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The Justice of the Peace in England

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THE JUSTICE OF THE PEACE IN ENGLAND

R. H. MAUDSLEY* AND J. W. DAVIES**

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The office of justice of the peace is part of the common heritage of England and the United States of America, and the sexcentenary of the foundation of the magistracy, celebrated in 1961, is something of a landmark in both countries. During the 600 years of their existence, the power and reputation of the justices have fluctuated considerably, but it would be difficult to over-emphasize their importance in the legal and constitutional history of England, and therefore, of the United States.

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There has, however, been a considerable divergence in the development of the magistracy in the two countries. It seems clear, at least to an English observer, that the justices in England have retained far more of the traditional functions of the office than have their American colleagues. The English justice is still an integral part of the judicial system of England and some of the administrative functions of modern government are in fact performed by him. In some respects, indeed, his power has increased; the scope of summary jurisdiction, for example, has been consistently widened over the past hundred years. The survival of the lay magistracy on a large scale is usually a matter of some surprise to foreign observers, and even in England its value is sometimes questioned. But, although professional magistrates have been appointed in some of the larger towns, there is no real likelihood of the present system being replaced. On the contrary, the trend of recent legislation has been to add to both the judicial and the administrative powers of these unpaid, part-time judicial officers.

This article will attempt to give a brief account of the history and present position of the justices in England, and will conclude with a discussion of some of the practical problems which the system presents and the criticisms which are made of it.

HISTORY¹

Although the sexcentenary has been celebrated on the basis that the origin of the justices of the peace is to be found in the *Justices of the Peace Act* of 1361,² the gradual development of their office can be traced back at least to the beginning of the fourteenth century, and perhaps earlier. Holdsworth mentions an experiment of 1195, when Richard I's Justiciar, Hubert Walter, issued a proclamation for the preservation of the peace, by which certain knights were to take an oath from all men over fifteen years of age that they would aid in the preservation of the peace.³ Certainly, during the thirteenth century, Keepers of the Peace were appointed during the frequent outbreaks of civil disturbance to aid the Justices of Assize and to perform other duties connected with the preservation of the peace. By the beginning of the fourteenth century, the office was beginning to assume the form it was to take under the justices. In 1327, Edward III enacted that Keepers of the Peace should be appointed in each county,⁴ and commissions of the peace issued in 1329, 1332 and 1338, gave authority to hear and deter-

1. See generally ALLEN, *THE QUEEN'S PEACE* (1953); OSBORNE, *JUSTICES OF THE PEACE 1361-1848* (1960); I HOLDSWORTH, *HISTORY OF ENGLISH LAW* 285-98, 24-29.

2. 34 Edw. 3, c. 1. The short title was given by the STATUTE LAW REVISION ACT, 1948, § 5, sch. 2. The more descriptive full title, given below, is the original one.

3. I HOLDSWORTH, *HISTORY OF ENGLISH LAW* 286.

4. I Edw. 3, st. 2, c. 16.

mine felonies and trespasses.⁵ The first statutory authority to hear cases of felony was given in an Act of 1344, which provided that:

two or three of the best reputation in the counties shall be assigned Keepers of the Peace by the King's Commission; and at what time shall need be, the same, with other wise and learned in the law, shall be assigned by the King's Commission to hear and determine felonies and trespasses done against the peace in the same counties, and to inflict punishment reasonably according to [law and reason and] the manner of the deed.⁶

The Act of 1361, the full title of which was "What sort of persons shall be Justices of the Peace; and what authority they shall have," is, however, notable as being the first official use of the name "Justices of the Peace." It assigned to every county in England "one lord and with him three or four of the most worthy in the county with some learned in the law" to keep the peace, arrest and imprison offenders and hear and determine felonies and trespasses. Perhaps even more significant as a landmark is the Act of 1363⁷ which ordered the justices to hold quarterly sessions; these, with one short break during the Civil War of 1641-1648, have continued to the present day.

At first there seems to have been some hesitation on the part of the central government as to the powers of the justices. In spite of the Act of 1361, the commissions issued by the King's Council between 1364 and 1368 excluded the power to determine felonies and the administration of the labor laws (which were of great importance at this period, because of the acute shortage of manpower created by the Black Death). But both these powers were restored by another statute in 1368.⁸ Many more statutes concerning their powers, numbers and qualifications were passed during the later Middle Ages and, as the old communal and feudal institutions died out, the justices tended to take their place in the administration of the country. At this time, and indeed until the eighteenth century, there was no distinction drawn between judicial and administrative functions, and a large share of both was entrusted to the justices of the peace. By the Tudor period they had become not only an important part of criminal law enforcement, but also the pivot of local government.

The focal point of the activities of the justices was Quarter Sessions, at which most of their business, judicial and administrative, had to be transacted. Quarter Sessions were, therefore, much more than mere judicial courts. However, whatever the nature of the business before the court, judicial forms were used. As one writer has remarked: "The

5. I HOLDSWORTH, *op. cit. supra* note 3, at 25.

6. 18 Edw. 3, st. 2, c. 2.

7. 36 Edw. 3, st. 1, c. 12.

8. 42 Edw. 3, c. 6.

remarkable thing was that so much government could be carried on through the forms of a criminal trial.⁹ Apart from the justices themselves, and the Clerk of the Peace for Quarter Sessions, who was usually a lawyer, the main participants were the members of the jury. This was a jury of presentment, the Grand Jury, for, as a statute of 1368 had provided: "None shall be put to answer without presentment before justices."¹⁰ Whatever the question before the court, from robbery to the maintenance of bridges, it was for the jury to say whether offences had been committed, and to indict those responsible. After the jury had been summoned, one of the justices gave a general charge to them as to matters into which they should inquire. The jury heard reports by the constables and others on the state of law and order within the county and, if there seemed any matter which called for further inquiry, the jury made their presentments, indictments were drawn up, and the persons indicted were tried.

However, some of the powers of the justices were exercised out of sessions, by justices sitting without a jury. The practice of conferring these powers of summary jurisdiction on one or two justices had already begun by the end of the sixteenth century. At this period, presentment was on the whole still necessary, but, for example, by an Act of 1552, two justices could deal with cases of keeping an alehouse without a license.¹¹ The practice grew in the following century. Acts of 1625 and 1627¹² gave a single justice power to deal summarily with breaches of the Sunday Observance laws, and the Conventicle Act of 1664, which imposed severe penalties on anyone attending a conventicle (defined as a meeting of more than five persons for worship other than in accordance with the forms of the Established Church), was remarkable for the large powers it conferred on justices outside Quarter Sessions. By the beginning of the eighteenth century, it was fairly common for the justices to organize periodical meetings for transacting summary business when more than one justice was required, and, in the second half of the century, resolutions of the Quarter Sessions of various counties can be found urging all justices to adopt the practice. These meetings were quite informal and no record was kept of their proceedings, although, since convictions other than those at Quarter Sessions had to be reported to that court, some idea of their work can be obtained from the records of Quarter Sessions. They came to be called Petty Sessions, and the term was increasingly used in nineteenth century legislation concerning the justices, notably in the Petty Sessions Act of 1849, which recognized them as courts. But it was not until 1889 that Petty Sessions was statutorily defined as: "A court of summary jurisdiction consisting of two or more

9. DAWSON, *A HISTORY OF LAY JUDGES* 140 (1960).

10. 42 Edw. 3, c. 3.

11. 5 & 6 Edw. 6, c. 25.

12. 1 Car. 1, c. 1; 3 Car. 1, c. 1(2).

justices sitting in a petty sessional courthouse."¹³ The distinction between magistrates sitting in Quarter Sessions and Petty Sessions is a fundamental one in the present-day jurisdiction of the justices of the peace.

The first duty of the justices was, of course, to keep the peace and after 1368 their criminal jurisdiction was, except for treason, unlimited. In practice, however, the Justices of Assize tended to take over their highest judicial powers, and there was a clause in the Commission of the Peace which directed that "difficult" cases were to be reserved for Assizes. Another limitation was that in the seventeenth and eighteenth centuries a practice grew up of reserving capital offenses for the Assizes and, since the death penalty was imposed for a large number of crimes, this cut down the criminal jurisdiction of the justices considerably. But it was not until the nineteenth century that the limits of this jurisdiction were defined by statute. One of their statutory powers, the power to "bind over," is one of the curiosities of legal history. The Act of 1361 directed the justices "to take of all them that be of good fame, where they shall be found, sufficient Surety and Mainprise of their good behaviour towards the King and his people, and the other duly to punish." A century later, a scribe's insertion of a "not" into the Statute empowered the justices to take surety of good behavior from those who were not of good fame. At the present day, the power to bind over, for a substantial sum, to be of good behavior for a certain period, is used mainly as a device for preventing the repetition of trivial offenses for which only a small statutory penalty can be imposed, or even to prevent the commission of acts which are regarded as undesirable but which are not legal offenses at all.¹⁴

Not all the functions involved in keeping the peace were judicial; to some extent the justices of the peace acted as a sort of superior police force, and amongst the powers conferred on one or two justices acting "out of Sessions" was the duty of examining into alleged offences. The justice issued the warrant, examined the accused, and decided whether to commit him for trial or to discharge him. There were no rules as to how the examination was to be conducted and no safeguards for the accused; under this highly arbitrary proceeding the justice was detective, prosecutor and judge. The system lasted in this form until 1848, when the preliminary hearing of a criminal charge was statutorily regulated. The modern preliminary hearing, which is the first stage in the prosecution of any indictable offense, is a thoroughly judicial proceeding. But the basic distinction between these two forms of jurisdiction—summary

13. Interpretation Act, 1889, 52 & 53 Vict., c. 63, § 13(12).

14. The legal action taken against supporters of the Campaign for Nuclear Disarmament has in the main been under this heading. Following the "sit-down" demonstrations in Trafalgar Square and Whitehall, Bertrand Russell and other members of the Campaign for Nuclear Disarmament were sentenced to short terms of imprisonment for refusing to be "bound over to be of good behaviour."

jurisdiction, where the case is actually heard by the magistrates, and the preliminary hearing of a charge which will be tried by a superior court—remains.

However, the most remarkable feature of the pre-nineteenth century Commission of the Peace was the variety and extent of the administrative duties entrusted to it. The Tudor monarchs, especially, seem to have been anxious to control every detail of their subjects' daily lives, and the execution of this comprehensive scheme was entrusted to the justices of the peace.

In the medley of administrative and judicial duties we now find (to take only a selection) the conservation of highways, rivers, and fortifications, employment regulations for apprentices, servants and labourers, unlawful hunting and games, tippling in alehouses, eating flesh at Lent, tile-making, selling of horses and harness by soldiers, possession of Papist symbols, Jesuits and Popish recusants, brawling in church, attendance at church (compulsory, on pain of a shilling fine), "Egyptians" or gypsies (a subject of legislation for many centuries), price-control of candles and earthenware, fuel, malt, corn and other commodities, plague-infected houses, pheasants and partridges, spawn of fish, watermen, claims to stolen horses, logwood, examinations in claims against the hundred for robbery, seditious meetings, regulations concerning sheriffs and bailiffs taking plaints in the county court, and, of course, the perennial rogues, vagabonds and sturdy beggars.¹⁵

This was only a small part of the duties of a justice of the peace, and the list was always growing.

It would be impossible to discuss this administrative code in any detail or with any hope of completeness; but, it may be worth while to take as an example of the difficulties involved, one of the most onerous (as it was one of the most long-lasting) of the justices' duties, the administration of the Poor Law. In 1597, an Act of Elizabeth I imposed the administration of the Poor Law on the justices of the peace.¹⁶ The main principle of the act was that every parish had the responsibility of caring for its own poor, and, to this end, overseers were to be appointed in each parish by the justices to see to the levying of a compulsory rate. By an amending act of 1601, an appeal from the overseers to the justices was provided and the whole system was placed under the justices' absolute control.¹⁷ The theory of the acts, however, was not borne out by the practice. In many parishes the poor rate was not collected at all; in others, collections were spasmodic and did not produce

15. ALLEN, *THE QUEEN'S PEACE* 139-40 (1953).

16. 39 Eliz. 1, c. 3.

17. 43 Eliz. 1, c. 2.

the requisite amount of money. Disputes were constant. The chief problem, which was to bedevil the Poor Law administration until the late eighteenth century, was the question of "settlement." Since the parishes were only bound to provide for their own poor, any potential claimants for poor relief who did not "belong" to the parish in which they lived were dispatched back to the parish of their origin. This led to countless disputes between parishes in various parts of the country as to whose duty it was to provide for the individual in question, and to a considerable traffic in transporting the subject of the dispute from one side of the country to the other, and frequently, back again. In an attempt to solve the disputes, the Settlement Act of 1662 formulated rules as to what was meant by "settlement" in a parish and provided that a newcomer had to be challenged, if at all, within forty days of his arrival. The only result of the act was to encourage a new outburst of uprootings and litigation, which was increased when an act of 1691 abolished the time limit, so that a newcomer to a parish remained liable to removal for the rest of his life.¹⁸ All sorts of devices were used by ingenious parishioners to establish evidence of "settlement," frequently involving the splitting-up of husbands, wives and children, forcing apprenticeships and even, on occasion, marriages.

These were the kind of disputes to which the Justices had to listen for hours on end—in many of the southern counties in the later eighteenth century, at least half of the time at Quarter Sessions was occupied in dealing with cases of disputed "settlement" In 1813 a Parliamentary return gave the amount expended by the parishes in connection with poor relief for the preceding year. Actual relief cost £6,656,000. In addition there was an item in respect of removals and law charges. The figure was £324,957. Not one penny of this huge sum had been spent on the purpose for which it was raised. Far from relieving the poor it had only added to their misery and distress.¹⁹

The problem was only really dealt with when the Royal Commission on the Poor Law in 1834 condemned the whole existing system of poor relief and recommended the setting up of a central body, the Commissioners for Poor Law, to unify and supervise local administration.

The recommendations were enacted by the Poor Law Act of 1834, and the administration of poor relief was taken almost entirely out of the justices' hands. The Poor Law Act is something of a landmark for the justices of the peace, for it marks the beginning of the turn of the tide in local government by the magistracy. Many important administrative duties still remained, but during the course of the nineteenth

18. OSBORNE, JUSTICES OF THE PEACE 1361-1848 129-31, 186-91 (1960).

19. *Id.* at 190.

century the justices were gradually relieved of most of them. The process was really completed by the Local Government Act of 1888, which set up local government councils and transferred to them most of the remaining administrative powers of the justices. The administrative functions of the modern justice, which will be discussed below, are of relatively minor importance.

A similar story of comparative failure could be told about the history of most of the administrative functions imposed on the justices, and to a large extent, the failure was probably due to the inadequacy of the number and quality of officials available. Apart from a few officials, specially appointed for specific purposes, like the Overseers of the Poor Law and the Clerk of the Peace who advised at Quarter Sessions, the only officer available to the justices was the Petty Constable of the parish. The Petty Constable, who is not to be confused with a much later creation, the modern police constable, was simply a parishioner elected by his neighbors to serve for one year. His duties are difficult to list, for he was the guardian of the law within his area and all complaints, of whatever kind, came in the first instance to him for appropriate action. Many criminal matters, including the pursuing and custody of offenders, were his responsibility, and he was the servant of the justices in the enforcement of a host of minor regulations. He was also responsible for delivering a report on the state of the law and the administration within his area to Quarter Sessions. In theory the office rotated, but in practice, since the duties were onerous, it became fairly common for the wealthier inhabitants of a neighborhood to avoid their turn. Indeed, one of the rewards for securing a conviction for felony in the eighteenth century was the so-called "Tyburn ticket," a certificate from Quarter Sessions exempting the holder from any kind of parish office for life.²⁰ As a result, even in the sixteenth century, the Petty Constable had become notorious for neglecting his duties. In fact, they were too numerous for one man to accomplish, and when the one man was likely to be a person of little or no education, it is hardly surprising that he seems, in many cases, to have abandoned even the attempt to perform them. The position varied, of course, from parish to parish, but in general it may be said that the administrative machinery by which the justices were expected to govern the country was so deficient as to be almost non-existent.

In view of the handicaps under which they worked, the government of England by unpaid, untrained, part-time officials was an extraordinary achievement; for, in spite of the eventual collapse of most of the administrative schemes with which they were burdened, it was on the whole a remarkably successful government. There were, of course, black

20. OSBORNE, *op. cit. supra* note 18, at 177. Tyburn was the place of public execution. At that time it was on the outskirts of London.

patches. The "trading justices" of eighteenth century London were notorious for their corruption and for the large fortunes they acquired by bribes and extortion.²¹ Many of the county justices must have been rather casual about their duties and some seem never to have appeared at Quarter Sessions at all. But in spite of these lapses, there were enough conscientious justices at work to maintain the high reputation of the body as a whole. The justices were, of course, at nearly all times, members of "the gentry," but they were gentry who felt the responsibilities of their position and who were respected and relied on by their poorer neighbors, to whom they were the embodiment of "the law." As Maitland remarked: "The most learned 'barrister of seven years' standing' will find it hard to get so high a reputation among country folk for speaking with the voice of the law, as that which has been enjoyed by many a country squire whose only juristic attainment was the possession of a clerk who could find the appropriate page in Burn's Justice."²² It seems a pity, therefore, that their efforts were not more appreciated by the governments they sought to serve.

A few compliments from authority can be found, but on the whole, the communications of the central government to the justices of the peace seem to have consisted largely of unrestrained abuse. This is particularly so in the Tudor period when the Privy Council, while constantly increasing the burden of duties on the justices, was also constantly and rather inconsistently complaining of their inadequate performance of the duties they already had. A statute of Henry VII, in 1489, contained a proclamation listing the failings of the justices and threatening them with expulsion from the Commission, which was ordered to be read out at each meeting of Quarter Sessions in the presence of the justices.²³ The reign of Elizabeth I is full of exhortations to the justices, and at one time she seems even to have been considering abolishing the institution.²⁴ In the following reign, Francis Bacon referred, in a report to James I, to "the distracted government of Justices of the Peace."²⁵ The volume of official complaint seems to have decreased during the seventeenth century, but this may be because, after the Restoration of the Monarchy in 1660, the central government gradually ceased to exercise any supervision over the activities of the justices. The eighteenth century justice was, apart from the control exercised by the higher courts by means of prerogative writs, very much of a law unto himself.

21. See generally the novels of Henry Fielding, himself a magistrate of great distinction.

22. Maitland, *THE SHALLOWS AND SILENCES OF REAL LIFE*, in *I COLLECTED PAPERS* 467, 477. This short article, written in 1888 in anticipation of the *Local Government Act*, is something of an obituary for the traditional justice of the peace.

23. 4 Hen. 7, c. 12.

24. OSBORNE, *op. cit. supra* note 18, at ch. 5.

25. S. & B. WEBB, *ENGLISH LOCAL GOVERNMENT; ENGLISH POOR LAW HISTORY: PART 1, THE OLD POOR LAW* 94.

Some reform of the heterogeneous authority exercised by the justices was, however, inevitable, and it came in the great age of reform, the first half of the nineteenth century. A beginning was made on the state of the criminal law, and in 1827²⁶ a large number of enactments dating from the sixteenth century and earlier were repealed. But direct action started in 1848, when four bills relating to the work of the justices were introduced into the House of Commons. Two of these, the Summary Jurisdiction Act of 1848, and the Indictable Offenses Act of 1848, are the foundation of all the modern law relating to the justices of the peace. By far the largest of these enactments was the Summary Jurisdiction Act, which provided "a veritable charter of the law governing the judicial activities of justices outside of Quarter Sessions. It set out in clear and unambiguous language to consolidate, clarify and reconcile, the hopeless tangle of earlier legislation. Its passage gave a new significance and importance to summary jurisdiction."²⁷ The consolidation and clarification of the existing criminal jurisdiction of the justices was in itself an important enough achievement, but probably the chief significance of the act from the point of view of the present day is that it laid down, for the first time in their history, a code of criminal procedure to be followed by the justices. Not the least important provision was section 12: "The room or place in which the justices shall sit to hear any complaint or information shall be deemed an open and public place to which the public generally may have access." Much more legislation on summary jurisdiction followed during the course of the nineteenth century, some of which will be mentioned below, but the great importance of the act of 1848 was that it provided the preliminary work without which none of these improvements and refinements would have been possible. Indirectly, it also paved the way for the enormous expansion of summary jurisdiction during the nineteenth and twentieth centuries which has resulted in the magistrates hearing and disposing of an overwhelming majority of present-day prosecutions in England. Almost as important is the other great statute of 1848, the Indictable Offenses Act, which dealt with the preliminary examination by the justices of all persons accused of indictable offenses. We have seen how, in earlier times, this was a very haphazard and often ruthless proceeding, which under the act was replaced by a purely judicial procedure. All the sworn testimony of the witnesses for the prosecution had to be taken down in writing, the accused was permitted to question the witnesses and, on this basis, the justices decided whether a *prima facie* case had been made out and whether the accused should be committed for trial at Quarter Sessions or Assizes. The accused was not at this time allowed to give evidence on his own behalf, either in these proceedings or at the trial. This hearing, being no more than a preliminary examination, did

26. 7 & 8 Geo. 4, c. 27.

27. OSBORNE, *op. cit. supra* note 18, at 225-26.

not have to be in public. The act has been amended, notably by the Criminal Justice Act of 1925, and its working has been affected by more general reforms in criminal procedure, of which perhaps the most important is the Criminal Evidence Act of 1898,²⁸ which permitted an accused to give sworn testimony on his own behalf. But it is on the basis of the act of 1848 that, with very few exceptions, all criminal cases in this country come, in the first instance, before the justices of the peace.

A few other important reforming statutes may be mentioned. The Justices Protection Act of 1848 extended a qualified judicial immunity to the justices by providing that no action would lie against them for anything done within their jurisdiction unless malice could be proved.²⁹ The Petty Sessions Act of 1849 regulated the holding of these courts. The Summary Jurisdiction Act of 1857 provided for appeals to the High Court on points of law. Of the other statutes on summary jurisdiction, the most important is the act of 1879,³⁰ by which, when an accused person was liable, on summary conviction, to imprisonment for more than three months, he could demand trial by jury. It also provided that when a child under the age of twelve was charged with any indictable offense other than homicide, the justices could, with the consent of the parent or guardian, try the case summarily. The same principle was applied to certain offenses against property committed by persons between the ages of twelve and sixteen, provided that the accused consented to summary trial. When the same type of offense was committed by persons over the age of sixteen, and the property did not exceed forty shillings in value, the justices could also, with the consent of the accused, deal with it summarily. These provisions are of great importance in two respects—in introducing the special treatment of juveniles and in beginning the extension of summary jurisdiction. The latter principle came into its own in the Criminal Justice Act of 1925, by which a large number of offenses, which were previously only triable by judge and jury, were, at the discretion of the justices and with the consent of the accused, made triable summarily.³¹ The punishments which can be imposed by the justices are strictly limited by the act, and a vast majority of accused persons do in fact choose to have their cases disposed of in this way. Two recent statutes may be mentioned. As a result of the Royal Commission on the Justices of the Peace of 1948,³² the Justices of the Peace Act of 1949, was passed. This act deals mainly with finance and administration, and its provisions will be discussed later. Finally, there is the great modern consolidating statute, the Magistrates' Courts Act of 1952, which re-

28. Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36, § 1.

29. The extent of the immunity conferred is a subject of dispute. See VII (C) of this article's text *infra*.

30. Summary Jurisdiction Act, 1879, 42 & 43 Vict., c. 49, §§ 10-12, 17. See IV(A) of this article's text *infra*.

31. Criminal Justice Act, 1925, 15 & 16 Geo. 5, c. 86, sch. 2, § 24.

32. Cmd. 7463.

peals and re-enacts most of the summary jurisdiction acts and under which most of the modern powers of the justices of the peace are exercised.

II. APPOINTMENT, QUALIFICATIONS AND RETIREMENT

The number of justices of the peace in a given area and the qualifications required for the office have varied during the course of their history, but the actual appointment has, with one exception, always been by the Crown. In 1327³³ the King assumed the right to appoint all keepers of the peace. The privilege was restated in an act of 1344,³⁴ and the Jurisdiction in Liberties Act of 1535 provided that no person should have authority to make justices, but all such officers should be appointed by letters patent under the Great Seal and by the authority of the King and his heirs. During the Interregnum of 1649-1660, commissions were issued solely on the authority of Parliament and in the name of "The Keepers of the Liberty of England" or, after 1655, "Oliver Cromwell, Lord Protector." The authority of the justices originally depended on the terms of this "Commission of the Peace," but as medieval statutes added to their duties, the Commission became exceedingly long and confused. Lambard, in 1581, wrote: "By the number of statutes in charge of Justices, and by much vain repetition and other corruption, and by the huddling of things together, it has become so foully blemished, that of necessity it ought to be redressed." Thereafter, in 1590, Sir Christopher Wray, Chief Justice of the Queen's Bench, in conference with the other judges, issued a revised commission, the terms of which are substantially the same as the modern one. The second clause of this commission, which deals with the institution of the *Quorum*, is not without interest. After appointing the justices, it provided that at least two justices must be present at a hearing, of whom (quorum) one should be chosen from a list of persons named in the commission. The intention was that only those justices who were learned in the law should sit, but from the late sixteenth century onwards, membership of the Quorum became a political favor, and eventually, all justices were made members. The distinction, which by that time had become meaningless, was abolished by an act of 1753.³⁵ Such legal knowledge as was needed was supplied by the clerk and in any case, what the justices increasingly required was a compendium of information about their mass of statutory duties. This could only be supplied by the bulky manuals on the subject which have been part of English legal literature since the sixteenth century.

Although by law, the appointment was in the hands of the Crown,

33. 1 Edw. 3, st. 2, c. 16.

34. 18 Edw. 3, st. 2, c. 2.

35. 26 Geo. 2, c. 27.

in practice, it had to be exercised on the advice of some person or body. The qualifications required showed the sort of persons who were to be considered. By a statute of 1389³⁶ they were to be the most sufficient knights, esquires and gentlemen of the land, and, by a statute of 1414,³⁷ to be resident in their counties. A further act of 1439³⁸ required them to have land valued at twenty pounds a year. In other words, they were to be "the gentry." In the Middle Ages, strenuous efforts were made by Parliament to get the names proposed submitted for Parliamentary approval, but the attempt failed, and in Tudor times and up to the time of the civil war, the appointments were made by the Privy Council, advised by the Assize judges. During the civil war, the function was performed by Parliament, who naturally preferred men of their own persuasions, so that for the first time merchants, attorneys and tradesmen appeared on the commission. But with the Restoration of the Monarchy, a wholesale reorganization brought back all the excluded gentry. During the reigns of Charles II and James II, there was a certain amount of manipulation of the commission for court purposes, usually in an attempt to get justices favorable to the Crown's policy of religious toleration. When James II was deposed, there was another purge designed to rid the commission of any traces of Jacobitism. After this period, however, direct interference by the central government seems to have stopped, and nominations for each county fell into the hands of the Lord Lieutenant of the county, who held the honorary position of *Custos Rotulorum*, head of the Commission of the Peace. This, together with the raising of the property qualification from twenty to one hundred pounds a year in 1732,³⁹ ensured that the justices were "men of substance," forming something of a "ruling class."

It was because of the extensive influence of the Lords Lieutenant and of their practice of advising the appointment of people of their political persuasion, that the report of the Royal Commission on the Selection of Justices of the Peace in 1910 recommended the setting up of the Advisory Committees. Justices are still appointed nominally up of the Crown, but in practice appointment is by the Lord Chancellor (or in Lancashire, by the Chancellor of the Duchy of Lancaster), and the Lord Chancellor acts on the advice of advisory committees which he creates for each county or borough having a separate Commission of the Peace. The composition of the advisory committees is now secret, but it is permissible to make public the name of the Secretary of the Committee, and anybody can suggest to him names for consideration. In the counties, the Chairman of the Committee is always the Lord Lieutenant of the county. Appointments had been almost exclusively

36. 13 Rich. 2, st. 1, c. 7.

37. 2 Hen. 5, st. 1, c. 4.

38. 18 Hen. 6, c. 11.

39. 5 Geo. 2, c. 18.

conservative in political outlook but although criticism on these grounds is still heard, there is no doubt that matters are much improved. Inevitably, people who are active in local politics are likely to be considered for appointment. Among these people it is important to maintain a balance, and equally important to ensure that leading citizens without political association should be included.⁴⁰

Justices are entitled to receive payment of travelling expenses incurred in attending court,⁴¹ but there is no provision for payment for loss of earnings nor for service. Originally, justices were paid four shillings a day during Quarter Sessions, "that pay being about sixteen times the wage of a day labourer, but the decline in the value of money led to the office becoming unpaid; by the end of the seventeenth century the remuneration merely provided a free dinner for the bench, and today their services are entirely gratuitous."⁴² Here, then, are the real victims of inflation. There is an obvious danger that only the more affluent members of society can allow themselves to be considered, but it does not appear in practice that this has been a serious problem.⁴³

Property qualifications for Justices were abolished by the Justices of the Peace Act of 1906, and the Sex Disqualification (Removal) Act of 1919, allowed women to be appointed. Justices must reside within fifteen miles of their area of jurisdiction.⁴⁴

A justice is appointed for life. The Lord Chancellor has long had power to remove a justice for good cause, but this power was for various reasons rarely used. It did not in any case meet the real problem, which was that of justices continuing to sit after they had become too old or incapable to be useful. Until recent years it was common to joke about the age and infirmity of the bench, and the position was all the more serious in that the justice in question was likely, by reason of his seniority, to be Chairman.

Section 4 of the Justice of the Peace Act of 1949 provides for the creation of a supplemental list on which are to be placed the names of all justices who reach the age of seventy-five or who apply to be transferred to it. Justices on the supplemental list may only perform certain very limited functions which do not include sitting in court.

40. Cf. Report of the Royal Commission on the Justices of the Peace (1948), Cmd. 7463.

41. Justices of the Peace Act, 1949, 12-14 Geo. 6, c. 101, § 8.

42. JACKSON, *MACHINERY OF JUSTICE IN ENGLAND* 149 (3d ed. 1960).

43. Some persons are justices, *ex officio*. These include some high officers of state, High Court and County Court judges, some ecclesiastical and university dignitaries, some lawyers engaged in the work of justices and mayors of boroughs, and chairmen of county councils, urban district councils and rural district councils. *Id.* at 90.

44. Justices of the Peace Act, 1949, 12-14 Geo. 6, c. 101, § 1(1).

III. THE ORGANIZATION OF THE COURTS

A. *The Composition of the Courts*

An account of the work of the present-day justice of the peace involves the consideration of two courts—Petty Sessions or, as they are also called, Magistrates' Courts, and Quarter Sessions. There are over 1,000 Magistrates' Courts spread across England and Wales, and most of them are staffed by lay justices. Each county has its own Commission of the Peace, headed by the Lord Lieutenant. The counties are divided up into Petty Sessional Districts, each of which has one or more courts sitting in the area. Boroughs⁴⁵ frequently have their own justices and, if this is the case, the borough forms a division of its own. Some of the larger boroughs employ legally qualified stipendiary magistrates who may, but need not, sit alone. In the city of London, the court consists of the Lord Mayor and Aldermen, any one of whom may sit alone. The number of magistrates who can compose a court is governed by rules made by the Lord Chancellor under section 13 of the Justices of the Peace Act of 1949.⁴⁶ Normally, the minimum is two,⁴⁷ and the maximum in Petty Sessions is now seven. The odd number is obviously advantageous and a relatively small bench is desirable. The usual bench consists of three or five justices; three is more convenient for purposes of consultation. The number of sittings varies in different parts of the country. In the more remote areas the court may sit only once a month, while in large towns there will be several courts sitting simultaneously every day.

Quarter Sessions, as we have seen, are organized on a county and borough basis and traditionally meet four times a year. This frequency is now the minimum, and Quarter Sessions will sit as often as is necessary to deal with business.⁴⁸ Until fairly recently, Quarter Sessions in counties consisted of all the justices of the county sitting together, which, in theory, would have meant a court of several hundred judges, and it was not unusual to find twenty or more justices on the bench. A court of this size is obviously inconvenient, and the situation has been regulated by statute.⁴⁹ In the counties, the justices normally sit and take part in the decision of the case, presided over by a legally qualified chairman.⁵⁰ For these purposes, the maximum number of justices who

45. A borough is a town which has been incorporated by royal charter. Its powers are governed by the Local Government Act, 1933. Between 400 and 500 of the largest towns are so incorporated.

46. Justices of the Peace (Size and Chairmanship of Bench) Rules, 1950. (S.I. 1950 No. 1908) and Amendment Rules, 1951 (S.I. 1951 No. 1982).

47. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6, 1 Eliz. 2, c. 55, § 98. But a single magistrate can try an offense for which the maximum penalty does not exceed twenty shillings or imprisonment not exceeding fourteen days.

48. Criminal Justice Administration Act, 1962, 10 & 11 Eliz. 2, c. 15, § 4.

49. Justices of the Peace Act, 1949, 12-14 Geo. 6, c. 101, § 13, and rules made thereunder. See note 46 *supra*.

50. "Legally qualified chairman": Administration of Justice (Miscellaneous Pro-

can sit with the Chairman is eight, but usually, and preferably, the number is four or six. Those individual justices who have previously sat on the case—whether at the preliminary hearing before committal or in the decision of a case which comes to Quarter Sessions on appeal—will not sit. Many boroughs have their own courts of Quarter Sessions in which the sole judge is the Recorder, who must be a barrister of five years' standing,⁵¹ and who is appointed by the Crown and receives a salary. As a courtesy, lay justices can sit with him on the bench during the session, but they take no part in the case.

The Magistrates' Courts are at the bottom of the judicial hierarchy, but in number and in the amount of business transacted, they are by far the most important of English courts. In what follows, therefore, we shall be concerned mainly with the work of the justices in Petty Sessions.

B. Internal Organization

A Bench must elect its Chairman annually by secret ballot and without nominations, the prohibition against nominations being intended to avoid different groups "running" a candidate. Until 1949, there was no Chairman, but the Mayor was entitled to preside at any meeting of justices. This was unsatisfactory because the Mayor may have no knowledge or experience of a Magistrates' Court.⁵² Deputy Chairmen are also elected with a view to providing someone who could take the chair on days on which the Chairman is not present, and also to provide a person who will preside in each court on days on which more than one court is sitting. The details of these arrangements vary with the situation of the particular bench.

The justices also appoint certain committees. The Justices of the Peace Act of 1949,⁵³ requires the appointment of Magistrates' Courts Committees, on the scale of one for each county and one for each county borough with a population of 60,000 or more. In a county, each sessional division within the county appoints one member of the committee. The Magistrates' Courts Committee is charged with various miscellaneous duties, and particularly, with the appointment and removal of Justices' Clerks,⁵⁴ the division of counties into petty sessional divisions, and the provision of courses of instruction for justices.⁵⁵ An

visions) Act, 1938, 1 & 2 Geo. 6, c. 63, § 2, as amended by the Criminal Justice Administration Act, 1956, 4 & 5 Eliz. 2, c. 34, § 12, sch. 3. The chairman may sometimes sit alone, Criminal Justice Administration Act, 1962, 10 & 11 Eliz. 2, c. 15, § 4(5).

51. Municipal Corporations Act, 1882, 45 & 46 Vict., c. 50, § 163(1).

52. He is still, *ex officio*, a magistrate. Justices of the Peace Act, 1949, 12-14 Geo. 6, c. 101, § 2.

53. Justices of the Peace Act, 1949, 12-14 Geo. 6, c. 101, § 16.

54. See III(D) of this article's text *infra*.

55. Each Magistrates' Courts Committee is obligated by the Lord Chancellor to provide courses of instruction. All new magistrates are expected to attend, and others may.

important question in this context is whether petty sessional divisions should be organized in such a way that the county can be served by a full time clerk with a permanent staff rather than allowing a number of divisions each to have a part time clerk, who will probably be a practising solicitor as well. Opinions are divided on the matter.⁵⁶

The Magistrates' Courts Committee is also concerned with the financing of courts of summary jurisdiction. The duty of providing the petty sessional court-house and other accommodations, furniture and books for the justices and their clerks, the salary of the clerks and staff employed by them, and the expenses of the Magistrates' Courts Committees, rests on the appropriate county or borough council having a separate Commission of the Peace.⁵⁷ The councils are, subject to a few qualifications, reimbursed out of the fines and fees received by the courts.⁵⁸ The amount to be expended by local councils for these purposes is determined by the Magistrates' Courts Committees, after consultation with the council concerned.⁵⁹

Other statutory committees which are appointed are the Licensing Committee, the Betting Licensing Committee, the Juvenile Court Panel and the Probation Case Committee.⁶⁰

C. Procedure and Practice

The procedure in court varies from that of other English criminal courts in so far as summary trial is necessarily different from trial by jury. The observance of procedure is no doubt less formal for, in a large majority of the cases, neither the parties nor the justices will be professionally trained. As explained below, many defendants are tried in their absence⁶¹ and most of those who do appear are not represented. Those who do obtain professional assistance may be represented by a barrister or solicitor, and may, on occasion, be given the representation free of charge. Too often, however, the magistrates have to ascertain the defendant's side of the story from his own incoherent statements, and sometimes, from inarticulate comment or from silence. It is of great importance not only to ascertain the defendant's story, but also to give him and the public the impression that every care has been taken. Magistrates can do this by patient listening or by careful questioning.

When the evidence and the arguments of both sides have been

56. JACKSON, *MACHINERY OF JUSTICE IN ENGLAND* 156-57 (3d ed. 1960). Report on the replacement of part-time by full-time clerks to justices, undertaken for the Central Council Magistrates' Courts Committees, by the Justices' Clerks' Society, Dec. 13, 1956.

57. Justices of the Peace Act, 1949, 12-14 Geo. 6, c. 101, § 25.

58. Justices of the Peace Act, 1949, 12-14 Geo. 6, c. 101 § 27.

59. Justices of the Peace Act, 1949, 12-14 Geo. 6, c. 101, § 26. There is an appeal from the decision of the Magistrates' Courts Committee to the Secretary of State: § 26(3).

60. The Probation Case Committee meets quarterly and reviews the cases of all the probationers in the area of its jurisdiction. See IV(C) and IV(D) of this article's text *infra*.

61. See V(A) of this article's text *infra*.

completed, the magistrates must both find the facts and decide the case. Discussion of a case can take place in court, but if the matter involves any difficulty, the justices usually retire to their private room, where they reach a conclusion on the case. In the event of a decision to convict, the justices will form a provisional view as to the penalty which should be imposed. This will of course be dependent upon the previous record of the offender, which will not be known until the justices announce their decision on the question of guilt. Consideration of the penalty may necessitate a further retirement.

D. *The Clerk*⁶²

Since the justices are untrained in the law, it is necessary to arrange to have competent legal advice available for them. The Clerk to the justices prepares the papers, arranges the dates for trial, sits in court below the bench, and is responsible for advising the justices on procedure and the law. He is the key figure in a Magistrate's Court. He can exercise a great influence by ensuring that the justices have all the information which is necessary to enable them to come to a decision, but he must not make their decision for them. He will often have to foresee occasions on which witnesses are about to give inadmissible evidence. He will sometimes question witnesses to clarify points of fact if they have not been elucidated by the evidence or by questions from the bench. He must answer the justices' questions as to the law and should call their attention to legal points overlooked. He needs to be alert and learned, and endlessly patient and tactful.

When questions arise on points about which he is asked advice or about which he thinks his advice should be offered to the justices, he may give it to them from his place in court. When the justices retire to a separate room to consider a case after the argument is concluded, there is some doubt as to the extent to which a clerk should advise them in private. If he retires with them, the parties may feel that he may say things which will, in effect, decide the case for the justices. On the other hand, the justices can properly require the benefit of his advice during their deliberations. This situation can give rise to very difficult theoretical questions. In fact, however, they rarely arise because of the trust which is placed in the bona fides of the clerks and the justices.

The present practice is based on a direction given by Lord Goddard, L.C.J.:

As for the manner in which the justices might consult their clerk, the Court, his Lordship thought, had made it clear in the *East Kerrier* case⁶³ that the decision of the Court must be the decision of the justices, and not that of the justices and

62. See Report of the Committee on Justices' Clerks, 1944, Cmd. 6507.

63. *Regina v. East Kerrier Justices*, [1952] 2 Q.B. 719.

their clerk, and that if the clerk retired with the justices as a matter of course it was inevitable that the impression would be given that he might influence the justices as to the decision or sentence or both. A clerk should not retire with his justices as a matter of course, nor should they attempt to get round the decisions to which his Lordship had referred merely by asking him in every case to retire with them, or by pretending that they required his advice on a point of law.

Subject to that it was in the discretion of the justices to ask their clerk to retire with them if in any particular case it had become clear that they would need his advice. If in the course of their deliberations they found that they needed him, they could send for him. On that matter his Lordship would emphasize one further point—that if the clerk did retire with the justices, or was sent for by them, he should return to his place in court as soon as he was released by the justices, leaving them to complete their deliberations in his absence, and come back into court in their turn.⁶⁴

E. The Police as Prosecutors

In Magistrates' Courts the prosecution is usually undertaken by the police, and the case is handled by the police officer in whose name the information was laid. A solicitor or barrister may be employed by the police where a case involves legal difficulties or where the individual prosecutor is for some reason not available. However, a solicitor or barrister must be employed to conduct committal proceedings.

While this practice is economical and has obvious administrative conveniences it has been criticized on the ground that it is improper for the police to be the detectives, the custodian of the accused (in cases of arrest), and also the prosecutor in court. There is also said to be a danger of creating an unfair position for junior police officers when in the witness box, as they may be influenced to give the answer required by a senior officer who is conducting the prosecution. A harsh cross-examination of an accused by a police officer may give the impression of bullying and of the desire of the police to obtain a conviction at any cost. There is also the danger that the justices hearing the same police prosecutor at successive sittings may be thought to feel an association with him and not be able to maintain the necessary impartiality.

The Royal Commission on the Police recommended that the whole matter be reviewed, and stated that they thought that it was undesirable that police officers should appear as prosecutors except for minor cases. "Anything which tends to suggest to the public mind the suspicion of

64. Statement by Lord Goddard, L.C.J., in the High Court: *The Times*, Nov. 17, 1953. See also *Regina v. East Kerrier Justices*, [1952] 2 Q.B. 719, *Regina v. Stafford Justices*, [1962] 1 WEEKLY L.R. 456.

alliance between the court and the police cannot but be prejudicial.⁶⁵ It is most important that the justices and the police should be aware of the dangers. If they are, the problem may remain theoretical rather than practical.

IV. JURISDICTION

A. *Criminal Jurisdiction*

There is a basic division in England between indictable and summary offenses. There is no constitutional right to trial by jury, and summary trial means a trial before justices who decide questions both of law and fact. Trial on indictment means trial upon an indictment which is drawn up after a preliminary inquiry by the justices, or after a coroner's inquisition, and always involves trial by jury. Statutory authority is needed to enable an offense to be tried summarily; this may be given by a general enactment⁶⁶ or by specific provision in the statute creating the offense. There are five categories:⁶⁷

(1) The most serious offenses are triable on indictment only. Homicide, arson, rape, causing grievous bodily harm with intent, burglary, and breaking and entering dwelling houses, are examples of offenses which are included in this category.

(2) Less serious indictable offenses may be tried summarily, subject always to the consent of the accused, who must be informed of his right of choice. Typical examples of this group are warehouse breaking, stealing, and various forms of fraud. The court must be satisfied that the case is a suitable one for summary trial, taking into consideration the nature of the case, the appropriateness of the punishment they can inflict, and any representation made by the prosecutor or the accused.⁶⁸ Another factor which could be relevant is the previous record of the accused, but this will not be available to the justices at the time when they make the decision whether to hear the case or not. Provision is presently made for the justices, after a finding of guilt, to commit the accused to Quarter Sessions for punishment if his character and record is such that they feel that their own powers of punishment are inadequate.⁶⁹ The Criminal Justice Administration Act of 1962, has removed another difficulty which could arise by providing that if the justices begin the summary trial of an offense and then find that the case is a more serious one than they had thought, they can discontinue

65. Report of the Royal Commission on the Police (1962) Cmd. 1728 ¶ 381.

66. Magistrates' Courts Acts, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 19, sch. 1.

67. JACKSON, *MACHINERY OF JUSTICE IN ENGLAND* 93 (3d ed. 1960). Magistrates' Courts Act, 1952, sch. 1; Criminal Justice Administration Act, 1962, 10 & 11 Eliz. 2, c. 15, § 1, sch. 3.

68. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 19.

69. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 29.

the summary proceedings and start on a preliminary examination with a view to committal for trial.⁷⁰

(3) Some offenses are stated in the statute creating them to be triable both summarily and on indictment.⁷¹ Such offenses will be tried on indictment unless, on the application of the prosecution, the court decides to try the case summarily. But if the justices decide to do so, or if they decide to inquire into it as examining justices with a view to subsequent trial on indictment, they may change their decision if the nature of the case shows that the alternative procedure would be more appropriate.⁷² If the offense, when tried summarily, as in the case of a charge of dangerous driving, carries a maximum punishment of more than three months imprisonment, the accused has the right to trial by jury on indictment, and must be so informed.

(4) Whenever a summary offense carries a maximum punishment greater than three months imprisonment, the accused has a right to be tried by jury on indictment, and he must be informed of this right.⁷³

(5) Other offenses are triable summarily only. A person convicted has a right to appeal from conviction or sentence to Quarter Sessions, but this appeal, whatever the grounds, is heard without a jury.⁷⁴

B. *Committal for Trial*

Although justices only try cases summarily, it is part of their duty to hold a preliminary inquiry into charges which will not be so tried.⁷⁵ In this connection, the justices must decide whether there is sufficient evidence to put the accused on trial by jury, and after hearing the evidence, they will either commit him for trial or discharge him. During the inquiry the accused may cross-examine prosecution witnesses, produce witnesses of his own, and make a statement. It is usual, however, for him to say little or nothing at this stage. The justices in this inquiry are not trying the case; they are doing no more than deciding whether there is evidence on which the accused ought to stand trial, and it is rare that the prosecution will proceed with a case without this evidence.

70. 10 & 11 Eliz. 2, c. 15, § 13.

71. *E.g.*, Road Traffic Act, 1960, 8 & 9 Eliz. 2, c. 16, pt. I, § 2: A person who drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public . . . shall be liable (a) on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years or to both a fine and such imprisonment; (b) on summary conviction, to a fine not exceeding one hundred pounds or to imprisonment not exceeding four months or to both such fine and such imprisonment . . .

72. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 18. In some circumstances the accused may be committed to Quarter Sessions for sentence. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55 §§ 25(5), 29.

73. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6, 1 Eliz. 2, c. 55, § 25. Some exceptions are mentioned in § 25(1).

74. The prosecution may appeal if a summary charge is dismissed.

75. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6, 1 Eliz. 2, c. 55, §§ 4-12.

As a matter of tactics, it is usually inadvisable for the accused to disclose the substance of his defense at this stage. He will do better to reserve it for the jury, for, while the prosecution's case must be known to the accused, he is not obliged to disclose his defense, and may therefore take the prosecution by surprise at the trial.

This proceeding takes the place of the Grand Jury. Some proceeding of this nature is necessary; however, it is time-consuming and tedious, and may bring distasteful publicity to the case before trial. The procedure is that all the witnesses give their evidence and this evidence is taken down on a typewriter by the clerk.⁷⁶ The evidence of each witness is then read over to him and signed before he is bound over to attend the trial. The evidence given is similar to that contained in the written statements previously given to the police and, since there is rarely any substantial cross-examination, the witness's story is rarely shaken. It has been suggested that it would be sufficient for the purpose, if the statements previously given to the police were read out to the witness for his approval and signature, and the witness made available only if cross-examination were required.⁷⁷ If this were done, the court would have the same evidence before it as it has under the present laborious procedure, and the matter could be disposed of in a fraction of the time.

Difficulties have also occurred in connection with the publicity which is given to these inquiries in sensational cases. It is hardly possible to find a jury at the subsequent trial which has not heard something of the newspaper reports, which are necessarily one-sided, since only one side of the case will probably have been given at the inquiry.⁷⁸ It is possible for the inquiries to be held in private when this is required by the interests of justice,⁷⁹ and this practice is sometimes followed.

C. *The Juvenile Court*⁸⁰

Separate courts for the treatment of juveniles were first set up under the Children Act of 1908. A juvenile panel is elected from the bench of

76. Some Courts still write the deposition in long-hand.

77. The suggestion was made by Lord Goddard, then Lord Chief Justice, at a meeting of one of the regional branches of the Magistrates' Association, November 5, 1959. A step in this direction was recently taken in Children and Young Persons Act, 1963, c. 37, § 27, which provides that in preliminary hearings before magistrates of charges of sexual offenses against children, written statements of the child's evidence shall be admissible and the child not called to give oral evidence, unless the defense objects to this course, or if the child's attendance is required to establish identity.

78. The trial of Dr. Bodkin Adams in 1958 is a good example. The facts were dramatic, and, after reading the reports of the preliminary hearing, at which no defense was offered, the public was convinced of Dr. Adams' guilt. The trial was very different, and Dr. Adams was acquitted. See BEDFORD, *THE BEST WE CAN DO*, and 20 *MODERN L. REV.* 387 (1957).

79. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 4.

80. See generally, CAVENAGH, *THE CHILD AND THE COURT*; Children and Young Persons Act, 1933, 23 Geo. 5, c. 12; Children Act, 1948, 11 & 12 Geo. 6, c. 43; Criminal Justice Act, 1961, 9 & 10 Eliz. 2, c. 39; Children and Young Persons Act, 1963, c. 37.

magistrates,^{80a} and members of the panel retire from it at the age of sixty-five. In dealing with children and young persons,⁸¹ whether as offenders or as persons in need of care, protection or control, the court is required to "have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training."⁸² The emphasis is thus upon treatment, not punishment.

The juvenile court has power to deal with all offenses other than homicide.^{82a} A "young person" has the right to be tried by jury for an indictable offense, or for an offense carrying, in the case of an adult, more than three month's imprisonment,⁸³ but this right is rarely exercised. Because of this wider jurisdiction and of the smaller percentage of traffic cases, statistics show a higher percentage of indictable offenses in the juvenile court than in the adult court. In most cases, the defendant admits his guilt, and the problems which face the court (and very baffling they can be) are those of deciding the course which is best in the interest of the child or young person. The procedure in court is kept as informal as is consistent with the dignity of the court and the observance of the requirements of legal proof in a case which is contested. The court tries to demonstrate to the child and his parents⁸⁴ that it is seeking the best course for him, but it must at the same time ensure that the visit to the court is an experience which the accused does not wish to repeat.

Great emphasis is placed in the juvenile court upon accurate and up-to-date reports of the social, school and home background of the accused.⁸⁵ The local authority and probation officers are required to provide these reports which play a large part in the court's decision. A problem arises in connection with the choice of the most suitable time at which to obtain the reports. It is clearly most convenient for the court to have the reports available at the time of the trial. This may be difficult if the family is not co-operative, and impossible if the accused is denying the charge. Provision is therefore made for an accused, after a finding of guilt, to be remanded for a period not exceeding three weeks, on bail or in custody, for further enquiries to be made.⁸⁶ At this stage, it is in everyone's interest to produce satisfactory reports. Better

80a. Children and Young Persons Act, 1963, c. 37, § 17, Sched. 2.

81. Under the Children and Young Persons Act, 1933, 25 Geo. 5, c. 12, "children" means persons under fourteen years of age, "young persons" means those between the ages of fourteen and seventeen.

82. Children and Young Persons Act, 1933, 23 Geo. 5, c. 12, § 44(1).

82a. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 21.

83. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 25.

84. Whose attendance can be required: Children and Young Persons Act, 1963, c. 37, § 25.

85. Children and Young Persons Act, 1933, 23 Geo. 5, c. 12, § 35.

86. Rule 11, Summary Jurisdiction (Children and Young Persons Rules) 1933, and Rule 22, Summary Jurisdiction (Children and Young Persons Rules) 1963.

information is generally obtained after a remand, but it is unsatisfactory to keep an accused waiting so long for the court's decision. In practice, however, many cases are remanded for the reports.

Children and young persons are brought before the juvenile courts under either of two main heads. First, that they have committed a criminal offense. The age of criminal responsibility in England is ten,⁸⁷ but from that age to fourteen, the accused is presumed to be incapable of forming the intent to commit a crime (*doli incapax*); but this presumption can be rebutted by proof of a "mischievous discretion"—that is, by showing that the child knew that what he did was morally wrong.^{87a} A finding of guilt in such circumstances counts as a criminal conviction, but the Children and Young Persons Act 1963^{87b} provides that, after such a convicted person has reached the age of 21, evidence of previous convictions when he was under the age of fourteen shall be disregarded; they therefore disappear from his "criminal record."

The second way in which a child or young person may be brought before a juvenile court is upon an allegation that he is in need of "care, protection or control."⁸⁸ To come within this description, it is necessary to show that the child or young person is "not receiving such care, protection and guidance as a good parent may reasonably be expected to give" or "is beyond the control of his parent or guardian." In the case of the former of these alternatives, other conditions must be shown to exist, namely that he is "falling into bad associations or is exposed to moral danger," or that "the lack of care, protection and guidance is likely to cause him unnecessary suffering or seriously to affect his health or proper development," or that certain offenses involving children have been committed against the child or by or against other members of the household. Proceedings of this type are usually brought by the police or by the local authority. It was possible before the 1963 Act came into force for parents to bring such proceedings themselves. This was unsatisfactory, and amounted, in effect, to a public rejection of the child by the parents, and created an even worse situation in the home if the child returned. It is now provided, therefore, that parents cannot bring such proceedings, but can, in suitable cases, require the local authority to do so.⁸⁹

If the court finds that a child is in need of care, protection or control, its powers are more limited than those that would be exercisable in

87. Children and Young Persons Act, 1963, c. 37, § 16(1), amending the Children and Young Persons Act, 1933, 23 Geo. 5, c. 17, in which the common law age of seven was increased to eight.

87a. *R. v. Owen* (1830), 4 C. & P. 236.

87b. Sections 16(1),(2).

88. Children and Young Persons Act, 1963, c. 37, § 2 where the statutory definition of this phrase is given.

89. Children and Young Persons Act, 1963, c. 37, § 3.

the case of conviction of a criminal charge. No punitive element enters into consideration; but the steps necessary for the welfare of the child may be the same as they would be if an offense had been committed. The court may, among other things, make a supervision order which places the child or young person under the supervision of the probation officer or "other suitable person" (usually an official of the Children's Department of the local authority). The court may also take the child or young person out of the custody of his parents and place him in the care of the local authority or send him to an approved school.⁹⁰

This is not the place for an account of the punishments available to the juvenile court. We have seen that the court must have regard first and foremost to the welfare of the child or young person, and that punishments are regarded only as occasions of being cruel in order to be kind. Recent research into the question of the treatment of wayward youth has underlined this aspect, and has also demonstrated the narrow line between criminal cases and the "care, protection or control" cases. Most children who are drifting into crime are in need of care, protection or control, and those who are not properly cared for, protected or controlled are likely to drift into crime. As individuals they are not very different sorts of people. If methods of treatment can be found which will successfully reclaim wayward youths and make them useful members of society, the treatment which is appropriate to one is not necessarily different from that accorded to the other. The Report of the Ingleby Committee⁹¹ recommended that some of the methods which were originally appropriate only in criminal cases should be made available in care, protection and control cases as well,⁹² and that proceedings in connection with children under the age of twelve should no longer be brought as criminal cases, but should all be brought as applications to the court for an order on the ground that the child is in need of "protection or discipline." If the allegation were proved, there would be very little distinction in the forms of treatment, from which the court could select the most appropriate, between cases in which the acts proved would have constituted an offense by an adult and those in which they would not. The 1963 Act, however, did not accept this suggestion, but merely raised the age of criminal responsibility from eight to ten years.

A final word should be said on the question of the competence of juvenile court panels to deal with the questions which come before them. We have seen that no professional qualifications are necessary for appointment as a magistrate. Rarely do magistrates have legal or sociologi-

90. An approved school is one which has been officially approved by the Home Secretary as suitable for the education and training of persons sent there by the Juvenile Court. Children and Young Persons Act, 1933, 23 Geo. 5, c. 12, § 79. Special schools are maintained by the State for this purpose.

91. Cmd. 1191, ¶¶ 83-94 (1960).

92. Cmd. 1191, ¶ 89 (1960).

cal qualifications. Suggestions have often been made to the effect that a juvenile court should be staffed by trained experts, including lawyers, psychiatrists and sociologists; and there is no doubt that England has much to learn from experiments in American and Scandinavian jurisdictions on the problem of finding people or organizations qualified to deal with these questions.⁹³ The curious thing about the English approach to these matters is that there is general public trust and confidence in the judiciary, but considerable suspicion of non-judicial experts and officials. Magistrates, though not lawyers, do hold judicial positions and, although they are criticized on many grounds, their *bona fides* is, in general, undoubted. This is a factor of the greatest importance, and any changes that are made in the composition of juvenile courts should be such as to increase their expertise without risking the loss by the court of its present reputation for impartiality and good faith.

D. *The Problem of Punishment*

Lay justices, being ordinary citizens of the community in which they exercise jurisdiction, are very conscious of the responsibility which they bear in the exercise of their powers. It is well that they should ask themselves what justification there is for their having power to inflict penalties, including the power of deprivation of liberty, upon their fellow citizen, and well that they should try to understand something of the theory of the punishments they impose.

The maximum punishments which a Magistrates' Court can impose, subject always to the statutory maximum for the offense in question, are:

(1) For indictable offenses—imprisonment for up to six months on any one charge, and a maximum of two periods of six months to run consecutively, or a fine up to 100 pounds, or both.⁹⁴

(2) For non-indictable offenses—whatever statutory penalty is prescribed, even though, as in the case of a few summary offenses, the maximum penalty is in excess of six months or 100 pounds.⁹⁵ In certain motoring offenses, the court may disqualify an offender from holding a driving license.

The court may also, with consent of the accused, place him on probation for a period of not less than one and not more than three years. This means that he is required to be under the supervision of a probation officer, to keep the peace and be of good behavior, and to observe any other condition which the court imposes. The probationer

93. R. Hagen, 6 HOWARD JOURNAL 187; NYQUIST, JUVENILE JUSTICE; GRUNHUT, PENAL REFORM 359-365 (1948).

94. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 108(1)(2).

95. Certain driving offenses, and some customs and excise offenses.

is liable to be brought back to court if he is in breach of any of the terms of the order, and may then be punished both for the breach and for the original offense.⁹⁶

The court may bind a person over to keep the peace and to be of good behavior, and may require him to give securities, or imprison him in default of securities. The justices may also discharge an offender either absolutely or conditionally on his remaining free from further conviction for a period of up to twelve months.⁹⁷

The problem of selecting the appropriate punishment is a formidable task. Minor criminals usually find themselves in trouble because of their incapacity and stupidity—because of their inability to live on terms with society. With adults, as with juveniles, the main object of the court in making its decision is the salvation of the individual. With adult criminals, however, the prospects of salvation are often very slight, and the community must be protected from their depredations. The imposition of fines achieves little where the offender has no money to pay. Opinions differ as to the efficacy of short terms of imprisonment which may have disastrous results upon a prisoner's wife and family. But something must be done. The offense cannot be overlooked and forgotten. An observer, almost any morning in Magistrates' Court, will see a number of problems for which there are no satisfactory solutions. The magistrates, or indeed, any judge of a criminal court, must take comfort in the thought, that with the common sense, learning and sympathy they possess, and bearing in mind the interests of all their fellow citizens, they have reached the best solution which their limited resources will allow.^{97a}

E. *Civil Jurisdiction*

Something should be said of the civil and administrative duties of magistrates although space will not allow these matters to be treated in detail. Apart from matrimonial cases, these duties do not often give rise to legal issues of great moment, but they do require an amount of time and attention which is appropriate to their importance in the community, but which may be quite out of proportion to their legal significance.

1. DOMESTIC PROCEEDINGS⁹⁸

A Magistrates' Court has no power to make any orders which affect the status of marriage but, for various matrimonial offenses, the court

96. *Regina v. Webb*, [1953] 1 All. E.R. 1156; *Regina v. Devine*, [1956] 1 All. E. R. 548; *Regina v. Calvert*, [1963] 1 Weekly L.R. 151.

97. Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58, § 7.

97a. In April, 1964, the Home Office published *The Sentence of the Court*, a handbook for courts on the treatment of offenders.

98. See generally, *Matrimonial Proceeding (Magistrates' Courts) Act*, 1960, 8 & 9 Eliz. 2, c. 48; *Maintenance Agreements Act*, 1957, 5 & 6 Eliz. 2, c. 35; *Maintenance Order (Facilities for Enforcement) Act*, 1920, 10 & 11 Geo. 5, c. 33; and *Magistrates' Courts Act*, 1952, 15 & 16 Geo. 6, 1 Eliz. 2, c. 55, §§ 56-62.

may, on application, make a "matrimonial order" which has the same effect in practice as an order for judicial separation. The Matrimonial Proceedings (Magistrates' Courts) Act of 1960, lays down the grounds on which a husband or wife may apply for an order, and states that the order may contain provisions for the termination of the duty of cohabitation, for the maintenance of the parties and the children, and for the legal custody of, and for the access to, the children. In practice, the matrimonial order is frequently the preliminary step in the presentation of a petition for divorce.

When exercising these powers, the court must consist of two or three magistrates, and so far as possible, there should be both a man and a woman on the bench. Every effort is made to keep these proceedings private and informal. The public is not entitled to be present, and the press is restricted as to the amount of detail that it can publish. Appeal from a magistrates' matrimonial order lies to the Divisional Court of the Probate, Divorce and Admiralty Division.

It is in this field that magistrates are faced with the most difficult and complicated legal questions. An attempt to explain them would necessitate a minor treatise on nearly all aspects of matrimonial law.⁹⁹ Magistrates are, of course, guided by their clerk on these matters, and find that he needs to be consulted more often in matrimonial cases than in any others. The questions which they have to decide are by no means abstract legal problems. Above all others, these are situations of human tragedy in which the lives, not only of the spouses, but also of the children, are at stake. Probation officers are available to the court and will sometimes be able to help the parties to find a solution which will be more satisfactory than the pursuit of legal remedies, but such a situation is exceptional, for every effort to find such a solution will generally have been made before the case reaches the stage of an application for an order being heard. Little is publicly known, for obvious reasons, of this side of the magistrates' work, but of the many and varied duties which a magistrate is called upon to undertake, these are the ones above all others which call for the highest combination of skill and judgment and human understanding.

2. AFFILIATION

Any single woman¹⁰⁰ may apply to a magistrate of the area in which she resides for a summons against the man whom she alleges to be the father of her illegitimate child.¹⁰¹ The court is required to hear the complaint and, in so doing, must hear the mother's evidence, which, if

99. PUGH, *MATRIMONIAL PROCEEDINGS BEFORE MAGISTRATES* (Butterworth, 1961).

100. This term may include a widow or married woman living away from her husband.

101. *Affiliation Proceedings Act, 1957*, 5 & 6 Eliz. 2, c. 55, § 1.

the court is to make an order, must be corroborated¹⁰² in a material particular.

If the court is satisfied with the evidence presented, it may adjudge the defendant to be the father of the child, and may, if it thinks fit, make an order requiring him to pay a weekly sum not exceeding fifty shillings per week, and in addition, the expenses incidental to the birth of the child, or, if it has died, the funeral expenses. Orders for periodical payments of money are usually made so as to require payments to continue until the child is sixteen years old, but unless an age is stated, payments will cease when the child is thirteen.

3. ADOPTION

A Magistrates' Court, in addition to the High Court and the County Court, has jurisdiction to make an adoption order, authorizing an applicant to adopt an infant.¹⁰³ This order has the effect of transferring to the adopter all the rights and duties of the natural parents or previous guardian of the infant.¹⁰⁴

This jurisdiction is always exercised, in Magistrates' Courts, by those magistrates who are appointed to be members of the juvenile court. At the hearing, which is in private, they are presented with detailed reports prepared by the authorities who are supervising the adoption, and they are in a position to question the adoptor, and, if he is of sufficient years, the infant. They must ensure, in the case of illegitimate children, that the consent of the natural parent or present guardian is given in all cases except those in which a dispensation is given, as where the natural parent cannot be found or where he unreasonably refuses.

As long as the preparatory work is properly done and a clear report made, little difficulty usually faces the magistrates in these cases. The proceedings are by consent and everyone is working toward the same end. In nearly every case the plans which are submitted to the magistrates for approval are clearly in the interests of the infant.¹⁰⁵

4. LIQUOR LICENSING

Each licensing district must appoint a Licensing Committee consisting of not less than five, and not more than fifteen, magistrates, and this committee is responsible for the issuance of licenses to sell liquor within its area.¹⁰⁶

102. *Id.* § 4. *Reffell v. Morton*, (1906) 70 J.P. 347.

103. Adoption Act, 1950, 14 & 15 Geo. 6, c. 26, §§ 1, 8(1).

104. *Id.* § 10.

105. See generally, CLARK HALL & MORRISON, CHILDREN AND YOUNG PERSONS (6th ed. 1960, Div. 3); for some problems, see *Re J.S.*, [1959] 3 All. E.R. 856 (Ch.); *Re C.S.C.*, [1960] 1 All. E.R. 711 (Ch.); *Re D.*, [1958] 1 All. E.R. 427 (C.A.); *Re P.*, [1962] 3 All. E.R. 789 (Ch.); *Re G.*, [1963] 1 All. E.R. 20 (C.A.).

106. Licensing Act, 1953, 1 & 2 Eliz. 2, c. 46, § 2(4), sch. I, pt. 1, ¶¶ 1, 2.

In the first two weeks of February in each year, the committee holds its general annual licensing meeting at which applications for new licenses, renewal of licenses, removal of licenses, transfer of licenses from one licensee to another, and all matters concerning the sale of liquor, are heard. Licenses are granted to applicants in respect of certain premises and the license runs for a year starting on the 5th of April. Dates and times are also arranged for at least four transfer sessions to be held during the year. At transfer sessions the committee formerly dealt only with the transfer of an existing license from a retiring licensee to his successor, but may now deal also with the granting of licenses, and most of the other business transacted at the annual meeting.

The hours during which liquor may be sold are prescribed by statute¹⁰⁷ and are subject to local variations and the discretion of the Licensing Committee. Provision is also made for an appeal to Quarter Sessions by any person who is aggrieved by any decision of the justices, and for compensation to licensees who suffer financial loss when their licenses are not renewed on the ground that their premises are redundant.¹⁰⁸

5. BETTING LICENSING

The Betting and Gaming Act of 1960, made certain amendments to the existing law, and provided, among other things, for the granting of permits to persons who wished to operate as bookmakers, and of licenses in respect of premises which may be used by the public for the purpose of betting. The authority responsible in such matters is, in England, a committee of the justices in each petty sessional area, consisting of no less than five and no more than fifteen justices. They must hold their meetings at least four times a year.

6. REGISTRATION OF CLUBS

Difficulties have arisen in recent years concerning the control of clubs in which intoxicating liquor has been sold. Until the passage of the Licensing Act of 1961, anyone could start a club by paying a fee of five shillings to the local clerk to the justices and the club could then be registered and supply liquor to its members. Even after the passage of this act, there was little control over the running of the clubs, unless the police were able to prove a contravention of the law, in which case, proceedings could then be taken to strike the club off the register. It was well known that many such clubs had become centers where liquor was sold outside the permitted hours, where unsavory attractions were offered to members, where membership had become a farce because anyone could join by signing a book, and where large profits were made for

107. Licensing Act, 1961, 9 & 10 Eliz. 2, c. 61, §§ 5-11.

108. Licensing Act, 1953, 1 & 2 Eliz. 2, c. 46, § 35(1) (Appeals); § 17(1) (Compensation for non-renewal of an old on-license).

the managements by disregard of the law. Of course, warning systems within the club could make it very difficult for the police to discover what was going on inside.

The act lays down a number of qualifications for registration, which, without going into details, are an attempt to simplify the running of bona fide clubs, and to exclude from registration clubs run by promoters whose object is to earn large sums of money by disregarding the law. The duty of examining applications for registration is placed upon the magistrates. The inquiry into the qualification of every club in the district is a formidable undertaking, and the decision to give this duty to the magistrates is a further example of the way in which miscellaneous duties which need to be performed in the community are cast upon the magistrates.

V. RECENT CHANGES IN PROCEDURE

A. *Magistrates' Courts Acts, 1952-1957*

It has long been possible for magistrates to try a summary offense in the absence of the accused. Since 1848, they have been able, on proof of service of the summons, either to try the case or to issue a warrant for the arrest of the accused.¹⁰⁹

A new and simplified procedure was introduced by the Magistrates' Courts Act of 1957.¹¹⁰ If the prosecutor applies this procedure, the accused may ask the magistrates to try the case in his absence, without his running the risk of being subjected to a warrant for his arrest if the magistrates decide, for some reason, to require his presence. A statement of facts is prepared by the police from the statements of the witnesses and is sent to the accused with the summons and with a form on which he may signify a guilty plea in writing and make a statement in mitigation. The proceedings in court are based entirely upon the written documents. The prosecution may not introduce additional matter, nor may the court ask questions. The fact that the proceedings are in writing saves time and expense and is greatly to everyone's convenience. So great is the convenience that, in prosecutions for minor (mostly traffic) offenses, even defendants who believe that they have a defense to the charge have been known to plead guilty under this procedure. They calculate that the fine which the magistrates will impose will be less than the expense of the travelling to court plus the loss of earnings caused by an appearance. This procedure is initiated by the prosecution, but can only be followed through with the written consent of the accused. He may, of course, prefer to appear in court and to allow the trial to proceed in the ordinary way.

109. Summary Jurisdiction Act, 1848, §§ 2, 13 (now Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 15).

110. Magistrates' Courts Act, 1957, 5 & 6 Eliz. 2, c. 29, § 1.

The procedure is applicable only where the charge is of a summary offense which is not also triable on indictment, and for which the maximum punishment is not greater than a term of imprisonment for three months. The service on the accused of a notice giving an explanation of this procedure and of a statement of the facts of the case, must be proved. Also, no sentence which involves a term of detention or imprisonment or any disqualification may be passed¹¹¹ without adjournment for the purpose of giving the accused an opportunity of attending.¹¹²

This procedure is an attempt to save the court, both parties and the witnesses, from unnecessary expenditure of time and money, while at the same time, not to deprive the accused of any of the protection which is normally afforded to him in a criminal trial. It has been considered to be a success and, speaking purely in numerical terms, the majority of cases coming before Magistrates' Courts are now dealt with in this way.

B. "Ticket" Fines

In this present age, it is inevitable that most of the cases dealt with in Magistrates' Courts are road traffic offenses of one sort or another. The problem of finding the best way to deal with the volume of cases is no easy matter. England has not tried the experiment of creating special traffic courts which deal only with traffic offenses. These offenses are generally treated like any other.

It has been seen, however, that a specially quick and convenient procedure was established by the Magistrates' Court Act of 1957 for dealing with minor offenses. In practice, those which are dealt with in this way are nearly all traffic offenses. It might therefore be said, that there is, in effect, a special procedure for minor traffic offenses, although the matter is brought before the ordinary court. Recently, experiments have been made for certain offenses whereby these offenders may, if they wish, pay a fixed penalty to the court instead of being prosecuted.

The Road Traffic and Roads Improvements Act of 1960,¹¹³ introduced a system of "ticket fines" with respect to the offenses of illegal parking or obstruction, leaving vehicles without displaying the lights required by law, and non-payment of charges due at parking meters. A constable¹¹⁴ may give to the defendant, or place on the car, a notice¹¹⁵ "offering the opportunity of the discharge of any liability to conviction of that offense by the payment of a fixed penalty," which is set by the

111. Magistrates' Courts Act, 1957, 5 & 6 Eliz. 2, c. 29, § 1(2).

112. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 14(3).

113. Road Traffic and Roads Improvement Act, 1960, 8 & 9 Eliz. 2, c. 63, § 1.

114. Or a traffic warden, who has, for these purposes, the same powers as a police constable. Road Traffic and Roads Improvement Act, 1960, 8 & 9 Eliz. 2, c. 63, § 2.

115. In the form prescribed by the Fixed Penalty (Procedure) Regulations, 1960 (§ I, 1960, No. 1600).

statute at forty shillings or half the maximum amount to which a first offender would be liable, whichever is less.¹¹⁶ If the person decides to accept liability and to pay the fine, he must pay the appropriate sum to the magistrates' clerk of the district. He will be immune from prosecution for twenty-one days from the date of the notice, but if he does not pay the fine within that time, he may thereafter be prosecuted. The payments are treated for all purposes as fines imposed by a court of summary jurisdiction. The system applies only to the areas which have been specified; it is in operation, according to information available at the time of writing, in about thirty cities or towns, and the number is increasing.

VI. LEGAL AID¹¹⁷

Free legal aid is available with most of the proceedings before Magistrates' Courts, but the granting of such aid is always subject to the discretion of the magistrates. In criminal cases, whether in a summary trial or in committal proceedings, aid may be granted if the defendant has insufficient means to enable him legal representation, and if it is desirable in the interests of justice that he should have free legal aid.¹¹⁸ Aid is available on these terms not only in proceedings in which the guilt or innocence of an accused is in issue, but also where, after a plea or finding of guilt, the question is one of sentence. Provision on similar lines is also made for free legal aid in trials on indictment and in appeals from Magistrates' Courts; but such matters are outside the scope of the present discussion.¹¹⁹

Provision is also made for granting legal aid in connection with civil litigation. The scheme covers civil litigation at all levels, but we need not trouble here with the details, since, so far as magistrates are concerned, legal aid is only available in civil proceedings in a limited class of cases, principally matrimonial proceedings and affiliation orders.¹²⁰ The administration of legal aid in civil proceedings is the responsibility of the Law Society.¹²¹

116. Road Traffic and Roads Improvement Act, 1960, 8 & 9 Eliz. 2, c. 63, § 1(9).

117. JACKSON, *MACHINERY OF JUSTICE IN ENGLAND* 130-135 (3d ed. 1960).

118. Poor Prisoners' Defense Act, 1930, 20 & 21 Geo. 5, c. 32, § 2, as amended by Legal Aid and Advice Act, 1949, 12-14 Geo. 6, c. 51, § 18.

119. Poor Prisoners' Defense Act, 1930, 20 & 21 Geo. 5, c. 32, § 1, and Summary Jurisdiction (Appeals) Act, 1933, 23 & 24 Geo. 5, c. 38, § 2, as amended by Legal Aid and Advice Act, 1949, 12-14 Geo. 5, c. 51, § 18.

120. There is also the system of dock-side briefs. Any prisoner who can produce £2 4/6d. is entitled to select any of the counsel robed and present in court, and irrespective of the means of the prisoner, the counsel selected must conduct the defence for this fee. This method gives very little time for the preparation of the defence. JACKSON, *op. cit. supra* note 117, at 133, n.1.

121. Legal Aid and Advice Act, 1949, 12-14 Geo. 6, c. 51, § 1(2), sch. 1, pt. 1, ¶ 3, § 8; S.I. 1961 No. 554.

It has been seen that the granting of free legal aid in criminal cases in courts of summary jurisdiction is entirely within the discretion of the magistrates. In the nature of things, this discretion is very difficult to exercise. The magistrates are asked to decide, before they inquire into a case, whether or not it is in the interests of justice that the applicant should have free legal advice. The decision is dependent upon matters which will arise in the hearing, and the hearing has *ex hypothesi* not taken place.

In practice, however, the exercise of this discretion does not prove to be as difficult as one might expect. So far as the means of the defendant are concerned, he may be required to furnish a written statement on a prescribed form, and the penalties for making false statements are severe.¹²² The information supplied is sufficient to enable the magistrates to determine this aspect of the question. More difficult is the question of the requirements of the interests of justice. However, it is usually possible to foresee, from the nature of the circumstances, whether any issues will arise which require consideration and presentation by a lawyer. If magistrates are hearing the trial of a case in which the defendant is not professionally represented, and during the trial issues arise on which they think that the defendant should be advised, the case can be stopped and adjourned for a period of time which will allow the defendant to take legal advice, and a legal aid certificate granted if the defendant's means are insufficient. Magistrates are instructed that if there is any doubt on the question of the sufficiency of the means of the applicant or as to the desirability of granting free legal aid, those doubts should be resolved in the applicant's favor.^{122a}

VII. JUDICIAL CONTROL

Magistrates' Courts are subject to two forms of supervision by superior courts—a direct control by way of appeal, and indirectly by means of the prerogative orders. There is also the possibility that in some circumstances a magistrate may render himself personally liable to an action for damages, but this raises difficulties in theory and rarely happens in practice.

A. Appeals

In order to consider the availability of appeals from Magistrates' Courts, it is necessary to distinguish between the two main functions of the magistrates in their judicial capacity. When the magistrates are sitting on a preliminary inquiry into an indictable offense, the only question they have to decide is whether there is sufficient evidence to

122. Legal Aid and Advice Act, 1949, 12-14 Geo. 6, c. 51, § 18(3); Legal Aid in Criminal Cases (Statement of Means) Regulations, 1952 (S.I. 1952, No. 391).

122a. Legal Aid and Advice Act, 1949, 12-14 Geo. 6, c. 51, § 18(1).

justify committing the accused for trial at Quarter Sessions, the Assizes, or the Central Criminal Court (the "Old Bailey"). No question of an appeal arises at this stage, since there is as yet no conviction from which to appeal. If, however, the accused is committed for trial and convicted at Quarter Sessions or Assizes, there is, subject to certain conditions¹²³ a right of appeal against both the conviction and the sentence to the Court of Criminal Appeal, with the further possibility of an appeal to the House of Lords.

When the magistrates are sitting as a court of summary jurisdiction, the position is rather more complicated, since an appeal may lie either to Quarter Sessions or to the High Court. The right of appeal to Quarter Sessions is a statutory one and must be expressly conferred, but in many cases it lies for questions of fact as well as of law. The principal cases in which an appeal may be taken are, on conviction of a criminal offense, (a) against the sentence alone, when the accused pleaded guilty, and (b) against the conviction or the sentence, when he pleaded not guilty.¹²⁴ But there are a large number of individual statutory rights of appeal. Two of the most important of these are appeals against an affiliation order, or the refusal to make, or from the revocation, revival or variation of such an order, and appeals against an order under the Justices of the Peace Act of 1361, which requires a person to enter into recognizances to keep the peace or be of good behavior.¹²⁵

The alternative to an appeal to Quarter Sessions is an appeal "by way of case stated" to the High Court, which is heard by a divisional court of three judges of the Queen's Bench Division. This is a procedure whereby the justices may, and in some cases must, "state a case"—submit a statement of the principles of law on which they have based their decision—for the consideration of the divisional court. This form of appeal, therefore, lies only for questions of law, but the divisional court has power, not only to affirm or reverse the decision, but also to amend it or remit the matter to the magistrates with its own opinion. A case can also be stated for the opinion of the divisional court during the course of or after an appeal to Quarter Sessions on the same conditions. A point particularly to be noted in relation to the appeal by way of case stated on a point of law is that the prosecution has a right of appeal. This is one of the rare cases in English law where there can be an appeal against an acquittal. From the divisional court, an appeal lies in criminal matters directly to the House of Lords.¹²⁶ In civil matters, however, there is a further appeal to the court of appeal, subject to the leave of the divisional court or of the court of appeal itself being obtained. When

123. Court of Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 3.

124. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 83.

125. Magistrates' Courts (Appeals from Binding Over Orders) Act, 1956, 4 & 5 Eliz. 2, c. 44, § 1(1). See *Shelton v. Bromfield Justices*, [1964] 2 All E.R. 131.

126. Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, § 1.

a criminal case is heard by Quarter Sessions sitting as a court of first instance, an appeal lies to the court of criminal appeal, and thence to the House of Lords.

B. *Prerogative Orders*

The provision of any sort of appeal from the justices is a comparatively modern phenomenon. As we have seen, the medieval and Tudor justices of the peace were controlled directly by the King's Council, but even when this supervision lapsed, the only check exercised by higher courts on the judicial activities of the magistracy was by means of the three prerogative writs of mandamus, prohibition and certiorari. Now known as prerogative orders, these three remedies are still much used as a means of enforcing technical correctness in the proceedings of Magistrates' Courts, as, in another field, they are the main means of judicial control of administrative tribunals. Prerogative orders are not appeals; they lie to enforce the performance of a duty and to control jurisdiction or the exercise of a discretion. They are not designed to allow the higher courts to rehear the case on the merits. Broadly speaking, mandamus is the appropriate remedy when the justices refuse to exercise jurisdiction. Prohibition will prevent them from continuing proceedings in excess of jurisdiction or contravention of law and certiorari will quash a decision made *ultra vires* or in breach of the rules of natural justice, or where there is an error of law on the face of the record.

Mandamus only lies where there is a legal duty to act, not where the justices have a discretion. But even when the powers are discretionary the remedy is only entirely excluded if the discretion is unlimited, because even discretion must be exercised "judicially." The order may issue to enforce any public duty, whether judicial or administrative, but most frequently issues to justices to compel them to exercise jurisdiction. Thus, where justices are entrusted with jurisdiction to hear applications for licenses, it is not a proper exercise of that jurisdiction for them to decide *a priori* that they will not grant certain kinds of licenses and mandamus will issue to compel them to hear each case on its merits.¹²⁷

Prohibition and certiorari cover much the same ground, but at different stages of the proceedings. Both issue only to an inferior court, or body "exercising legal jurisdiction," the first to prevent the wrongful exercise of jurisdiction, the second to quash a decision defective on this ground or for an error of law appearing on the face of the record. Certiorari is the more common of the two and has been issued against the justices in a large variety of cases. A significant group of authorities deals with defects caused by interference by the magistrates' clerk in the fact-finding or sentencing functions of the justices.¹²⁸ This inter-

127. *Rex v. Rotherham Licensing Justices*, [1939] 2 All. E.R. 710 (K.B.).

128. See III(E) of this article's text *supra*.

ference is always well-meant, but is particularly dangerous since the justices may be all too ready in weighing the evidence to rely on the advice of the experienced, legally-trained clerk. Thus, in a recent case, a conviction by the justices was quashed because, before making their decision, they had received a private note from the clerk pointing out inconsistencies in the evidence of the accused.¹²⁹ Another difficulty likely to arise with lay magistrates drawn from all walks of life is that one or more of the justices may in some way be connected with one of the parties and thereby be open to the charge of bias. In one recent application for certiorari, six out of the seven licensing justices who heard an application for a liquor license were members of the applicant cooperative society. There was no suggestion of bad faith or that any bias had in fact been shown, but the justices were automatically disqualified from hearing the application.¹³⁰

Certiorari for error of law on the face of the record is a very old method of controlling justices of the peace which has only recently been revived.¹³¹ The writ issued to quash a decision for an error of law apparent on the record from the seventeenth century onwards, and the King's Bench compelled the justices to record the proceedings on summary convictions at great length, so that the errors appearing on the record would include, not only errors of substantive law, but also lack of evidence and trivial formal defects. The all-embracing scope of certiorari which resulted from this full record tended to defeat the purpose of summary jurisdiction, since some ground could be found in it for taking practically any case to a higher court. Consequently, the Summary Jurisdiction Act of 1848, prescribed a standard form of conviction which omitted all mention of the evidence or the reasoning by which the decision had been reached. The effect of the enactment was that only the most fundamental errors of jurisdiction were likely to appear on the record at all, and this ground for certiorari fell into disuse. It was revived in 1951 as a means of controlling administrative tribunals,¹³² some of which were required to give reasons for their decisions as part of the record and, as far as administrative tribunals are concerned, the scope of this remedy has probably been widened by the Tribunals and Inquiries Act of 1958.¹³³ However, until recently, it did not seem that the position with regard to the summary criminal jurisdiction of magistrates would be greatly changed, because of the limited nature of the written record. In one case, however, the divisional court issued certio-

129. *Regina v. Stafford Justices*, [1962] 1 Weekly L.R. 456 (Q.B.).

130. *Regina v. Barnsley Licensing Justices*, [1960] 2 Q.B. 167. On the particular facts, the disqualification did not involve quashing the decision made. See Licensing Act, 1953, 1 & 2 Eliz. 2, c. 46, § 48(5).

131. DE SMITH, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 294 (1959).

132. *Rex v. Northumberland Compensation Appeal Tribunal*, [1952] 1 K.B. 338.

133. Tribunals and Inquiries Act, 1958, 6 & 7 Eliz. 2, c. 66, § 12, provides that a large number of tribunals must, if requested to do so, give reasons for their decisions.

rari to quash a decision of the justices when the error of law was apparent only from an oral statement made by the chairman of the justices when their decision was announced, on the ground that it was "this oral order and not the written register of convictions which the applicant must seek to quash."¹³⁴ The decision has aroused criticism,¹³⁵ but if the definition of a record is to be expanded to include evidence other than the written records of the case, then this ground of certiorari is likely to become of considerable importance.

These three remedies can be, and frequently are, combined in some way. This is usually the case because certiorari only quashes a decision, and so it is often combined with mandamus in order to have the case sent back for a rehearing. Alternatively, certiorari may be combined with prohibition, in order to quash the decision already given and prevent further proceedings of the same kind. Mandamus is also a convenient way of compelling the justices to state a case for the opinion of the High Court. The prerogative orders are not free from difficulty; indeed, they are in many ways procedurally cumbersome. However, they are useful means of separating off the technical defects, which are likely to be the most common ground of complaint in the decisions of lay magistrates, from the substantive issues which are the proper subject of an appeal.

C. *Personal Liability*

The extent to which justices of the peace may incur personal civil liability in the performance of their judicial duties is still a disputed question. The relevant statute, the Justices' Protection Act of 1848, is by no means clear, and the case law consists in the main of inconclusive, and sometimes conflicting, dicta. It has been suggested that much of the confusion is due to the tendency of text book writers to equate the justices of the peace with other judges in a single generalization on liability.¹³⁶ The true position would seem to be that the justices are not necessarily in the same position as the judges of superior courts, and their personal liability may depend on the nature of their jurisdiction and the circumstances of the wrong complained of in each particular case.

The first distinction which must be made is between judicial words and judicial acts, for there is no doubt that justices of the peace are absolutely protected in actions for defamation for words spoken while performing judicial functions.¹³⁷ The defense of absolute privilege is, in fact, available to any tribunal which is "exercising functions equiv-

134. *Regina v. Chertsey Justices*, [1961] 2 Weekly L.R. 442, 447.

135. 77 L.Q. REV. 157; 77 L.Q. REV. 322 (1961).

136. Thompson, 21 MODERN L. REV. 517, 526 (1958).

137. *Law v. Llewellyn*, [1906] 1 K.B. 487.

alent to those of an established court of justice."¹³⁸ It follows that absolute privilege does not cover words spoken by a justice while performing a purely administrative function, as, for example, hearing applications for liquor licenses.¹³⁹ As far as privilege in defamation is concerned, the liability of a justice of the peace does not differ from that of any other judicial officer.

When judicial acts are in question, liability may vary according to whether the justices are acting within their jurisdiction or not. Any person who is injured by an act done by a justice without or in excess of jurisdiction, may maintain an action against the justice, unless the latter neither knew nor ought to have known of the facts (as distinct from the law) which deprived him of jurisdiction.¹⁴⁰ Where the justice was acting without jurisdiction, it is not necessary to allege that he acted maliciously and without reasonable and probable cause.¹⁴¹ Section 2 of the Justice's Protection Act imposes one further proviso in such cases—that no action lies for anything done under a conviction or order until the conviction has been quashed. The intention of the legislators here seems to have been to prevent civil courts from commenting on the validity of a conviction before that conviction has been considered by the appropriate appellate court on the criminal side. But the drafting of the section is not clear and its interpretation has caused some difficulty.¹⁴²

The liability of justices acting within their jurisdiction is covered by section 1 of the Justices' Protection Act, which provides that every action brought against a justice of the peace for an act done by him in the execution of his duty, with respect to any matter within his jurisdiction, "shall be an Action on the Case as for a Tort; and in the declaration it shall be expressly alleged that such Act was done maliciously and without reasonable and probable cause; and if . . . the plaintiff shall fail to prove such Allegation, he shall be nonsuit, or a Verdict shall be given for the defendant." The interpretation to be given to this section is doubtful. It is quite clear that justices are protected by the statute for any act done within their jurisdiction, which is not proved to have been done maliciously and without reasonable and probable cause. However, it cannot therefore be assumed that, if malice and absence of reasonable cause are alleged and proved, an action will always lie. The section does not create a new cause of action; it assumes the existence of a common law tort and the position of the common law on this point before 1848 is uncertain. Halsbury states categorically that magistrates

138. *O'Connor v. Waldron*, [1935] A.C. 76, 81 (Can.).

139. *Attwood v. Chapman*, [1914] 3 K.B. 275.

140. *Abbott v. Sullivan*, [1952] 1 K.B. 189, 217; *Polley v. Fordham*, [1904] 91 L.T.R. (n.s.) 525 (K.B.). It may be that this exception should be confined to the facts of the particular case, *i.e.*, liability for trespass.

141. Justices' Protection Act, 1848, 11 & 12 Vict., c. 44, § 2.

142. *O'Connor v. Isaacs*, [1956] 2 Q.B. 288.

are liable to an action for damages when they have acted maliciously and without reasonable and probable cause,¹⁴³ and there are certainly cases which seem to assume that this is so, without actually deciding it.¹⁴⁴ There are no binding authorities on the point, either before or since the statute, and there are dicta to the contrary suggesting that, in respect of judicial acts within his jurisdiction, a justice is absolutely protected.¹⁴⁵ On this basis, the only effect of section 1 was to create a qualified immunity for purely ministerial acts. One attractive, though perhaps not very tidy, solution of the problem is that immunity for malicious acts is confined to courts of record, and that a justice of the peace is absolutely protected for acts done maliciously but within his jurisdiction when acting as a court of record. When discharging judicial functions otherwise than as a court of record, he is protected only if he acts in good faith.¹⁴⁶ Whatever view of the authorities is adopted, it is something of a tribute to the work of the justices of the peace that their liability for malicious acts should have been left undecided for so long.

Attempts to sue magistrates personally are, however, sometimes made, although these actions are usually either compromised or dismissed. Under the existing law, a magistrates' courts committee may authorize the payment out of local funds of any costs incurred by, or damages awarded against, a justice in defending any legal proceedings taken against him in respect of any act done in the execution of his duty out of Quarter Sessions.¹⁴⁷ Costs incurred by a justice in defending an action in respect of any act done in County Quarter Sessions may similarly be paid out of public funds, but in the case of Quarter Sessions there is no provision for the payment of damages awarded against a justice in such an action.¹⁴⁸ No provision is made for actions against clerks to justices, clerks of the peace, or recorders. A Working Party on the Expenses of Legal Proceedings against Justices and Clerks, appointed by the Home Secretary, recommended that magistrates and clerks should be entitled to be indemnified out of public funds for any act done in good faith and reasonably in the execution of his duties, and that for this purpose no distinction should be made between judicial and administrative acts. The indemnity would be available to magis-

143. 25 HALSBURY, LAWS OF ENGLAND 160 (3d ed. 1960).

144. *E.g.*, *Linford v. Fitzroy*, 13 Q.B. 240, 116 Eng. Rep. 1255 (1849); *Pease v. Chaytor*, 1 B. & S. 658, 121 Eng. Rep. 859 (K.B. 1861).

145. *Everett v. Griffiths*, [1921] 1 A.C. 631, 666.

146. *Thompson*, 21 MODERN L. REV. 517 (1958). A court of record is a court which has jurisdiction to fine and imprison, or a court with jurisdiction to try civil causes according to the common law in matters involving forty shillings or more. A justice of the peace is, therefore, acting as a court of record when exercising summary criminal jurisdiction. Examples of discharging judicial functions otherwise than as a court of record would be the grant of warrants of arrest, search warrants, remands in custody, etc. *Id.* at 521, 533.

147. Justices of the Peace Act, 1949, 12-14 Geo. 6, c. 101, §§ 25, 26.

148. Local Government Act, 1888, 51 & 52 Vict., c. 41, § 66.

trates, recorders, chairmen of Quarter Sessions, clerks to justices and clerks of the peace, and would cover the reasonable costs of the defense, costs or damages awarded against a justice or clerk, or any reasonable amount paid in settlement of an action.¹⁴⁹

Magistrates are, of course, liable to criminal prosecution for gross misconduct in the execution of their office. Most of the cases are of some antiquity, but some examples of gross misconduct for which magistrates have been prosecuted are extortion, acting where they were directly interested, the improper conviction of an innocent person, refusing bail improperly, the grant or refusal of licenses from corrupt motives, and neglect of duty in not using force to suppress a riot.¹⁵⁰

VIII. PROBLEMS

It is remarkable, to say the least, to realize that a large proportion of the criminal prosecutions and a small but not unimportant number of civil matters are dealt with in England by unpaid citizens with no legal qualifications. We should consider whether, as a system, it is satisfactory. "To cold detached calculations—to a mind, let us say, like that of Jeremy Bentham—our system of lay justice is among those British legacies of history, including the British constitution itself, which obviously cannot work, or at all events cannot do so except in defiance of all reason and probability."¹⁵¹ The system has the advantage of being economical. It would be a large financial operation to provide professional lawyers to do the work which is now being done free of charge by the 16,000 or so amateur magistrates who are currently sitting.

It is not often, of course, that controversial legal questions arise. However, they sometimes do arise and often upon a problem of construction of a regulation creating a minor offense, or on a point which has never been taken to the High Court. Even if there is authority on the point, this authority is not produced to the court with the clarity and efficiency that would be assumed in a higher court. The magistrates, not knowing what cases they will be hearing until their arrival in court, have no opportunity to look up the law for themselves. On these matters, as we have seen, they are dependent on their clerks, who will know what points are likely to arise and will be prepared for them, and commonly will have been informed beforehand of the authorities that will be relied on.

From the small number of appeals from decisions of Magistrates'

149. Report of the Working Party on the Expenses of Legal Proceedings against Justices and Clerks, 1961.

150. *Rex v. Jones*, 1 Wils. 7, 95 Eng. Rep. 462 (K.B. 1742); *Rex v. Davis*, Lofft 62, 98 Eng. Rep. 534 (K.B. 1772); *Rex v. Webster*, 3 T.R. 388, 100 Eng. Rep. 636 (K.B. 1789); *Regina v. Badger*, 4 Q.B. 468, 114 Eng. Rep. 975 (1843); *Rex v. Holland & Forster*, 1 T.R. 692, 99 Eng. Rep. 1324 (K.B. 1787); *Rex v. Pinney*, 3 St. Tr. (N.S.) 11, 17, 110 Eng. Rep. 349 (K.B. 1832).

151. ALLEN, *THE QUEEN'S PEACE* 179 (1953).

Courts, statistics¹⁵² will give the impression that there is little dissatisfaction with the results of their work. These figures, however, should be read in perspective. As explained above, the justices hear little argument between high-powered lawyers whose clients are determined to establish their defense, at whatever cost. The defendants are usually not legally represented, and would not contemplate an appeal even if legal questions could be raised. Indeed, as we have seen, defendants have been known to plead guilty in order to save the expense and loss of earnings involved in coming to court rather than to put forward a possible defense.

From the point of view of technical legal efficiency, the amateur magistrates could not demonstrate superiority over the professionals. Another criticism which is sometimes directed against the magistrates is that they are too much inclined to decide a case upon a general impression and too little upon the precise evidence. The lawyer is more ready than the layman to appreciate the difference between a situation in which a man is "obviously guilty" and one in which he is proved by the evidence to be guilty. This difficulty may be aggravated by the fact that the magistrate is responsible, historically, for the keeping of the peace. From this point of view, the magistrates' duty is too closely associated with that of the police. If an offense has been committed, it is satisfactory, from their point of view, to bring someone to justice. And, as has been pointed out, the fact that prosecutions are undertaken by the police may add to the impression that the proceeding is executive rather than judicial.

These dangers are endemic in the system. The important thing is for the magistrates to be aware of them, and to ensure that they are not influenced by these factors. The clerk, of course, will advise on the question of admissibility of evidence, but it is for the magistrates themselves to determine how much weight should be given to any piece of admissible evidence.

A further problem, and this is by no means limited to Magistrates' Courts, relates to consistency of sentence. Criticisms on this ground are inevitable. It is not to be expected that groups of citizens throughout the country will have exactly the same views as to the appropriate penalty for a particular offense. The problem is more serious when, as is usually the case, different groups of magistrates sit on different days of the week, or when more than one court sits on the same day. Unless there is a consistent sentencing policy, variations in penalties for similar offenses give the appearance of injustice.

Some of the criticism which is based upon inconsistency of sentencing is, however, unfounded. The court does not give reasons in open

152. Criminal Statistics, 1961, Cmd. 1779, Table XIII, p. 77.

court for its decisions, and the cases are not reported. Two prosecutions for the same offense may, of course, have widely different features. These will have been taken into account by the magistrates, but there is no way in which the public and the press can know what factors were considered. It would be an error to try to unify punishments for particular offenses; the important factor is that magistrates should apply a consistent policy in determining sentences.

With many minor offenses, especially those to which no moral blame is attached, many courts use a list of standard penalties, which are regarded as the norm. The penalty imposed will be greater or less if there are special circumstances to justify it. This practice has been found helpful in the trial of traffic offenses. A list of these penalties has been published in *The Magistrate*.¹⁵³

Criticism breaks out from time to time and is directed against both the composition of Magistrates' Courts and against their work generally. The problem of appointment of magistrates has been discussed.¹⁵⁴ The magistracy, like the police, have lost much public sympathy because of their responsibility for dealing with traffic infringements. In this sphere they necessarily become unpopular with a large, influential and law-abiding portion of the community. It is in this respect that most of the criticism is heard. The possibility of using traffic wardens and special traffic courts has been mentioned.¹⁵⁵

Some of the inevitable disadvantages of an unprofessional, unpaid magistracy have been noted. It should be remembered, however, that the magistrates' jurisdiction is limited to summary trial; there is no jury and the magistrates must perform this duty as well as that of judge. The jury is essentially a body of local citizens, who are required to give a decision, based upon their common-sense, upon the issue of guilty or not guilty. For this purpose the magistrates should be well chosen. Of the duties of the judge which they must perform, there are basically two. First, they must apply the law. They are, as we have seen, advised by their clerk on this, and each new magistrate is expected to take a course of instruction in his duties during his first year of office. Second, they must determine the sentence to be imposed when a defendant is found guilty. Except in cases where the sentence is automatically determined by the law, the selection of the appropriate sentence has always been the duty of the judge. Modern penologists challenge this practice. Judges in common-law systems where judicial appointments are made from practicing lawyers, are not specially trained in sentencing. In England, many newly appointed High Court judges find that, on Assize, they are dealing with criminal matters for the first time since

153. June, 1960.

154. See II of this article's text *supra*.

155. See V(B) of this article's text *supra*.

their early days in practice at the bar. The same is true of recorders. It may well be that a similar problem exists in the United States. In some jurisdictions, those which deal with the sentencing of juveniles, special boards are made responsible, but no action along these lines has been initiated in England.¹⁵⁶ It seems, therefore, that we should not assume that legal qualifications guarantee the necessary comprehension of penological policy. No doubt, the lawyers who are responsible for these duties should make themselves qualified. At the level at which magistrates operate, it may well be that intelligent, devoted citizens can understand and deal with the problems of the neighborhood as well as professional lawyers. It should be appreciated that in a Magistrates' Court a large majority of defendants plead guilty. When the plea is not guilty, the issue is rarely one of law, and the "jury" aspect and the "sentencing" aspect of the court's duties are the ones which magistrates are most commonly called upon to perform.

Provision is made for the appointment, in a borough or a county, of paid professional magistrates, who may sit in addition to, or instead of, the amateurs. Such magistrates are known as "stipendiaries," and less than fifty of them are functioning at the present time. It may be thought remarkable that the number is so low. One can only conclude that the boroughs and counties have been satisfied with the services of the unpaid judges (at least they are not so dissatisfied that they are prepared to pay for a professional).¹⁵⁷ The numbers of stipendiary magistrates will no doubt increase in the years ahead. There is nothing surprising in that. The remarkable feature of this whole story is that the lay justices have adapted themselves so successfully to modern conditions; there is something more than the British love of tradition and continuity in the desire to continue the 600 years of service already given by this group of citizens.

156. Ingleby Report, ¶ 155.

157. JACKSON, *MACHINERY OF JUSTICE IN ENGLAND* 162-165 (3d ed. 1960); 9 *MODERN L. REV.* 1 (1946).