to delegate" (p. 295). It may be, as Professor Dawson suggests, that this indeed led to a choice of jury trial instead of the Roman-canonist trial procedure. Where his explanation seems a little too pat is in suggesting that the choice, once

made, was essentially irrevocable (p. 87), that the system, once started on its way, was "further refined and elaborated under the pressure of its own internal logic" (p. 68). With all respect, this seems an overdramatization and oversimplification of the causal factors. To the extent that it is true, it seems a mere statement of the importance of inertia as a factor in legal growth. Beyond that, it is hard to believe that there is much of an "internal logic" of any system of procedure. The Roman-canonist system, once selected, could surely have evolved in a variety of directions, the choice among which must have been made because of forces in society rather than because of any assumed inherent seminal difference between witness proof and trial by jury. The immense variability of a procedural system is illustrated, if illustration is necessary, by Professor Dawson's description of the procedure in the Court of Chancery, where he takes a view of this evolution different from the traditional one. This section is, in itself, a fruitful and provocative essay challenging Langdell's classic interpretation of chancery procedure as an adaptation of the canonist system (pp. 145-72).

Moreover, the use of the jury has changed its meaning fundamentally since it began its course. In the beginning it "clearly was not, as we consider the jury now to be, a major protection against oppression by government; it was, on the contrary, an oppressive exercise of the highest powers of government" (p. 119). This point, repeatedly emphasized by Professor Dawson, seems to come closer to explaining the difference between French and English development than the mere selection of a procedural form. English kings were strong in a period when, in order to be strong, it was necessary to encourage and make use of local institutions. When French kings became strong, the local institutions had passed into private hands, because of the earlier weakness of the royal authority, thus creating entirely different pressures for the further evolution of the legal system. It is not that the selection of a procedure is unimportant, but that it is much less decisive than Professor Dawson would make it. On the other hand, Professor Dawson's underlining of the choice of a procedural system has the great merit of stating emphatically the lawyer's perception of the crucial importance of procedure to a society, a point all too little understood by those who have not had legal training, whether they be professional historians or not.

If there is any other weakness in the book, and I suggest both with great diffidence, it is in Professor Dawson's fascination with paradoxes. There is something intriguing about stating a paradox, but perhaps the temptation should sometimes be resisted. The main paradox he states in more than a single form, one of which we have already seen. It relates to the central theme discussed above. "And so we face the paradox, that the great power of the English monarchy, mobilized so early, produced in

the end self-government" (p. 295). "The canonist methods of proof were soon to require a vast increase in the royal bureaucracy and the criminal inquisition came later to symbolize the overriding power of unlimited monarchy, but the initial choice of this procedure by the central government may well have been due much more to weakness than to strength" (p. 48). Nor are these central paradoxes all he finds. "The land that had exported the jury abolished it at home" (p. 122). "Perhaps this is another paradox, that the English respect for law is still partly due to the important share that laymen still have in administering it" (p. 145). The fault, if fault it be, is the fondness for dramatic overgeneralization that the liking for paradoxes betrays.

To point to these as the book's worst (though very minor) faults is merely another way of saying that this is an exceedingly important study, with interesting and fruitful hypotheses about the causal forces operative in legal change. This is a book to be read and reread, to be reflected upon and reconsidered. This review has pointed out only a tithe of the book's contributions to our thinking about our past. It may well become one of the classics of English and comparative legal history and should certainly become well known to everyone with any interest in that neglected subject.

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