









THE HAMLYN LECTURES

*FIFTH SERIES*

THE QUEEN'S PEACE

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# THE QUEEN'S PEACE

BY

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TO  
THE RIGHT HONOURABLE LORD GODDARD  
*Lord Chief Justice of England*  
*and of*  
*The Peace of the Queen of England*



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## HAMLIN LECTURERS

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THE Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn, of Torquay, who died in 1941 aged 80. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of dominant character, intelligent and cultured, well versed in literature, music, and art, and a lover of her country. She inherited a taste for law, and studied the subject. She travelled frequently on the Continent and about the Mediterranean and gathered impressions of comparative jurisprudence and ethnology.

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JOHN MURRAY,

*Chairman of the Trustees.*

*October, 1953.*

## P R E F A C E

A NUMBER of the questions touched upon, all too summarily, in these pages belong to a shadowy past where it is easy for any but historical experts to stumble. I am grateful to Dr. Austin Lane Poole, President of St. John's College, Oxford, for allowing me most generously to draw upon his abundant store of learning in medieval history; but he must not be deemed an accessory to any of my errors or oversights. I must also express my warm thanks to Mr. A. John Broughton, Clerk to the Oxford City Magistrates, for valuable suggestions and criticisms in the concluding sections, and for the benefit of his wide experience in summary jurisdiction.

C. K. A.



**ROYAL PEACE**



# I

## ROYAL PEACE

THE "peace of our Sovereign Lady the Queen" has been described by our greatest legal historian, Maitland, as an "all-embracing atmosphere" in our law, and, we may add, in our whole social life. We could not breathe in any other atmosphere, and we take it for granted as if it were part of the order of nature. It did not, however, come to us by any Providential dispensation, but by a series of strange and gradual transformations, which it is the object to these pages to sketch. In order to understand its origins and development, we must go back to Anglo-Saxon times and try to picture the mantle of peace which the English king fashioned first for himself and then for all his subjects.

### THE ANGLO-SAXON KING

"King" has always been a word of earthly might, and, as we may learn from anthropologists like Sir James Frazer, there is scarcely a superlative attribute, natural or magical, which in the course of history has not been ascribed to kings. But one monarch differeth from another in glory, and many have assumed the trappings of majesty who have held a comparatively puny sway. So, at least, it must have been among our early Anglo-Saxon rulers.

During the 500 years before the Conquest at least 150 "kings" reigned in different parts of England and there were probably others whose very names are unknown to us. Many of them reigned only for short and precarious periods. The kingdoms of the Heptarchy may seem to be a sufficient fragmentation of a small country like England (not, of course, comprising Scotland or Wales), but those realms themselves—or some of them, like Mercia—were probably an agglomeration of smaller states, and Northumbria comprised two distinct kingdoms until the middle of the seventh century. In the latter part of the eighth century Kent was divided among several kings, apparently vassals to Mercia, and a little later, for some forty years, there was a kind of joint kingship between East Anglia and Mercia. Even before the Danish régime of the eleventh century, there had been some eleven Danish kings in York between 876 and 954 A.D.

In 1086 the population of England, on the evidence of Domesday, is estimated to have been about a million and a half. It cannot, then, have much exceeded a million at any time before the Conquest, and in the seventh and eighth centuries it was probably much less. Thus it is plain that many of the "kings" of the various segments of English territory must have "reigned" within a very small sphere indeed. That the best of them were strong, audacious men, who acquired power by the force of personality and by leadership in peace and war, we need not doubt, but in the extent of their sway they cannot have been much more than tribal chieftains or local commandants. It is not until the ninth century, when

the Kings of All England are established with the House of Egbert—only to be challenged by the rivalry of Danish potentates—that we can discern a true kingship which is gradually to develop into our national type of monarchy.

The characteristics which it later assumed are already present in germ in the sovereignty of Alfred and Cnut. Being Teutonic in origin, it was never, from the first, an absolute principate in the Byzantine sense. Tacitus<sup>1</sup> says of the Germans that they chose their kings *ex nobilitate*, and adds: *nec regibus infinita aut libera potestas*. This duality is well illustrated in the Anglo-Saxon king: he was not *ex nobilitate* in the sense of being solely hereditary, and his power was not unlimited because, in theory at least, he was an elected king and in all grave matters he acted with the advice of his *witena gemot*. The exact balance of these two principles has been much debated by historians; some have held that the hereditary element prevailed—and it generally seems to have done so *de facto*—and that the elective process was little more than a *commendatio* or recognition by magnates of a *primus inter pares*. Whether this be so or not, the English monarchy was never acknowledged to be purely hereditary *de jure*, and indeed has never become so to this day, since the present succession is governed by the Act of Settlement, 1700, together with the special provisions of the Statute of Westminster, 1931, concerning the assent of the Dominions (or “realms”) to any change in the royal style and title.

<sup>1</sup> *Germania*, c. 7.

As the lord of lords, the king was entitled above all others to fealty, but this did not mean, any more than his hereditary claim meant, that he was wholly inviolable. According to Kern, in his learned treatise on *Kingship and Law*, "the Germanic peoples very frequently claimed the right to rid themselves of a king who for one reason or another was unsuitable." The tenure of some of the earlier Anglo-Saxon kings was far from secure; a considerable number abdicated, or were deposed or assassinated, and in the ninth century several of the kings of Wessex, Mercia and Northumbria were even executed.

Despite this frail mortality, there begin to appear at an early time some of those "sparkles of divinity" which, centuries later, were to kindle angry flames in England. Although the formula was not actually included in the royal style until the time of Henry II, the Sovereign who still today reigns "by the Grace of God" really began to do so about fourteen hundred years ago, for loyalty to him was soon assimilated by the Church to the obedience which man owes to the Lord of Lords. Early in the eleventh century Aethelred II (a prolific lawgiver, if a weak king), proclaims a doctrine pregnant with coming controversy: "A Christian king is Christ's deputy among Christian people, and he must avenge with the utmost diligence offences against Christ."<sup>2</sup> The latter part of the precept reappears in the laws of Cnut.<sup>3</sup> This is, needless to say, no full-blown dogma of divine right, as later conceived, but at least the bud of it.

<sup>2</sup> VIII Aethelred, 2.1.

<sup>3</sup> II.40.2.

Considered in more mundane terms, the king's exalted state is measured by his wealth and by the enormous *wergild* on his person. He is the richest lord because the greatest landowner, and also the recipient of copious forfeitures and fines, though not (until the coming of the Danegeld) of direct levies upon his people, unless the compounded *feorm* could be so considered. He has in his hands the appointment of all great officers, from eorls and ealdormen (though these were not always easily amenable to his authority) to shire-reeves and town-reeves. He is "Commander-in-Chief" in the sense that it is only he who can call out the *fyrð*, or militia, service in which is the duty of every able-bodied man. He summons special councils when, in his discretion, he considers them necessary. His royal dignity is symbolised by the golden circlet (the *cynehelm* or *cynebeah*), and his ceremonial crown-wearings, usually in London or Winchester, are occasions of high solemnity. He keeps great state, his household retinue is large and favoured, his hospitality lavish; and it is reciprocal, for on his frequent royal journeys he demands of his more affluent subjects his *feorm* of transport, hawk and hounds, and perhaps of meat and drink as well. (I do not know whether the costly progresses of later "spacious" monarchs like Elizabeth I had any avowed connection with the ancient right of *feorm*, but they were certainly a formidable tax on noble hosts.) He was not the "fountain of justice" in the modern sense, for at this time litigation was essentially the concern of the shire and hundred courts, and it is repeatedly laid down in the laws, most

explicitly in II Cnut, 17, that none shall appeal to the king unless he has failed to obtain justice within the hundred. The reservation, however, is significant, for it can only mean that in the last resort the king *was* the final arbiter (and so the true source of justice);<sup>4</sup> but unfortunately we cannot tell how often, and in what circumstances, the subject could bring his grievance to the royal ear. We can only make a fair guess that, however he did it, he obtained regal justice at a price.

In one source at least (I have found no other) there is a hint of that kingly jurisdiction of conscience, or equity, which was to have such a long and fruitful history. In the laws of Edgar,<sup>5</sup> there is the same command as the later one of Cnut's, to exhaust all means in the local courts before appealing to the king; but there follows the interesting qualification that "if the law is too heavy, he shall apply to the king for lightening of it." Again we have nothing but the bare bones and no glimpse of the living flesh of this "equitable jurisdiction," for that is what it seems to mean, and, if so, it may be an adumbration of the whole great Chancery system. Elsewhere occurs another suggestion of the king's residual benevolence as that general patron and protector who came to be known as *parens patriae*. In VIII Aethelred, 33, we find: "If an attempt is made to deprive in any wise

<sup>4</sup> Bracton (f. 107), writing in the reign of Henry III, laid it down as a general principle that all justice was royal justice; but even in that later age, when the king's courts had certainly absorbed much of the old local jurisdiction, this was too large a claim: see Pollock and Maitland, *Hist. Eng. Law*, i. 528.

<sup>5</sup> III.2.1, *circ.* 962 A.D.

a man in orders or a stranger of either his goods or his life, the king shall act as his kinsman and protector (*for maeg and for mundboran*), unless he has some other." Once more we are left, curious but tantalised, to guess how the friendless clerk or outlander brought himself within the king's all-sheltering *mund*.<sup>6</sup>

#### GENERAL AND SPECIAL PEACE

Such, in broad outline, was the greater kind of Anglo-Saxon king—the prototype, in most essentials, of his "constitutional" successors and the forerunner of their prerogatives. In token of his overtopping stature he arrogated to his person a special kind of peace different in degree rather than in kind from that which he strove by so many expedients to establish among his subjects.

The words *frith*, *grith* and *mund* are of frequent occurrence and are not easy to distinguish—I am inclined to think that the Anglo-Saxons themselves did not always draw precise lines between them.<sup>7</sup> *Mund* was a kind of general responsibility assumed by a greater person—lord or magnate—for a lesser, and infringement of it was the converse, so to speak, of

<sup>6</sup> This law of Aethelred was re-enacted by Cnut (II Cnut, 40), with the addition that fitting compensation shall be paid to the king, "or he shall avenge the deed to the uttermost" (as is the duty of a Christian king for offences against God). It is possible that there was a specific intention here to protect the king's Danish followers.

<sup>7</sup> Thus in Aethelred's truce with the Danes (II Aethelred, 2) it is provided that every merchant ship shall enjoy *frith*, which Sir Frederick Pollock ("The King's Peace," *Oxford Lectures*, p. 77) takes as equivalent to *grith*; *sed quare*.

vicarious liability; injury to the person under the shield was injury to the holder of the shield. We have a very faint echo of this principle in the law today inasmuch as damage to a servant may in some circumstances be damage to the master (or parent), *per quod servitium amisit*. But I do not know of any modern analogy to the conceptions of *frith* and *grith*. We of this age take it for granted that the peace established by law is that of the whole community and that everybody shares equally in it. The Sovereign herself is encompassed by the law of treason, and special safeguards apply to her representatives like her Lord Chancellor and her judges in the seat of office; but otherwise no man is more entitled to the cloak of the Queen's Peace than any other. Not so with the Anglo-Saxons. There was not yet any established, comprehensive peace of the whole realm. While we think of wrongdoing as a breach of *the* peace, our ancestors thought of it as a breach of *a* peace. Each man carried with him a personal shield against unwarranted attack or molestation and it varied greatly according to his social rank. It was one thing—and probably a very little thing indeed—for the serf, and a number of other things for the freeman, the thegn, the shire-reeve, the bishop, the eorl, and so forth; and the difference was expressed in the amount of penalty which could be demanded for breach of it, until we reach the most heinous offences against the most exalted person, for which the penalty is crushing, with death or outlawry threatened on default. The *frith*, again, varied with places as well as persons; breach of it was, as we should say, "aggravated" if committed in a man's home, or in a church, or at a

moot, or in the mere presence of a magnate, or, worst of all, under the king's own roof.

*Grith*, so far as we can understand it, was a special, pre-eminent *frith* attaching to the person of the king and through him to those of his immediate *entourage*. It also seems to have included any others within the king's personal hand or *mund*, for frequently no distinction is drawn (unless we misunderstand the texts) between the royal *grith* and *mund*. The two ideas, indeed, are combined in the word *handgrith*, which is of frequent occurrence. How essentially personal it was to the Sovereign is shown by the fact that it died with him and was proclaimed anew at the accession of each king. Hence if a king died and his successor was not present to take his place, there was a dangerous interval of abeyance of the King's Peace.<sup>8</sup>

#### OFFENCES AGAINST THE KING'S PEACE

What this *jus regale* meant in practice is an illustration, among many, of the marriage of disciplinary and financial motives. Certain offences were reckoned so grave, so "contrary to public policy," that they must meet with exceptional displeasure; but the extraordinary penalty for them was demanded by the king

<sup>8</sup> This happened on the death of Henry III, Edward his son being then in Palestine, and the Council took the bold but sensible step of issuing a proclamation of the royal peace in the yet uncrowned King's own name (it is reproduced in Stubbs's *Charters*, 9th ed., p. 439). This was the foundation of the doctrine that "the King never dies" and at no time after 1272 was there a gap in law and order on the demise of a sovereign.

and so became a source of profit to him. They were not, therefore, *botless* in the sense that they could not be redeemed at any price; but the price was certainly heavy—so heavy as to be beyond the capacity of most men. Consequently, in the course of time, if they were to be met at all, only a levy or joint payment could liquidate them, and, as Maitland has shown in his study of “The Criminal Liability of the Hundred,” by the twelfth century a breach of the King’s Peace had become a charge on the delinquent’s hundred or even of a considerable group of hundreds. From several sources we know what these special misdeeds were, and I select the passage in the laws of Cnut<sup>9</sup> which refers to royal dues (*gerihta*) demandable “from all the men of Wessex” (subsequent Articles deal with Mercia and the Danelaw) for the following crimes: *mundbryce*, breach of *mund*; *hamsocne* or housebreaking; *forsteal*, a term of somewhat doubtful interpretation, but it is generally understood to mean ambush or attack by stealth<sup>10</sup>; *fyrdwite*, or evading military service; and to these we must add from the next Article (Cap. 13, concerning outlawry) *flymena fyrmthe*, or the harbouring of outlaws. It is easy to see that all these were crimes very necessary to be restrained, but it is surprising to the modern mind that they do not include the offence which smells to heaven—murder, or *morth*, which the Anglo-Saxons

<sup>9</sup> Cap. 12.

<sup>10</sup> It is curious that “forestall” lived on in our law in the quite different sense of forestalling or “cornering” the market, a misdemeanour at Common Law which was not abolished by statute until 1844.

distinguished from *murdrum*, or "secret" homicide.<sup>11</sup> There were two reasons for this omission—first, the open murderer, caught red-handed, was liable to instant retribution; and second, if he were not red-handed, the kindred, in early days, retained their primordial right to prosecute the blood-feud against him. If this was compromised by blood-money, then it was another aspect of the royal *grith* that the King's Peace was established, at their peril, between them. *Interest reipublicae ut sit finis litium.*

#### TIMES AND PLACES OF THE KING'S PEACE

The King's Peace was related not only to the quality of certain dangerous crimes, but to specified times and places which were considered to aggravate any breach of the law. The clearest account of these local or temporal affronts to the royal peace is to be found in the so-called Laws of Edward the Confessor, an apochryphal post-Conquest compilation, which however, may be regarded as accurate enough on this topic. These are the words: "The King's Peace is multiple. One kind is given *manu sua*, which the English call 'king's hand'; another on the day when he is crowned, and this lasts for eight days; eight days at Christmas, Easter and Pentecost. Another kind is given by his writ (*per breve suum*). Another kind applies to the

<sup>11</sup> It could be "secret," either because it was done by covert means such as poison or (more probably in a superstitious society) by sorcery; or, in the later interpretation, especially in the presentment of Englishry (see *post*, p. 24) simply because the killer was not discovered, or, at all events, not brought to justice.

four highways, namely, Watling Street, the Fosse, Icknield Street and Ermine Street, two of which run the length and two the breadth of the kingdom. Another applies to the waters on which victuals are brought by ship from different parts to cities or towns."

The catalogue is simple and the reasons for it plain enough. The coronation, and the principal festivals of the Church, are to be days of peace and goodwill, and the main transport of the country is to be specially protected. The reference to the ancient arterial roads is interesting, and to this day we speak of "the Queen's highway," though it has for long been no more sacrosanct as an area of "peace" than any other part of the soil. The "Laws of Edward the Confessor" in another place suggest that other roads, such as they were, were under what we should call the "local authority," who was the shire-reeve, but how or by what means they were maintained we do not know. Any unauthorised works or nuisances on the king's highways or waterways were liable to be destroyed and made good and involved a forfeiture (*forisfactura*) to the king. Sir Frederick Pollock, in his invaluable lecture on the King's Peace, has shown that this important aspect of it tended to be steadily enlarged. "First, only the four roads are the king's; then every common road which leads to the king's city, borough, castle or haven; and as most roads of any importance must, sooner or later, answer this description if followed far enough, the king's highway came to be, as it now is, merely a formal or picturesque name for any public road whatever." May we not suspect, however, that there was something, to the traveller at least,

more than formality and picturesqueness—namely, the fear of highwaymen, some of whom may well have been outlaws? The wayfarer by horse or carriage was always the easiest prey for the robber, and even in the days of our great-grandfathers travel was an affair attended by no little risk. The highway—any highway—may well have been considered a place needing special protection, and yet one which, for obvious geographical reasons, was the most difficult to guard.

There were other special occasions when crime, especially violence, amounted to *grithbryce*, and two in particular are mentioned in the laws of Cnut<sup>12</sup>—one, though of doubtful interpretation, seems to mean homicide, probably in the nature of mutiny, on active service, and for this the penalty is loss of life or *wergild*; the other is attack on a man when he is discharging his legal duty of attending a moot; the penalty is not stated, and there is the curious proviso that protection is not extended to a notorious thief. There seems to have been a constant tendency to extend the *grith* to more and more times, places and occasions, and this was a natural anticipation of the process which, later, gradually absorbed the gravest forms of lawbreaking within the Pleas of the Crown. When that tide set in, the special forms of the King's Peace become merged in a general "law of the land."

#### PRIVATE JURISDICTIONS

But before that happened, ordinary justice continued to be local and the king's justice exceptional.

<sup>12</sup> II Cnut, 61 and 82.

“Local” justice had two aspects. There were the ancient folkmoets, which were the only “ordinary” courts of the country; but there were a number, constantly growing, of other tribunals in which justice of a kind, at first probably domestic and then of much wider scope in what we should call tort and crime, was administered by lords spiritual and temporal. There has been endless controversy among historians about the origin of this private jurisdiction both as to time and place, for it has been suggested that it may even have been a Continental importation. I must leave this treacherous ground to the delicately-treading angels, together with the problems of *sake and soke*, those much-debated terms which came to be applied to divers jurisdictions and territories. The process of delegation, whenever and however it may have begun, grew rapidly under the Normans and frequently comprised all or part of the *jus regale* of exacting special dues and forfeitures for a breach of the King’s Peace. The privilege could be conferred by the king’s hand or seal, by writ or by an authorised representative of the king, *e.g.*, an earl. For violation of the royal peace thus put in commission special penalties, which generally shared with the earl, were payable to the king, and they varied considerably from person to person and place to place; typical examples, extracted from Domesday, of these variations may be found in the pages of Stubbs. Thus the delegation, either to individuals or to cities, of the king’s rights in his own special peace became widespread and complex; whole areas grew into spheres of jurisdiction separated from

the national system of justice<sup>13</sup>; and by 1086, when the commissioners compiled the Domesday survey, it was not the least of their tasks to collect and record the innumerable local variations of *jura regalia*. By that time the reckless dispersion of royal privileges, begun by the Anglo-Saxon kings and intensified by the Normans, had become one of the principal factors in converting the old English institutions into a feudal system. It became unwieldy and oppressive and eventually needed the strong hand of Henry II to bring it back to order and control.

#### CRIME *Does* PAY

Behind it all we perceive again the desire to make justice a profitable industry. "Justice," observes Sir Paul Vinogradoff,<sup>14</sup> "falls into the hands of numerous local potentates, who, although they have to administer it not individually, but through courts, turn this valuable regality into the means of exacting profits and grasping power." More and more people came to have vested interests in crime and punishment—the king, the lord, the ealdorman, the Church in cases of "mixed" offences (such as perjury and incest), possibly the sheriff, and, it may well be, others that we wot not of. Maitland is of opinion that as time went on, the wages of sin often became, in effect, death—at all events, civil death; for in many cases the forfeiture, if pressed to its full extent and not (as seems to have

<sup>13</sup> See the striking example from the *Monasticon*—an extraordinarily comprehensive grant to the Abbot of Ely—cited by Sir Frank Stenton, *William the Conqueror*, p. 441.

<sup>14</sup> *English Society in the Eleventh Century*, p. 210.

happened later) compromised, amounted to an automatic sentence of outlawry, which was the usual alternative to non-payment.

It is not surprising, therefore, that the old Teutonic system of compositions was already losing its character before the Conquest and disappeared soon after it. But if their origin was forgotten, monetary payments certainly did not cease but rather tended to multiply. By the twelfth century if not earlier, they took the form of the numerous fines and amercements which became a grievous burden upon the people. They were imposed both for serious and apparently for petty misdeeds, such as failure to attend the hundred or the county court, for wrong verdicts, small trespasses on the king's forest rights, and other trivial contraventions; and Maitland<sup>15</sup> goes so far as to say that in the thirteenth century "most men in England must have expected to be amerced at least once a year"<sup>16</sup>; whence we may learn that ours is not the first age in which law-abiding citizens have found it difficult to abide by the law. It was not only the culprit himself who suffered, for his amercement had to be "affeered," or guaranteed, by some of his unfortunate neighbours. The plague spread from the criminal to the civil sphere; for, when trespass had greatly extended the scope of civil actions, an unsuccessful plaintiff was liable to amercement for the falsity of his claim and for errors of pleading. Men were evidently groaning and sweating under this "icy

<sup>15</sup> Pollock and Maitland, *op. cit.*, ii. 513.

<sup>16</sup> See A. Lane Poole, *Obligations of Society in the Twelfth and Thirteenth Centuries*, Chap. 5.

load" as early as the reign of Henry I, for in his Coronation Charter he promised to restore the ancient system of fixed payments. We have no evidence, however, that he attempted to do so, and certainly *wer* and *bot* never returned to our law. By the time of John the whole system of exactions seems to have become intolerable, and it remained for Magna Carta, by its 20th, 21st and 22nd Articles, to lay down that all ranks of the community—commons, nobles and clergy—should be amerced only according to the gravity of the offence, by judgment of peers, and in such manner that the guilty man should not be left entirely destitute—the freeman without his *contenementum*, or free status, the merchant without his wares, the villein without his wainage (tillage, or possibly crops), the clerk, for lay offences, without the value of his benefice. From these express safeguards, comparable with the modern law which preserves to a bankrupt at least the tools of his trade, we may judge how ruthlessly the penal law had impoverished some of its victims, great and small.

#### A LIVING WAGE FOR KINGS

I dwell upon this, at the cost both of anticipating and digressing, because it is symptomatic of a trend which runs through our criminal law from its earliest origins. It is not merely cynical to say that crime has been a vested interest of the state almost until our own day, when it has become, on the contrary, a heavy liability. We shall find this motive asserting itself over and over again. It was not until 1870 that we abolished the

forfeitures for felony, which were a terror to the evil-doer and a source of handsome revenue to the Crown. I do not think that these exactions can be attributed merely to royal rapacity. For the greater part of our history the Crown has needed, for public purposes, all the resources it could amass, and it had no reason for delicacy in extracting some of its needs from those who had deserved least of the King's Peace. Much of our constitutional history could be written in terms of the struggle of the sovereign for a living wage. There has been a strange inconsistency in expecting the monarch on the one hand to carry on the government and, on the other hand, in keeping such a tight Parliamentary control of the purse-strings that he has been driven to those expedients of direct taxation—tallages, scutages, patents, monopolies, benevolences, ship-money, and all such—which we bitterly resisted, in repeated constitutional crises, until the age of “the redistribution of wealth.” It took us a long time to abandon the principle that the king should “live of his own,” and even in days when he was by far the wealthiest man in the country, it is probable that he could ill have spared the profits which accrued to him from the misdeeds of his errant subjects.

# THE HIGHWAY OF THE PEACE



## 2

### THE HIGHWAY OF THE PEACE

#### CONQUEROR'S PEACE

IF ever a monarch had need of peace and quiet, it was William of Normandy when he seized the English throne. He was then 39 years old, and all his life he had been a man of war. He was destined to remain so, and to die in the field. Now master of two realms, both equally combustible, he urgently needed a breathing space to establish himself in his new domain.

Of the many problems which faced him, the most immediate was racial. He was bringing to an already mixed population, strife-ridden for centuries, a new strain with alien language and institutions. On the very day of his coronation he was reminded in startling manner—what an omen it must have seemed!—of the smouldering dangers, when his bodyguard mistook the English form of acclaim for a hostile demonstration and fell to blows and even (according to some accounts) to arson. One of William's first measures, therefore, was to provide special protection for his followers, and a passage in the *Dialogus de Scaccario* tells us that this was made necessary by frequent slayings of Normans by the wild English. In the third of the so-called *Ten Articles of William I*, to which Liebermann assigns a date between 1068 and 1077, it is provided that "all the men whom I brought with me or who have come after me shall be in my peace and

quiet." If any one of them were slain, it was the responsibility of the culprit's lord to produce him within five days, or else to pay the King 46 marks of silver, or as much of that sum as the lord's estate would bear; for the remainder of the sum the hundred was liable.<sup>1</sup> At a later period the hundred acquired the right to escape liability by proving, if it could, that the slain man was not French, and this process became known as the presentment of Englishry. But in the course of time this degenerated into little more than a fiction, for the races had become so thoroughly intermingled that proof of nationality was often, perhaps usually, impracticable; and the result was that the hundred became liable to the *murdrum* fine if the slayer, whatever his extraction, could not be brought to justice. After the fine had been abolished by Edward III, there were other ways in which, as we shall see, the hundred for a long period remained answerable for undetected crime. Other Articles of William, regulating the form of trial between English and French—whether by the native method of ordeal, by compurgation, or the Norman importation of battle—show that William was apprehensive from the first of clashes between the two races. The detested curfew which he established was significant evidence of his view of the general state of the peace. Lanfranc, the cultured Italian, was so depressed by the conditions which he found in England that he besought Pope

<sup>1</sup> This *murdrum* fine was huge, and Dr. Lane Poole, *op. cit.* 85, is of opinion that it was never exacted in full; see also Robertson, *Laws of the Kings of England*, 363. The King was evidently content to take what he could get.

Alexander II to be relieved of his archbishopric and to return to the cloister.<sup>2</sup>

Again, William came from a country where private warfare between rival magnates was familiar and recognized, and he was well aware of the danger from powerful and ambitious nobles. For some considerable time before his accession the English earldoms had been growing in power and presumption, and a magnate like Earl Godwine was not very far removed in status from the monarch. Forebodings on this score proved to be justified, for when William had been on the throne nine years he had to deal—and his methods were summary—with a formidable revolt which was in no sense a popular rising but a challenge from those who owed him the highest fealty.

#### THE KING AS OVERLORD

Peace, then, among his people was what he earnestly desired not merely as an ideal but as a necessity for the task which lay before him. The policy which he adopted for attaining his object was twofold. Negatively, it was to appear as little as possible in the guise of either a conqueror or a "new broom." He therefore confirmed to his new subjects their ancient laws, making very few changes of his own. Even trial by battle, which he brought with him from the Continent, was not as great an innovation as it is sometimes represented, for it was not conceived merely as a personal contest with the victory to the strong, but as another form of appeal to the supernatural which was familiar

<sup>2</sup> *Lanfranci Opera*, ed. Giles, i. 19, Letter No. 3.

to the Anglo-Saxons in the ordeal. While the jury of inquest was of Frankish origin, it is doubtful whether the jury of presentment, which has often been described as a Norman innovation, was really of foreign origin at all, though the Normans undoubtedly fostered and extended it in England. In short, there was never any "reception" of Normanic law in this country and during the Conqueror's reign most of his subjects cannot have felt that they were living, for the most part, under any different system of law from that to which they had been accustomed.

The more positive aspect of William's policy has a direct bearing on the King's Peace. It was an assertion of the principle, which was to be the keystone of the whole feudal system, that whatever the claims of lordship and service might be, there was only one supreme overlord and to him the transcendent fealty was due. We do not know exactly who was summoned to the famous assembly on Salisbury Plain in 1086, nor how many attended it, but they seem to have been the more considerable tenants of the great land-owning lords whose domestic sovereignty the King had reason to regard with jealousy. Each was "the man" of somebody lower in degree than the King, but the King ensured that every one of them acknowledged himself to be above all the King's own man. This is made clear in the account which is given of the assembly in the Peterborough Chronicle: "There his Witan came to him and all the landholding men in England" (this must be an exaggeration), "no matter whose men they might be, and swore him fealty that they would be true to him against all men." It may

not be without significance that William had been on the throne twenty years before he took this step. By then, nearly at the end of his reign, he had established the central government in a stronger position than any of his Anglo-Saxon predecessors, and the way was open for even more imaginative rulers than himself to bring within the royal authority the whole administration of justice throughout the land. This was perhaps William's richest legacy to England.

#### RELAPSE AND RECOVERY: HENRY II

And yet, within fifty years of his death, it seemed as if all his work had been in vain. He himself had never enjoyed the peace for which he had hoped, for peace is not the portion of conquerors. For the four years 1081 to 1085 there was something of a lull, but for the rest of his reign he was never free from threats in England or Normandy, or from Scotland or Denmark. The sceptre which he had grasped so manfully was less firmly held by his two sons, and from the nerveless hands of his grandson Stephen it fell to the ground and the country suffered a nightmare of anarchy such as had not befallen it for many a long day. But even in dark ages light somehow filters through, and the Plantagenets were to show that the foundations of William's edifice had not quite crumbled away.

To Henry II belongs the chief credit for having extended the King's Peace into the law of the land, and his work was consolidated during the reign of his grandson Henry III after another apparent relapse in

the reigns of his two sons Richard and John. The second Henry, a remarkable man, far more intelligent and far better trained for kingship than any of his predecessors, found the law in a state of great confusion and corruption for reasons which we have already considered. The administration of justice had become a vast system of exploitation and the unfortunate citizen was the vile body of local custom, manorial courts, forest law, ecclesiastical law, and private jurisdictions, not to mention the old shire and hundred courts. The latter were a double burden, for the freeman was not only a potential defendant before them but was himself, if qualified, a member of them and under the onerous duty of attending them. Their procedure was exceedingly clumsy, and the old methods of proof, such as compurgation, were falling into decay through their inherent vices and abuses. Henry did not relieve the burden of the law on the community—in a financial sense he probably increased it—but he set to work vigorously to systematise it under central control.

#### THE NEW ROYAL PEACE

One of his first measures was a “purge” of his local officers, especially the sheriffs, who had more and more tended to become mere placemen of doubtful integrity rather than the direct appointees of the King, selected for merit. Local administration was thus reformed and invigorated; while at the centre a similar tonic was administered, the King’s justices holding regular courts and building up the precedents of the Common Law. It is possible that in this reign began the process which

was to be momentarily developed under Henry III—the issue from the royal Chancery of many new kinds of writs to meet all manner of claims. Not the *laws*, as formerly, but the *law* of England is being built up stone by stone, and when, soon after Henry's work has been done, the Plea Rolls and the Register of Writs inaugurate an imperishable record, it is possible to see what shape the edifice is going to take.

Henry's judges are his ministers throughout the land, riding out upon those circuits which are later to be highly developed under the various commissions still held today by the Justices of Assize. Apart from the regular circuits which bring royal justice to every part of the country, instead of imposing on suitors a toilsome and costly journey to Westminster, the King may send his judges on some special mission or inquiry into any matters which seem to need investigation—and there is every reason to believe that the investigation was extremely thorough. (These special eyres were at least as old as Henry I, and possibly older. Henry II, however, used them more freely than his predecessors.) Far more searching—Argus-eyed and inescapable—was the General Eyre; it visited centres of population at intervals which eventually were fixed, probably in response to the piteous appeals of the citizenry, at not more often than once in seven years. These commissioners of the General Eyre are well described in the *Dialogus de Scaccario* as “*deambulatorii and perlustrantes*.” There was little which they did not perlustrate—the whole local conduct of administration for years past, with fines and penalties for every default or irregularity. The scope of their insatiable probing, which

an irreverent generation might call "snooping," has been admirably and amusingly described by W. C. Bolland in his lectures on the subject.

Their unpopularity grew until they fell into disuse some time in the early fourteenth century. Henry's use of this drastic expedient seems oppressive, but it had at least two salutary effects. It reminded the whole country that the King, watching over England, slumbered not nor slept. His royal peace was everywhere present. It was not Henry's object to oust or swamp local jurisdiction, a vast amount of which still continued as a necessary part of the national system of justice. His reforms had, rather, the effect of stimulating its honesty and efficiency. Again, though we meet here once more the everlasting financial motive, and though the exactions of the General Eyre seem to have been inexorable, they did provide Henry with resources which enabled him to strengthen his whole administration.

#### THE FOUNTAIN OF JUSTICE

The immense legal developments of this reign are familiar to all students of our legal history. I need not re-tell the story of the possessory assizes, and especially the assize of novel disseisin, which Maitland has called one of the most important laws ever passed in England. In an age when violent deforcement of land and other hereditaments was all too common, Henry, by special processes much more speedy and effectual than the unwieldy means of asserting title, established the principle that actual "sitting" possession was at least "nine points of the law," provided

that the wronged party showed due diligence in claiming relief. It is probable that the King's motive was not solely solicitude for the dispossessed, but, as Lady Stenton has pointed out,<sup>3</sup> determination to preserve the peace; for there can be no true peace in the land when a freeman's "stake in the country" is at the mercy of covetous violence. Though Henry could not know it, his assizes were the forerunners of those numerous later writs, and especially the writs of entry, which were destined to establish, at the expense of the feudal courts, a general royal jurisdiction over land-holding in all its aspects.

In the field of crime the process which has been going on, and which becomes more clearly defined under Henry II, is that those deadly sins which anciently were breaches of the King's own peace or *grith* remain heinous, but take on the character of felony; and felonies become Pleas of the Crown, for every felony is an offence committed *nequiter et in pace Domini Regis*. This, too, is an oft-told tale, not without its obscurities, and it is enough here to say that the scope of felony steadily grew until by the end of the thirteenth century all the more grievous misdeeds had become Pleas of the Crown. The King, in the person of his judge, co-operated with the citizen, as accuser and witness in the jury of presentment and the jury of recognition, in the campaign against crime. Henry II's system, based on this dual principle and destined to oust the old, crude appeal of felony, was set forth, in a clear and comprehensive manner, in the famous

<sup>3</sup> *Cambridge Medieval History*, v. 587.

Assize of Clarendon exactly a hundred years after the Conquest, and this was amplified and revised ten years later by the Assize of Northampton. It is one of the capital documents in our legal history—truly a Charter of the King's Peace. It is not a "statute," as we understand the term, for no such thing existed in 1166; but while it was expressed to be made *de consilio baronum*, it was undoubtedly a piece of imperative royal legislation, which was to endure—the expression is most significant—*quamdiu ei (i.e., the King) placuerit*.

This enactment was a symbol of Henry's great authority and prestige, which were higher than those of any monarch who had preceded him or, indeed, of any other prince in Europe. Nothing but that royal authority could have been the instrument for doing what he did for English law. The groundwork which he laid for the Pleas of the Crown remained, and still remains, the foundation of our criminal law in all subsequent ages. We saw earlier that the Anglo-Saxon kings repeatedly laid down the principle that ordinary justice was local and the King's justice exceptional only. How completely the wheel has come full circle by the thirteenth century, after Henry's work has been done, is shown by Article 24 of Magna Carta, which forbade subordinate officers to adjudge Pleas of the Crown. The same contrast is to be observed in the whole conception of the King's Peace. Once it was his own special (and expensive) privilege; under Henry II it is in a fair way to becoming every free man's privilege through and by the royal jurisdiction. The people of England did

not obtain it cheaply; it cost them huge contributions to the royal coffers; but it was to be a good investment in the end. "For the first time in English history," as Lady Stenton has observed,<sup>4</sup> "criminal justice was to be administered all over the land in accordance with the same rules."

#### PEACEFUL PENETRATION

We have now reached a point at which we can say that the criminal law of the realm is well grounded upon the King's Peace, and to pursue the story farther is needless for our present purposes. The general principles of our criminal law and procedure settled into their shape, which was by no means symmetrical or flawless, in the seventeenth and eighteenth centuries, between the times of Coke and Blackstone. The vast number of contraventions, below the degree of Pleas of the Crown, which had been the concern of subordinate tribunals like the sheriff's tourn and the court leet, fell into the category of misdemeanours and were to become in the course of time, by a host of statutes, "offences of summary jurisdiction"; this was, and is, another facet of the King's Peace, of which we shall have more to say.

In this age, too, begin the outgrowths, of immense consequences for the future, of the notion of trespass, which in its origins is simply sin or wrongdoing, as we are reminded every time we hear the Lord's Prayer. Whenever it was committed—as it constantly was in the Middle Ages—*vi et armis*, the

<sup>4</sup> *Loc. cit.*, v. 585.

King's Peace was immediately engaged and the King's remedy was available. If there is one principle of our legal history which, in my experience, is embedded, as it were in concrete, in the minds of students, it is that trespass was a "fertile mother of actions," and I need not describe in detail the genealogy of this doughty matriarch. From wrongs of physical aggression legal ingenuity—never at a loss when the true good of the community is at stake!—with the assistance of the Statute of Westminster, 1285, carries the civil remedy to analogous injuries, even when no force has been used, and then, by another admirable stretch of imagination, to "wrong" done by breach of promise; and thus it swallows up in new forms, such as trover and assumpsit, old, hidebound actions in the fields which we should nowadays call tort and contract. In the land law it is found to be much easier, less dilatory and less costly to prove and defend possession than to prove and defend title; and so trespass to possession becomes the foundation of a new form of pleading, the action of ejectment, which is to remain until the nineteenth century the ordinary means of deciding disputed title to freehold. It is true that in the course of time the relationship of many of these actions to the King's Peace becomes tenuous and largely fictitious, but it was far otherwise in their beginnings, and whatever new complexions were put upon them in later times by the devices and desires of pleaders and conveyancers, the fact remains that the King's Peace, in its aspects of trespass and

trespass on the case, was the seed of them all in the only soil from which they could have sprung.

Thus we may say that this notion of the King's Peace, extended, elaborated and even a little fantasticated, has coloured with one hue or another the whole field of our law, civil as well as criminal. If it has not been in the civil sphere as pivotal a conception as in the criminal, at least it has been a most useful and adaptable instrument for the development of civil remedies. Marching with it throughout our legal history has been another attribute of monarchy—the "quality of mercy," or of humane, equitable and protective jurisdiction, out of which grew another great department of our system; but that is a different story.

So far, we have been travelling along what I may call the main highway of the royal peace; but there are also many inviting byways in its long history. I must not be tempted into them all, especially as some of them are tortuous and ill-lit, but it may be permitted, and I hope it will not be without interest, to make a brief *détour* into a few of them.



BYWAYS OF THE PEACE



### 3

## BYWAYS OF THE PEACE

### THE EX OFFICIO CRIMINAL INFORMATION

IT is a characteristic of the Queen's Peace of which we are seldom reminded today that the sovereign has always retained, and still possesses, a personal concern in the enforcement of law. Criminal prosecutions are now almost always initiated by the police or by other modern officers of law and order, such as the Director of Public Prosecutions; but the Queen has power and right to assert her peace in her own proper person. This is illustrated by a kind of criminal procedure which is now virtually obsolete but was erstwhile of brisk vitality, though with pernicious results in one of its aspects. Indictment, until our own times, lay on the presentment of the grand jury; but, as Stephen observes,<sup>1</sup> "from the earliest times the king accused persons of offences not capital" (*i.e.*, of misdemeanours only, for quite different considerations arose in felonies) "in his own court by the agency of his immediate legal representatives without the intervention of a grand jury." This was the procedure of the *ex officio* criminal information, and it still exists. It is filed by the Attorney-General (or, him failing, the Solicitor-General) on behalf of the Sovereign, and the rules which govern its operation are nowadays much the same as those which apply to

<sup>1</sup> *Hist. Crim. Law*, i. 295.

indictments. Blackstone,<sup>2</sup> basing himself on Hawkins, gives this account of it, which is found in most of our books as the authoritative description: "The object of the king's own prosecutions . . . are properly such enormous misdemeanours as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the Crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal." He goes on to say that this "high and respectable jurisdiction" is "as ancient as the common law itself"—a vague and questionable statement; in fact, the origin of the information has been the subject of controversy which is now, however, only of antiquarian interest. It was by this form of accusation that a great many famous "constitutional" cases, recorded especially in the *State Trials*, were instituted, particularly those which form the long and unhappy chapter in our law concerning seditious libel. The Seven Bishops, Lord George Gordon, John Wilkes, Horne Tooke, Cobbett, Burdett and others were all prosecuted in this manner, and I regret to add that not even a Vice-Chancellor of the University of Oxford was exempt from inquisition for neglect of his duty both as Vice-Chancellor and as a Justice of the Peace.<sup>3</sup> Many of the offences

<sup>2</sup> 4 *Comm.*, 309.

<sup>3</sup> *R. v. Purnell* (1748) 1 Wils.(K.B.) 239. Regrettably, the case turns only on the discovery of records in the possession of the Vice-Chancellor (this was refused to the prosecution),

alleged in these prosecutions fall very far short, according to modern notions, of the enormity and urgency which Blackstone presupposes, but our notions of "disturbing and endangering" the government by free criticism are very different from those which prevailed in the seventeenth and eighteenth centuries.<sup>4</sup>

#### THE PRIVATE CRIMINAL INFORMATION

The process was much abused by the Star Chamber, and under Henry VII by informers like the notorious Empson and Dudley (for a statute of Henry VII had extended the power of information to such predatory types), but after the abolition of the Star Chamber in 1641 the jurisdiction reverted to the King's Bench, where it still resides. There was another form of it which was the parent of great abuses. This was a criminal information issued by the Master of the Crown Office at the suit of a private individual, especially for alleged criminal libels. It seems to have been very easy to obtain process from the Crown Office—so easy that one cannot but suspect irregularities in the nature of heavy fees and perquisites, not to say corruption; and accordingly in 1694 a statute (4 & 5 Wm. and M. c. 18) provided that the Crown Office should not file any private information except by leave of the King's Bench or without requiring

and we are not informed in what respects Dr. Purnell was alleged to have failed in his duties.

<sup>4</sup> The luckless Rev. Mr. Earbery, author of the *Royal Oak Journals*, prepared in 1770 an elaborate argument against the criminal information, which is reported in 20 *St.Tr.* 855, but which the court refused to hear.

security for prosecution and costs from the complainant. This, however, does not seem to have suppressed the practice, for it still flourished into the early nineteenth century, and under certain judges, and especially Lord Tenterden C.J., the court showed a surprising readiness to grant leave in respect of so-called libels which would now be considered trivial and even absurd. The whole matter came under review in *R. v. Labouchere* (1884) 12 Q.B.D. 320, in which the Duke of Vallombrosa sought leave to file a criminal information against that stormy petrel of British journalism, Henry Labouchere. Lord Coleridge C.J. went to great trouble to examine authorities reported and unreported, and the curious may find in his judgment some remarkable sidelights on the difference between our modern ideas of free speech and those which prevailed 150 or even 100 years ago; for some of Lord Tenterden's rulings are well-nigh incredible, though probably not out of harmony with aristocratic opinion of the time. The conclusion of the court in Labouchere's case was that leave to file a criminal information for libel should be granted only to persons who were in some public office or position, and not at the suit of ordinary private individuals. This decision in effect gave the quietus to this sinister form of process<sup>5</sup>—savouring as it frequently did of blackmail—and it was dead or at least moribund long before it was formally abolished by

<sup>5</sup> See, however, *Ex p. Bowen* (1911) 27 T.L.R. 179, and *Ex p. Freeman-Mitford* (1914) 30 T.L.R. 693. For informations filed by Justices of the Peace for reflections upon them in the discharge of their office, see *R. v. Masters* (1889) 6 T.L.R. 44 and *R. v. Russell* (1905) 93 L.T. 407.

section 12 of the Administration of Justice Act, 1938. The *ex officio* information still has a theoretical existence, but there has been no example of it since 1910, when it was employed<sup>6</sup> to nail down a persistent and absurd rumour that King George V had in youth contracted a morganatic marriage. The libel was of that very rare variety which might be said to fall within Blackstone's rhetorical description of this misdemeanour.

Let us now consider some past episodes in the history of the Queen's Peace from which, perhaps, we can derive a little unction, for they will show us that in some respects at least we of this age breathe the "all-embracing atmosphere" with fewer bronchial disorders than our forefathers.

#### FORCIBLE ENTRY

It must, I apprehend, be a good many years since anybody was prosecuted in this country for a forcible entry or detainer upon lands or tenements, and still longer since any justices of the peace restrained such high-handed conduct upon their own view. At all events, I have been unable to find any reported instances of these prosecutions for a hundred years past, though criminal liability for forcible entry has been incidentally important in certain modern leading cases, notably *Hemmings v. Stoke Poges Golf Club* [1920] 1 K.B. 720—a case which dispelled some long-standing misapprehensions about this branch of the law. In earlier times, however, there was a mass of

<sup>6</sup> *R. v. Mylius* (unreported).

case-law on this subject and it points to an ugly and all too common threat to the King's Peace from which our politer manners, and perhaps our developing respect for the law, seem fortunately to have delivered us.

Our old authorities tell us that it was always a misdemeanour at Common Law to effect entry to land or tenements by violence, or to detain possession so acquired, but that originally the breach of the peace was excused, as a legitimate form of self-help, if the aggressor could show a good title. I believe that this is historically disputable, but, however that may be, the real or supposed or pretended claim of right to dispossess a freeholder by force undoubtedly led to great mischiefs. As Bacon says in his *Abridgment* under this title, it was a temptation to "arming the tenants of the lords, and in a manner encouraging them in mischief, who were always too forward in rebellions and all contentions in their neighbourhood; also it gave an opportunity to powerful men, under the pretence of feigned titles, forcibly to eject their weaker neighbours." A deal of ancient and discreditable history lies behind that observation; it carries us back, indeed, to a time when the King's Peace was constantly threatened by something like private warfare. The menace seems to have been particularly grave in the fourteenth century. The industry of L. O. Pike<sup>7</sup> extracted from the Patent and Controlment Rolls of Edward III a considerable number of really astounding instances of forays, incursions and ousters committed not, as we should expect, by

<sup>7</sup> *History of Crime in England.*

common felons and ruffians, but by the "upper classes"—by knights and nobles and, I regret to add, often by the clergy. These depredations were committed by armed bands which were, in effect, small private armies of mercenaries, and their escapades justify Pike's description of them as "open brigandage." Their aggressive character was aggravated by the common practice of giving liveries and tokens to the retainers of lords and magnates and thus distinguishing them not only as rival factions of Montagues and Capulets but as general men-at-arms for all exploits and adventures.<sup>8</sup> Behind their unblushing seizures of Naboth's Vineyards was the motive that *possidentes* were always *beati*, however the possession had been obtained and with whatever colour of right. Not even churches and parsonages, it seems, were immune from force of arms. It was against this turbulence that the famous Statute of Richard II, which is still the law today, was aimed in 1381. "The King defendeth that none from henceforth make any entry into any lands and tenements but in case where entry is given by the law, and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner." The statute was aimed not so much at wholly wrongful violence as at the employment of excessive force even in the assertion of real or supposed right; and, as many decisions laid down afterwards, something more than *vi et armis* must be

<sup>8</sup> The mischiefs which resulted from this practice, and the long course of legislation against it, are described in Stubbs, *Constitutional History*, iii. 548ff.; and see Stephen, *Hist. Crim. Law*, iii. 234ff.

alleged (for that was common to all trespass)—“strong hand,” which might be shown even by one person without “multitude,” or even the threat of it, or the presence of “multitude,” which was itself evidence of aggressive intent, though perhaps it consisted only of a handful of invaders (who might also be guilty of the separate offence of riot).

The statute, however, was *lex imperfecta*, partly because it was openly disregarded, and partly because it provided no swift remedy for the dispossessed. Ten years later another statute of Richard II<sup>9</sup> established a summary procedure by justices of the peace, who were required, with the assistance of the county, to go to the spot and arrest and imprison the wrongdoer who had made forcible entry and who continued in forcible detainer. This, however, provided no remedy against the defendant who got wind of the justices' intention and was prudent enough to make his escape before they arrived; it gave no power to restore the ousted complainant to his tenement; and it was ineffectual against the more wily sort of disseisor who had gained peaceable entry by fraud or blandishment and then remained in forcible detainer against all comers. These gaps were filled, and certain other provisions made, by Acts of 1429,<sup>10</sup> which extended summary powers to other officers besides justices of the peace, and of 1624,<sup>11</sup> which gave the right of restitution to dispossessed leaseholders, copyholders, and

<sup>9</sup> 15 Rich. II, c. 2.

<sup>10</sup> 8 Henry VI. This, and the 15 Rich. II, c. 2, are amended in part by the Statute Law Revision Act, 1948, Sched. 1.

<sup>11</sup> 21 Jas. I, c. 15.

other kinds of tenants besides freeholders. The Act of Henry VI and another of Elizabeth I<sup>12</sup> in 1588 protected the "squatter" who had been in possession for three years, even if his original entry had been forcible.

That this scandal, which shocks all our ideas of law and order, continued for centuries is shown not only by its frequency in our old books, but by the fact that it came very often before the Star Chamber, under the Tudors. Not all our elaborate and intricate rights and remedies of the land law seem to have counteracted the lure of obtaining possession by fair means or foul, and then clinging to it defiantly. It was not until the eighteenth century that any marked abatement was evident. Pike regarded it as a great advance of civilisation that for the year 1700 he found in the King's Bench only eleven cases of violent seizure and detention of land. By the end of the century the number had greatly diminished. There is still a considerable amount of case-law in the first half of the nineteenth century, but from that time onwards we may fairly congratulate ourselves that the Queen's Peace has become less and less endangered by this kind of brutal violation. Today dispossession which is committed *fortiter in re* is usually answered *suaviter in modo* by civil proceedings, but it may still happen that a defendant against whom no damages can be recovered, because his entry and possession are supported by a claim of right, may nevertheless be criminally liable if his entry has not been "peaceable

<sup>12</sup> 31 Eliz. I, c. 11.

and easy." It need hardly be added that these considerations do not apply when the peace itself is being vindicated—*e.g.*, in the restraint or pursuit of felony, or when otherwise entry "is given by the law."<sup>13</sup> In *Harvey v. Harvey* (1884) 26 Ch.D. 644, Chitty J. had to consider whether a sheriff was justified in breaking open doors in order to attach a person who was in contempt of court. The learned judge found authority as far back as the Year Books for laying down the principle that "where the King has an interest"—*i.e.*, for the sake of his peace, of which contempt of court is certainly an important aspect<sup>14</sup>—then the breaking is justified, but not when it is in assertion of a mere private right or interest, *e.g.*, on a sheriff's execution by writ of *feri facias*. So far as I know, that is still the law: and it is the reason for the perennially comic spectacle, so dear to playwrights and novelists, of the patient or crafty bailiff trying to obtain entry without strong hand or multitude of

<sup>13</sup> *Thomas v. Sawkins* [1935] 2 K.B. 249 lays down that the police have a right to enter private premises to prevent an apprehended breach of the peace—in this case at a public meeting—and presumably this includes a right to enter by force.

<sup>14</sup> Contempt of the King's Court is contempt of the King. This is well exemplified by the old Chancery procedure against a party who was in contempt by disobeying a subpoena. If the sheriff was unable to attach him after proclamation, he was held to be "standing out in rebellion," and a Commission of Rebellion, or "petit army," could issue against him. The elaborate procedure is described by Blackstone, 3 *Comm.* 443 (who confuses Nicholas Bacon with Sir Francis Bacon in this connection): see Holdsworth, *History of English Law*, v. 286 and ix. 349, Spence, *Equitable Jurisdiction*, i. 370, and *Müller v. Knox* (1838) 4 Bing.N.C. 574, especially the opinion of Bosanquet J. The advantage of the commission of rebellion was that it extended to all counties, whereas the sheriff's powers were limited to his own county.

people. Doubts remain, however, as to what exact warrant of law will justify forcible entry. At the present time thousands of persons are authorised by statutes and statutory instruments to enter private premises without search warrant for many different kinds of inspection, and it has been suggested that they may do so by force if necessary. Fortunately there has been so far no occasion to test the question, and I for one prefer to express no opinion except that I hope no such occasion may ever arise.<sup>15</sup>

#### ROUT AND RIOT

Another threat to the peace which troubled the unhappy Richard II and many monarchs after him, but which may be said to have shrunk nowadays to inconsiderable proportions, was tumultuous assembly, rout and riot. The first statute on the subject seems to have been passed in 1393,<sup>16</sup> and it refers to an earlier Act of 1381 which had doubtless been occasioned by Wat Tyler's rebellion, just as the second

<sup>15</sup> In *Grove v. Eastern Gas Board* [1952] 1 K.B. 77, it was held that the statutory power of the authorised official of a gas board to enter premises in certain circumstances included a power of forcible entry. The case turned on the construction of a schedule to the Gas Act, 1948, and is therefore not necessarily an authority concerning other statutory powers of entry, but Somervell L.J. observed: "Perhaps, broadly speaking, a power of entry conferred by a statute is, prima facie, at any rate, a power of forcible entry if necessary." This view was not dissented from, though not stated in terms, by the other members of the Court of Appeal. If it is correct, forcible entry by officials under statutory authority is doubtless entry "given by law" within the statute of Richard II.

<sup>16</sup> 17 Rich. 2, c. 8. Amended in part by the Statute Law Revision Act, 1948, Sched. 1.

Act itself was probably connected (as Stephen suggests) with the agitations of the Lollards. There were numerous other enactments in succeeding ages, down to the famous Riot Act of 1714,<sup>17</sup> which was to assume dramatic importance during the Gordon Riots in 1780. There was also much legislation under George IV and Victoria concerning malicious damage and the riotous and felonious destruction of houses. Our history contains only too many examples of the necessity for these restraints, such as the riots of the silk-weavers against the East India Company in 1697, the sectarian tumults of Dr. Sacheverell's "No Dissent" in 1710 and Lord George Gordon's "No Popery" in 1780, the mob rule of John Wilkes, Peterloo, the Luddites and machine-breakers, the Corn Laws and Reform Bill agitations, the Bristol Riots of 1831, the Chartists, the Trafalgar Square Riots in 1886, and many others of earlier times. All readers of Dicey's *Law of the Constitution* will remember the terrifying duties which are laid on the magistrates and the military in maintaining the Queen's Peace against civil commotion. But it must be a great many years—though it is still within the memory of living persons—since the solemn incantation of the Riot Act was read to an angry mob in this country, and it is a remarkable fact that during the General Strike of 1926 there were, so far as I know, no prosecutions for rout, riot or unlawful assembly. We fortunately hear little of this offence nowadays except in infrequent claims for compensation under the Riot (Damages) Act, 1886, and the "riots" which give rise to these claims are singularly

<sup>17</sup> 1 Geo. I, st. 2, c. 5.

mild by comparison with those of earlier history—*e.g.*, damage done by an ebullient but good-natured crowd on Armistice Night, 1919,<sup>18</sup> or by a crowd of disappointed enthusiasts trying to obtain admission to a football ground.<sup>19</sup> The Act of 1886 transferred liability for compensation from the hundred, on which it had previously lain, to the police rate. At the date of its passing, riots were still not uncommon at times of general elections,<sup>20</sup> and if anybody is interested to know how high political feeling ran as late as the year 1880, and how ferociously the disappointment of free and independent but unsuccessful voters expressed itself, I commend to him the epic of the Great Marlow election of that year, as revealed in *Drake v. Footitt* (1881) 7 Q.B.D. 201. Whatever the strength of our political convictions today, we seem to entertain them with more respect for the Queen's Peace than our elders and betters did 73 years ago.

#### MAINTENANCE AND CHAMPERTY

It is one thing to break the peace oneself and another and perhaps a worse thing to move others to do so; and the instigation may consist either in inciting to violence or in stirring up strife by promoting suits at

<sup>18</sup> *Ford v. Receiver for the Metropolitan Police District* [1921] 2 K.B. 344.

<sup>19</sup> *Munday v. Metropolitan Police District Receiver* [1949] 1 All E.R. 337. A more serious modern case was riot damage done by disaffected soldiers: *Pitchers v. Surrey County Council* [1923] 2 K.B. 57.

<sup>20</sup> Significantly, also, there still lingered apprehension about attacks in force on stranded or distressed ships, and injury to or destruction of machinery, and the Act made special provision against these.

law in which one has no legitimate concern. For centuries the intermeddler or "breedbate," to use the old term, was an endemic problem in our law and the object of much odium as a disturber of the peace. Blackstone<sup>21</sup> describes him and all his tribe as "pests of civil society," and Coke,<sup>22</sup> in referring to "vexatious relators, informers and promoters" of criminal charges allows himself some characteristic flowers of vituperation which might equally well be applied to "promoters" of civil suits; they are "viperous vermin . . . who under the reverend mantle of law and justice instituted for protection of the innocent and the good of the commonwealth, did vex and depauperise the subject, and commonly the poorer sort, for malice or private ends, and never for love of justice." How grievous this nuisance was is shown by the remarkable amount of legislation directed against it in the Middle Ages and the quantity of learning, now for the most part obsolete, which appears in the Abridgements and in all our old treatises on Pleas of the Crown about the kindred offences of maintenance, champerty, barratry and embracery (or "sinister labouring," as the old terminology had it) of juries. The legislation begins in the reign of Edward I with the Statute of Westminster I in 1275 and is followed by at least three other enactments of the same reign; it continues under Edward III and Richard II and down to the Tudors, when two statutes of Henry VII and Henry VIII dealt with it more effectively than any of their predecessors. The line

<sup>21</sup> 4 *Comm.*, 135.

<sup>22</sup> 3 *Inst.*, 191.

was not always very clearly drawn between these various forms of disturbing the peace and perverting justice, and, as Sir Percy Winfield has shown in his *History of Conspiracy*, they were all connected in the medieval mind with that offence—indeed, two of the principal statutes of Edward I are aimed specifically against conspirators of divers kind. They were also inextricably bound up with the perjury which was rampant throughout the courts in the Middle Ages, perhaps as a legacy from the old system of compurgation.

Maintenance, as every beginner in the law knows, is the officious intermeddling in other people's legal disputes by "maintaining" a cause in which one has no legitimate interest or charitable motive, and champerty is a baser form of it which aims at a share of the spoils. Coke is very positive that maintenance was an offence at Common Law, but this is doubted by Holdsworth; however, the point is academic, for it was certainly made a crime as early as 1275, and in 1331 the statute 4 Edw. III, c. 11, gave a civil remedy as well. The whole basis of liability has been controverted, for in the leading modern case on the civil aspect of it,<sup>23</sup> Lord Shaw of Dunfermline and Lord Phillimore were strongly of opinion, which they supported with much apparatus of learning, that it was at no time wrongful to maintain another in a just claim, but only in a groundless or fictitious suit, to the perversion of justice. This, however, is not the accepted view, and the substance both of the civil

<sup>23</sup> *Neville v. London Express Newspaper Co.* [1919] A.C. 368.

wrong and the criminal offence appears to be unwarranted intervention and encouraging strife, whether the plaintiff's claim was rightful or wrongful, successful or unsuccessful.

#### LAW IN DECAY

The general principle of the law in this respect seems to be "Mind your own business." In early times that counsel was not merely one of perfection, but of practical urgency. The old statutes point to a hideously corrupt state of the law. I referred previously to the rapacity of the law even under Henry II, and there can be no doubt that in the thirteenth and fourteenth centuries it had reached abysmal depths of corruption, chicane and extortion. All this has been described by Holdsworth<sup>24</sup> and by many other historians. It makes sad reading for any lawyer, and, persisting as it did, though in a greatly diminishing degree, right down to the time of Dickens, it has probably been largely responsible for the popular dislike and distrust of the legal profession. A study of the old statutes shows that they were directed principally against two sources of infection. The first was, shamefully enough, the officers of justice themselves and the ministers of the King; thus the first two statutes of Edward I mention specially the clerk of any justicer or sheriff, the Chancellor, treasurer, justices, and "any of the King's house"; and similarly the Acts of Richard II's reign (1377 and 1383), though they include "any other person," are

<sup>24</sup> *Hist. Engl. Law*, ij. 457.

aimed chiefly at officials. The second standing danger has been mentioned already, namely, the "thick-and-thin" clan spirit of the retainers of magnates, with their badges and liveries. They are clearly the "conspirators" contemplated by the Statute of 33 Edward I—"such as maintain men in the country with liveries or fees for to maintain malicious enterprises—stewards and bailiffs and great lords . . . to bear or maintain [other] quarrels, pleas or disputes (*baretz*) than such as touch the estate of their lords or themselves." Just as these septs and factions conducted, as we have seen, private campaigns of their own, so they were confederated to maintain each other in lawsuits, many of which were fraudulent or fictitious. A faint trace of this old order still remains in the rule that it is lawful for a master to maintain his servant or apprentice in a suit. This constant and specious disturbance of the peace, under the guise of legal process, was the original form of maintenance, with its concomitants of champerty, perjury and embracery; and it was largely owing to the irrepresible power of the magnates and their retinues that most of the legislation against this pestilence proved ineffectual. It was the much-abused Star Chamber which first took the matter in hand energetically, and maintenance was at the head of the prevalent abuses which it aimed at suppressing. In 1540 an Act of Henry VIII,<sup>25</sup> which I think has never been repealed, consolidated the law and imposed fresh penalties for maintenance, champerty, embracery, subornation of

<sup>25</sup> 32 Hen. VIII, c. 9.

perjury and the buying and selling of "pretensed" titles to lands and tenements. This latter had been a great evil, facilitated by the ingenious manipulation of uses,<sup>26</sup> and we hear of it as late as 1882.<sup>27</sup> Stephen, with whom Holdsworth agrees, is of opinion that after the stern measures of the Star Chamber, though maintenance certainly did not disappear, its character changed. It was no longer primarily a confederacy of powerful groups, but rather the offence of unscrupulous individuals (who, however, still abounded), and the emphasis shifted from the criminal aspect as a disturbance of the peace to the civil remedy of the party who had suffered from the gratuitous intervention of a "breedbate." Nevertheless, all the old criminal legislation had left a legacy in the odium which attached to the maintainer or champertor. Even if the laws were defied by the great, they were a terror to the humble, and a plain man might shrink from being a party to any suit, or an attorney from representing a client, lest he be held for a maintainer. It seems that at one period even a witness who volunteered his evidence might be in danger of the criminal law. According to the usual, though perhaps speculative, explanation, the savour of maintenance was the reason for the strange and inconvenient rule that a chose in action could not be assigned at Common Law.

In our own age the criminal aspect of maintenance and champerty has disappeared and there has been no recorded prosecution for a very long time past. The

<sup>26</sup> As explained in *Doctor and Student*, 169.

<sup>27</sup> *Jenkins v. Jones* (1882) 9 Q.B.D. 128.

modern cases, and there are not very many, are concerned with the civil remedy; it has been the occasion of some interesting and still disputable rules of law, which do not now concern us. It is, however, still the law that anybody who, without any of the various excuses which are now well recognised, maintains another in his suit, whether as a mere busybody or for financial gain, is liable to criminal penalties; and, according to the better opinion, it does not matter whether the suit, plaint or defence, which he unwarrantably fosters is successful or unsuccessful.

#### BARRATRY

I cannot leave this subject without a brief reference to another type of "breedbate," known to the law as the barrator. He is virtually an extinct species, but is interesting as a fossil in the long geological history of the Queen's Peace. A *baret* appears to have been, in the most general sense, a quarrel or brawl; it is used in that meaning in the Statute of Edward I *De Conspiratoribus* which I have quoted, and in various other medieval Acts. The Statute of Edward I known as "Rageman" provided against "hockettors or barretors," and Coke<sup>28</sup> explains (whether as a guess or not) that *hocquetour* is "an ancient French word for a knight of the post (worthy to be knit to a post), a decayed man, a basket-carrier"—which does not enlighten us very much, but at all events clearly implies something derogatory. A surprising amount of attention is paid to this "decayed man" in our

<sup>28</sup> 8 Rep. 36.

old books, and there is even a leading case about him in Coke,<sup>29</sup> but unfortunately it only lays down rules and does not record any facts. That is a pity, because we should like to know in what circumstances of fact a man could be adjudged a barrator, and this, so far as I have been able to discover, our records do not reveal. However, we know that a barrator was indicted under the style of *pacis Domini Regis perturbator et oppressor vicinorum suorum*. Coke<sup>30</sup> describes him as “a common mover and exciter, or maintainer, of suits and quarrels either in the courts themselves or in the country” (*i.e.*, *in pais*, meaning generally, and not necessarily in connexion with litigation), “as by a disturbance of the peace, or where the right to the possession of land is in controversy in taking or keeping possession by force, subtlety or deceit, or by making false inventions and sowing calumnies, rumours and reports whereby discord and disquiet may grow between neighbours.” That is a very wide net to catch the busybody, slanderer or troublemaker, but in practice the offence seems to have been connected chiefly with vexatious litigation. The barrator was something more than a maintainer or champertor, for he made a practice, and possibly even a profession, of “multiplicity of unjust and feigned suits.” His object was petty blackmail, for he seems generally to have set the law in motion in order to buy silence or composition. His analogy to-day would be the person who moved another to issue writs, generally for libel or literary plagiarism, with a view to “settlement.” He had to be in a

<sup>29</sup> 8 Rep. 36.

<sup>30</sup> *Co.Litt.* 368a.

considerable way of business to fall foul of the law, for one act of maintenance or champerty was not enough to constitute this offence—he must be indicted as *communis barractor*, and Serjeant Hawkins in his *Pleas of the Crown*, comments at length on the fact that the common barrator and the common scold were exceptions to the rule which requires specific allegations of criminal acts in an indictment. However, there was no great hardship in the exception, for the prosecution was bound to supply the accused with the instances which, as it alleged, made him a “common” barrator. I regret to say that he was generally a member of the legal profession, and this seems to have been the painful fact down to the time of Blackstone, who mentions curtly<sup>31</sup> that it is “too often the case” that the offender “belongs to the profession of the law.” In *Alwin’s Case* (1655) Style 483, for “false practice and barratry” an attorney was struck off the rolls, fined £50, “turned over the Bar” and ordered to stand committed. “He was turned over the Bar accordingly at the West End of the Bar by the Tip-staffs of the Court.” This process seems to have consisted in thrusting the offender (probably none too gently) beyond the Bar which was the boundary of the courts in Westminster Hall: see *Jerome’s Case* (1588) 3 Cro.Car. 74, the case of *Osbaston* there mentioned, and *Byrchley’s Case* (1585), Jenkins 262. To check the abuse, which evidently had reached the dimensions of a notorious scandal, an Act of 1725 (the Frivolous Arrests Act)<sup>32</sup> provided a

<sup>31</sup> 4 *Comm.* 134.

<sup>32</sup> 12 Geo. I, c. 29. Made perpetual in 1727 by 21 Geo. II, c. 3.

very remarkable remedy. It enacted that if anybody who had been convicted of common barratry practised as an attorney, solicitor or agent in any suit, the court could examine him "in a summary way," and—let it be observed, without any trial by jury—sentence him there and then to seven years' penal servitude. There can be very few examples in modern law of such a swift and condign power of punishment. So far as I know, this enactment has never been repealed, but I have been unable to discover any reported instance of its Draconic provisions having been applied. The last known prosecution for barratry seems to have occurred in 1882 at Guildford Assizes<sup>33</sup> in connection with a number of fraudulent actions against a railway company, but no detailed record is available. I am not sure that we can say that the barrator has disappeared from our midst. We have all heard of the "ambulance-chaser" solicitor or agent, and assuredly we are not yet rid of those who sow "calumnies, rumours and reports whereby discord and disquiet may grow between neighbours"—I imagine that every village in the country contains at least one such person. It would, however, be a bold prosecutor who would nowadays initiate proceedings for barratry, and the various sleights of the "pest of civil society," whether layman or lawyer, for troubling the Queen's Peace, are now usually restrained by civil remedies or by the discipline of the legal profession.

These then, are some of the disturbances of the Queen's Peace from which we suffer less today than our predecessors did in the past; and I turn now to

<sup>33</sup> *R. v. Bellgrave* (unreported).

one ancient institution of the peace which remains in vigour and is still of considerable social value.

#### PREVENTIVE JUSTICE: SURETIES OF THE PEACE

It is a venerable principle of the Queen's Peace that prevention is better than cure and that part of our law which is called "preventive justice" is, or was, of singularly wide scope both by the Common Law and by statute. This, as we should expect, has always been the special province of the Justices of the Peace, but formerly it was possible, though not frequent, to invoke protection against a threatened breach of the peace by exhibiting Articles of the Peace either in the High Court or before the justices in quarter sessions. Today, however, the matter comes invariably before justices in petty sessions. It takes one of two forms, both very similar in effect (and not always very clearly distinguished in the minds either of justices or the public), but of different origin. These are sureties of the peace and sureties for good behaviour.

The origin of sureties of the peace is uncertain—it may be traceable, as Blackstone somewhat hesitatingly suggests, to Anglo-Saxon institutions, or it may lie in the original powers of the conservators of the peace, whom we shall have further occasion to notice. Whatever the exact ancestry, it was an immemorial rule that any person who stood in fear of violence or molestation from another, and would affirm that he was not inspired by mere malice or wantonness, could "swear the peace" against the aggressor before a justice, who was bound to hear his complaint and take recognisance and sureties of the threatener. The

application was purely *ex parte*, and little discretion was left to the magistrate, though he had to be satisfied that the complainant went in actual bodily fear.<sup>34</sup> The party charged was not heard in his own defence and an order against him might be made even in his absence; and if he failed to find sureties as required, he could be committed to prison forthwith. He was not, however, without some redress, for if he could show that the complaint was false, malicious or vexatious, he had an action for malicious process—a different thing, and the distinction is of importance, from malicious prosecution.

All this was changed by the Summary Jurisdiction Act, 1879, which converted the process into a full legal hearing, both parties being before the court.<sup>35</sup> The taking of recognisances and sureties is now entirely within the discretion of the justices, but they have power to apply either or both of these safeguards in appropriate circumstances, and on default to commit to prison for not more than six months. The order, however, is neither a conviction<sup>36</sup> nor judgment in a suit at law, and it therefore will not give rise either to an appeal to quarter sessions or to an action for malicious prosecution.<sup>37</sup> Again and again its purely precautionary nature is emphasised. The jurisdiction

<sup>34</sup> In modern practice it is not necessary for the complainant to aver bodily fear; it is sufficient if the justices consider a breach of the peace probable, on account of threatening language, or for any other reason: *R. v. Wilkins* [1907] 2 K.B. 380.

<sup>35</sup> See *Everett v. Ribbands* [1952] 2 Q.B. 198.

<sup>36</sup> *R. v. County of London Quarter Sessions Appeals Committee* [1948] 1 K.B. 670; *R. v. London Sessions, ex p. Beaumont* [1951] 1 K.B. 557. See also *Wilson v. Skeock* (1949) 113 J.P. 294.

<sup>37</sup> *Everett v. Ribbands, ubi sup.*

is not limited to complainant and respondent; the justices have power to bind over any person concerned who is before them. It has even been held that when a charge of assault has been dismissed, nevertheless the acquitted defendant may be bound over to keep the peace.<sup>38</sup> This power affects not only the general peace, but the dignity of the tribunal itself, for it is really the only means by which a court of summary jurisdiction can restrain a contempt in the face of the court; and indeed any justice has the power to bind over anywhere for an affray or breach of the peace committed within his view. It would be interesting to know whether any justice of the peace, being "of ordinary firmness and courage," has in modern times ever asserted this power as a passer-by during a street fight or an exchange of high words. It is not one of the functions which most magistrates, of mature years and average weight, would be most zealous to exercise.

#### SURETIES OF GOOD BEHAVIOUR

Sureties for good behaviour are derived from the famous Statute of 34 Edw. III which, by the Statute Law Revision Act of 1948 has for the first time been given the short title of "The Justices of the Peace Act, 1361." It is a very remarkable enactment and, since it will come under our notice again, I will here quote its general provisions,<sup>39</sup> in translation from the Norman-French. After providing for the establishment of keepers of the peace in the counties, it

<sup>38</sup> *Ex p. Davis* (1871) 35 J.P. 551.

<sup>39</sup> A few obsolete phrases have been repealed by the Statute Law Revision Act, 1948.

continues that "they shall have power to restrain the offenders, rioters and all other barrators and to pursue, arrest, take and chastise them according to their trespass or offence; and to cause them to be imprisoned and duly punished according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretion and good advisement; . . . and to take and arrest all those that they may find by indictment, or by suspicion, and to put them in prison; and to take of all them that be not of good fame,<sup>40</sup> 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; to the intent that the people be not by such rioters or rebels troubled nor endamaged, nor the peace blemished (*enblemy*), nor merchants nor others passing by the highways of the realm disturbed, nor put in the peril which may happen of such offenders: And also to hear and determine at the King's suit all manner of felonies and trespasses done in the same county according to the laws and customs aforesaid."

Burn, in his authoritative *Justice of the Peace*, said of the statute that "the purport of it hath been extended by degrees, until at length there is scarcely any other statute which hath received such a largeness of interpretation." Within its strictures have come in former times not only rioters and barrators, but

<sup>40</sup> In the original Statute Roll the word "not" is omitted, but the better opinion is that this was *per incuriam*: see *Lansbury v. Riley* [1914] 3 K.B. 229, and *R. v. County of London Quarter Sessions Appeals Committee, ubi sup.*, at p. 674.

nightwalkers and eavesdroppers, idle persons without visible means of support, gamesters, and many others who were deemed guilty of, or likely to commit, acts *contra pacem* short of indictable offences. We are taken back to a time when the county justices, as we shall see later, really combined the functions of judges and police with regard to the general orderly behaviour of the community. But that part of the statute which referred to "surety and mainprise" was purely preventive, and it has been laid down in the clearest terms in a modern case that it did not "create any offence at all" and that there is "no such offence as blemishing the peace."<sup>41</sup> The statute differs from the Common Law rules of preventive justice only in that its terms are wider, since "good behaviour," though it undoubtedly includes keeping the peace, may cover conduct which can hardly be said, except in a technical sense, to involve breach of the peace. Thus one of the most frequent occasions on which this hoary statute is invoked is when a petty delinquent—*e.g.*, a street trader, a rag merchant, or a street bookmaker or his "runner"—has repeatedly committed the same offence; the penalty for it is perhaps trifling, and he is cheerfully prepared to pay it again and again as a regrettable but inconsiderable part of his business expenses. It may then be desirable for the persistent and unrepentant sinner to be, as he often is, bound over in a substantial sum to be of good behaviour for a specified period. Or again, it may happen that in the vast mass of our criminal

<sup>41</sup> *Per* Lord Goddard C.J., *R. v. County of London Quarter Sessions Appeals Committee*, *ubi sup.*

law some form of misconduct or annoyance, such as the habit of Peeping Tom (who seems to inhabit many places besides Coventry), has not been provided for but may be conveniently provided against. It is in that connection that in recent years "blemishing the peace" has enjoyed a certain notoriety.

The wide powers conferred by the Act of 1361 will call for our further consideration; but let me mention now that the general power of taking sureties of the peace is still very much alive and all magistrates' courts have frequent experience of it. Sometimes it is needed to restrain serious threat or aggression; but I think it is the experience of most justices that they are generally called upon, and none too soon, to preserve the peace between near neighbours. I regret to add that a familiar spectacle is that of two embarrassed husbands striving chivalrously to be the scape-goats for their wives' remarkable gifts of backyard repartee. The upshot usually is that all parties concerned are bound over for twelve months to keep the peace towards all the Queen's subjects and "especially towards" each other. It is usually sufficient to bind over the parties in their own recognisances in a comparatively small sum; it is rare to require additional sureties, and very rare indeed to commit a recalcitrant party to prison. All passion spent, the disputants frequently forgive and forget at the nearest "local" over pints for the gentlemen and ports for the ladies. Thus is the Queen's Peace preserved and

"Malt does more than Milton can

To justify God's ways to man"—

and, let us add, to woman.

**OFFICERS OF THE PEACE**



## OFFICERS OF THE PEACE

*THE FORERUNNERS*

## A LAW-ABIDING LAND?

No belief is more dear to the heart of the average Briton than that England is, above all others, a law-abiding country. This seems to me to be a bold assumption in our present state of law and order; but even if it be justified, our reputation for good behaviour is "a new-found halliday," being really a legacy of the nineteenth century. Before that time our crime-sheet is long and black and the efficiency of our law-enforcement has been almost in inverse ratio to the severity and multiplicity of our punishments.

For the greater part of our history we have attempted to make the community responsible, by various means, for policing itself. There have been from the earliest times certain accredited peace officers, of whom the most important were, anciently, the shire-reeve, the bailiff, the town reeve, and the petty constable. But for the general maintenance of order and the pursuit of malefactors the traditional method was the very ancient and primitive one of constituting each man his brother's keeper, in the sense that another and more powerful individual, or else a group of his neighbours, was answerable for

every person's good conduct. Maitland has observed<sup>1</sup> that in the Middle Ages "communities rather than individual men appear as the chief units of the governmental system." He adds that this is a somewhat deceptive appearance in medieval times, but it was certainly true of Anglo-Saxon society, with its twin pillars of status-hierarchy and kindred-grouping. That all-pervading duality is reflected in the two ancient forms of sureties of the peace, the one individual and the other communal. It is repeatedly laid down in the Anglo-Saxon dooms, from Edgar to Cnut, that a freeman must be in somebody's *borh* or pledge, to ensure that he is either brought to judgment if he breaks the law or that, if not, the penalty will in any case be paid. The most common example was that of the magnate who was held responsible for those within his *mund*. In the Middle Ages this liability seems to have shrunk to the circle of the lord's household, the members of which were in his *mainpast*—the domestic dependents fed and maintained by him. The Anglo-Saxons called them bluntly his "loaf-eaters." Even after the system of frankpledge was established, as we shall see, those in *mainpast* remained outside it, being sufficiently guaranteed by their lord and master.

#### THE GROUP-PLEDGE

The indigenous form of group-pledge was that of the kindred or *maegth*, whose liability for an erring brother was the counterpart of their right to vengeance

<sup>1</sup> Pollock and Maitland, *op. cit.* i. 616.

or composition when blood was shed. The *maegth* surety-groups generally consisted of twelve of the kindred. As time went on and the clan spirit declined, the emphasis shifted from blood-relationship to local personal knowledge and the groups tended to be constituted—exactly how is not clear—from among neighbours. We must envisage a community which, outside the townships, was distributed in very small settlements, where neighbourhood meant much; and throughout all these group-arrangements runs the principle which still holds good in every village in the land, *i.e.*, that everybody knows everybody else's business. As late as Alfred, however, the kinship influence was still in vigour, for he enacted (repeating in part a law of Ine) that if a malefactor had no kindred, then a group of associates known as *gegildan* should be liable for a third of the *wergeld* if he had no paternal kin, and a half if he had neither paternal nor maternal kin. On what basis these peace-gilds were established, how they worked and how long they lasted, are all open questions; it is even uncertain whether they were compulsory or optional. Alfred's law certainly suggests the former, but it is known that there were also many voluntary peace-gilds, with common funds, which seem to have been associations for mutual insurance against loss and damage through crime, especially theft, as well as for the pursuit and prosecution of criminals; and they seem also to have been sworn to take up the cudgels for each other's wrongs. The best known of these is the elaborate organisation which was formed in London during the reign of Athelstan (A.D. 924–940) by the bishops and

reeves of the city. It has often been described and a full account of it is to be found in Sir Frank Stenton's *Anglo-Saxon England* (p. 350). The capital city doubtless had special needs and facilities for local government, and this Daedalian group-system in London cannot be regarded as typical of the whole country.

### BORH, TITHING AND HUNDRED

This famous association of London, which we know contained its hundreds and tithings, *may* have been—more than that cannot be ventured—the model for the other common form of group-liability throughout a great part of the country—the tithing. We have no information about the origin of this division in Anglo-Saxon society, but in Edgar's *Ordinance of the Hundred* (circ. 960 A.D.) there is reference to tithingmen as established institutions and about forty years later the laws of Aethelred,<sup>2</sup> in an enactment concerning fasts, mention *decimales homines* along with priests and village reeves. The tithing, by its name, should be a tenth of a hundred—a group of ten, or sometimes twelve, men—but early in its history it often represented a territorial unit, as it certainly did in the medieval period. We are quite in the dark as to how it was conscripted; and its historical interest lies in the part which it was destined to play in the medieval system of frankpledge.

In these group organisations the twofold purpose is clear—on the one hand to make the community

<sup>2</sup> VII. 2.5.

responsible for its own good order by concerted action, and on the other hand to establish a kind of census by accounting for every lawful man and his place in society. There was nobody more odious in those unruly times than the vagrant or vagabond, the "masterless man," the transient, who, in the familiar phrase, "could not give an account of himself." There was good cause to fear him, for he was very likely to be a fugitive from justice, if not actually an outlaw. All such rogues, vagabonds and sturdy beggars were necessarily outside the peace organisations, and the suretyship system went so far, in repeated enactments, as to require that any householder who entertained a transient became *borh* for his guest. It will be remembered that the first item of Dogberry's classic charge to the watch was to "comprehend all vagrom men." They were no more popular in the sixteenth than in the tenth century, and they were, and still remain, the subject of much legislation and case-law concerning vagrancy, suspected persons and incorrigible rogues.

Before the Conquest the most explicit enactment concerning group-liability was that of Cnut, in about A.D. 1030, who provided<sup>3</sup> that every freeman above the age of twelve should be in *borh*, hundred and tithing, on pain of losing his *lad* (i.e., right of exculpation for crime) and his right of being atoned for, if he were slain, by *wergeld*. Residence for a year and a day in the district was requisite for enrolment. Just as William the Conqueror had to take special

<sup>3</sup> II Cnut, 20.

measures to protect his Normans, so Cnut may have had powerful reasons for reinforcing the law for the protection of his foreign followers, for he cannot have forgotten the wholesale massacre of the Danes, at the order of King Aethelred, in A.D. 1002.<sup>4</sup> Some perplexity has been caused by Cnut's insistence on both *borh* and tithing, which have sometimes been supposed to be identical in principle. It seems probable, however, that they were two different but complementary forms of safeguarding the peace; the *borh* was essentially suretyship or pledge, and not reciprocal, while the old Anglo-Saxon tithing seems to have been essentially a police-force, or *posse*, for the capture of thieves and felons.<sup>5</sup>

#### FRANKPLEDGE

Out of these ingredients developed the system of frankpledge which held sway for over two hundred years. Its exact origin has been much controverted, but, in the form in which we best know it, it is generally regarded as a post-Conquest institution, though by no means an importation. There is much attraction in the suggestion of Professor W. A. Morris,

<sup>4</sup> *Anglo-Saxon Chronicle* (R.S., ed. Thorpe), i. 252.

<sup>5</sup> Coke (2 *Inst.*, 73) asserts of the Anglo-Saxon tithing: "By the due execution of this law, such peace . . . was universally holden within this realm, as no injuries, homicides, robberies, thefts, riots, tumults, or other offences were committed, so as a man with a white wand might safely have ridden before the Conquest, with much money about him, without any weapon throughout England." This is a typical fantasy of the "good old days." We do not in fact know how effectual the early tithing was, but nothing in the laws either of Alfred or Cnut encourages us to believe that it maintained a very tranquil state of the peace.

in his study of *The Frankpledge System*, that it was one of the expedients by which the strong central government of William I endeavoured to reinforce the maintenance of the peace. The whole system was regulated by the Assize of Clarendon in 1166, by Henry III's Second Reissue of the Great Charter in 1217, and by other enactments and charters. Leaping the years and the intervening developments, let us consider frankpledge as Bracton knew it in the thirteenth century.

A large proportion of the population was placed in tithing groups at the head of which was the tithing-man or "capital pledge." His office was annual, elective and apparently obligatory, and, unless he was able to compensate himself (as is not improbable) by petty exactions, it must have been exceedingly thankless. The system was not uniform throughout the kingdom and does not seem to have existed in Northumbria and the border districts; Professor Morris estimates that it may have comprised some thirty counties. There were many exemptions, notably for all of the degree of knight or above it, for those in the mainpast of a lord, for clerks, for freeholders whose land was considered a sufficient pledge in itself, and for women. Otherwise it applied to all males of the age of twelve and over, and its chief effect was that it conscripted the peasant or villein population, which represented probably not less than two-thirds of the community, for the maintenance of law and order. The exact constitution of the tithing-group varied in different parts of the country. Townships and boroughs were separate frankpledge units with

“mickleorns” of their own, and long remained so. The tithing was responsible for the lawfulness of its members; a delinquent among them must be brought to justice on pain of a communal amercement for his non-production. The penalty was serious, amounting under Henry II to as much as half a mark.<sup>6</sup> In addition, the unhappy peasant seems to have paid a penny for enrolment and another penny for the privilege of appearing at the sheriff’s tourn, which we must now briefly describe.

#### THE VIEW OF FRANKPLEDGE AND THE LEET

Twice a year at Easter and Michaelmas (after 1217 once only, at Michaelmas) the sheriff held special sessions of the hundred court, which even in Anglo-Saxon times had been the supervising authority of *borh* and tithing, for the “view of frankpledge.” In strict law, every member of the tithing was required to attend, but from an early time the capital pledges seem to have represented their groups.<sup>7</sup> The object of the “view” was twofold—first, to ensure that every qualified male was enrolled, and, second, to review the tithing’s “state of the peace,” and, of course, to impose penalties for sins of omission and commission. A sort of catechism was administered by

<sup>6</sup> This sum—6s. 8d.—seems to have been the minimum amercement in the King’s courts. In the twelfth and thirteenth centuries it represented an average labourer’s wages for nearly three months.

<sup>7</sup> The Provisions of Westminster, 1259 (Stubbs, *Sel. Ch.*, 9th ed. 389) exempted from attendance prelates and nobles, certain freeholders, and all clerics and women “nisi specialiter eorum praesentia exigatur” (c. 4).

the sheriff in accordance with his "articles" and thus the tithings were put through an inquisition which seems to have been thorough and unsparing. After the establishment of the jury of presentment, there was a kind of double accusation; grave offences reported by the tithingman were matter for the jury of presentment and the King's Justices, while less serious misdemeanours were dealt with by the sheriff himself in the hundred court. Thus the sheriff's, or often his bailiff's, "view" and his own jurisdiction became a kind of general discipline and, when supplemented by that of the itinerant justices, ought in theory to have kept a tight hold on the general *morale*.

The sheriff was the king's officer and his view of frankpledge was a valuable regality both in law-enforcement and as a source of revenue. But in many parts of the country the right of holding the view was also a private franchise, whether by grant, by real or pretended inheritance, or—frequently, it would seem—by sheer usurpation. The motive, it need hardly be said, was again acquisition of revenue through levies and amercements. Henry II, in the 9th Article of the Assize of Clarendon, had attempted to lay it down that his sheriff should have the right to supervise the view of frankpledge in whatever court it was held, but this does not seem to have arrested the frequent usurpations and abuses until Edward I in 1290 again asserted the royal right and made a thorough purge of the private franchises by means of writs of *quo warranto*. The general result was that although the frankpledge, for the greater part, remained in private hands, it was conducted by the

lord's steward in a uniform manner according to custom and by the methods and standards established in the sheriff's tourn, and under the eye of the king's representative. From this time on the frankpledge became chiefly identified with the manorial court of leet, which, from being a domestic tribunal, developed into a part of the national judicial organisation. The identification was so complete that in our old books the terms frankpledge and leet are used almost interchangeably, and "leet" itself often denotes the whole miscellany of disciplinary powers exercised by the sheriff in his tourn and the steward in the manor court.

The jurisdiction was chiefly concerned with petty infractions and nuisances, and especially with the assizes of bread and beer—those regulations of quantity and quality which are interesting ancestors of modern Statutory Instruments and Supplies and Services. A statute of 1325<sup>8</sup> specified thirty-four "articles" into which the stewards were to inquire in their leets. Some of these interrogatories are rather startling in their sumptuary tone—*e.g.*, "Of such as continually haunt taverns, and no man knoweth whereon they do live. . . . Of such as sleep by day and watch by night, and eat and drink well, and have nothing." This is perhaps what Shakespeare meant by "needy nothing trimmed in jollity." The species is not extinct. From the time of Henry II, who by the Assize of Clarendon had required all inhabitants of boroughs to be in frankpledge, the boroughs had their own courts leet, which survived

\* 18 Edw. II.

until the seventeenth century, long after frankpledge had lost its original significance.

#### DECLINE OF FRANKPLEDGE

The frankpledge system lost most of its character and purpose during the fourteenth century. Many causes contributed to its decline, one of them being that the swift and summary jurisdiction which the Justices of the Peace exercised after 1360 was found to be a far more effective buttress of law and order than any communal surety arrangement. The whole system of tithing presented such opportunities for perjury and evasion that, while it was extremely active in the visitation of trifling offences (and thus in the collection of revenue), it is difficult to believe that it was ever very successful in restraining the more serious forms of crime. At all events, it had fallen into disuse by the end of the fourteenth century, except in manors and boroughs, where it still served as a useful means of census and control of the local community. By Blackstone's time<sup>9</sup> tithing is simply synonymous with town or vill. The capital pledge or tithingman remained long in our law under various titles, such as borsholder or head-borough (*praepositus* in the Norman terminology), but he rapidly declined into a sort of petty constable at the service of the Justices of the Peace or the manorial leet.<sup>10</sup> He continued to be appointed until the nineteenth century and is mentioned in Acts of 1839 and 1842. The

<sup>9</sup> 1 *Comm.*, 114.

<sup>10</sup> See *post*, p. 96.

sheriff's tourn itself, though it had long ceased to have any real part in the judicial system, was not formally abolished until 1887, by the Sheriffs Act of that year.

The main reason, however, for the decay of frankpledge was that it manifestly failed to achieve its primary aim of maintaining the peace against the chief enemies of it. There is abundant evidence that throughout the thirteenth century violence increased and crime flourished, and it could not have done so on such an alarming scale if the tithings had really been doing their duty with regard to the major offences which were the real threat to the King's Peace. Despite stern royal ordinances throughout the century, frequent Commissions of Inquiry, of Oyer and Terminer and of Trailbaston—this latter seems to have been specially directed against open brigandage by armed bands, which, as we have seen, had become a grave national menace—lawlessness still abounded and the tithing system failed to control the vagrants and masterless men who, as we should expect, formed the rank and file of crime. That things were constantly growing worse is shown towards the end of the century by the Statute of Winchester, 1285, which in its preamble recites that “from day to day robberies, murders and burnings are more often committed than heretofore”; and it goes on to lay the chief blame upon juries which fail in their duty of presentment of felons. They do so, says the preamble with asperity, because they had rather that strangers were evilly entreated than that they should bring their own neighbours into bad odour. This is a significant

admission, which points to the inherent weakness of the local group-system from its beginning. A little elementary psychology might have warned that small groups with local pride were more likely to shield than to arraign their brethren, and were ready to treat an oath very lightly (as most people seem to have done in the Middle Ages) in order to shield the malefactor. That being the general temper, the Statute of Winchester availed little to abate the volume of crime, and it is evident that if both juries and tithings were powerless or sluggish, this elaborate experiment in national self-discipline, after centuries of trial and error, had broken down. Things were no better in the following century.

#### LIABILITY OF THE HUNDRED

No greater success attended another form of group-liability, that of the hundred—an institution of greater antiquity and of more obscure origin than I can here describe. We have seen how William I made the hundred liable for the *murdrum* fine and how this developed, or more accurately degenerated, into the “presentment of Englishry,” which lasted on with diminishing utility until it was abolished by Edward III. An even greater, because more common, threat to the peace was robbery with violence, a constant anxiety to the central administration throughout the Middle Ages. In 1252 Henry III had proposed to supplement the criminal law by giving an action for damages against those who had failed in their duty to bring the robbers to justice; but,

according to Maitland,<sup>11</sup> he was unable to make so bold an innovation without the common assent of the baronage, and he omitted the project from his Ordinance of the Peace. Edward I, however, felt himself to be in a stronger position and in the famous Statute of Winchester, 1285, he enacted that if the offender was not attainted, the whole hundred "shall be answerable for the robberies done and also the damages," which were to be paid before the next ensuing Easter. This statute remained in force for over 500 years and gave rise not only to endless actions against the hundred, and to much amending legislation, but also to many inequalities and abuses. The great and numerous franchises were outside the sphere of liability; and within the hundred itself the burden was not evenly distributed, so that the action could be brought against any member of it who seemed the fairest game, and apparently he had no right of contribution against the others. This defect was not remedied until the sixteenth century by the statute 27 Eliz. I, c. 13, in which we already have hints, destined to grow in the future, of fraudulent perversions of this action for damages. By 1735 it is clear that the whole process had fallen into disrepute, for an Act of that year<sup>12</sup> recited its "many and great inconveniences to the subjects," and sharply tightened the conditions under which the action could be brought. These precautions were evidently insufficient, for fourteen years later, by the 22 Geo. II, c. 24, it

<sup>11</sup> Pollock and Maitland, *op. cit.*, j. 181.

<sup>12</sup> 8 Geo. II, c. 16.

was provided that nobody was to recover more than £200 against the hundred unless he could produce two witnesses to the fact of the robbery. Finally, in 1827,<sup>13</sup> the whole of the Statute of Winchester was repealed except one clause relating to markets and fairs.

What had happened, and what, indeed, seems to have been happening under Elizabeth and probably earlier, was that the irrepressible crook, if I may be forgiven the term, had seen in this action a hell-sent opportunity for easy money by means of fictitious robberies and swollen damages. Was it perhaps on this model that the famous robbery on Gadshill was conceived? There is no evidence that Falstaff ever claimed damages against the hundred, but it seems that a great many men in buckram, and their accomplices, did so with considerable profit. At all events, by the nineteenth century it was clear that this early attempt at "collective security" had failed of its purpose and had probably done more harm than good. In the meantime, some pretty points of law had been contested between neighbouring hundreds, especially when the victim was captured or killed in one hundred and actually despoiled in another.<sup>14</sup> The liability of the hundred was not confined to robbery and felony. This division of the country, of most erratic size and distribution, was, as has been already mentioned, for long held liable for riot damage, until this burden

<sup>13</sup> 7 & 8 Geo. IV, c. 27.

<sup>14</sup> See, e.g., *Deane's Case* (1635) Hutton, 125, and *Cooper v. Hundred of Basingstoke* (1702) 11 Mod. 8.

passed to the general ratepayer and the police fund. The decorative but outmoded high constables and bailiffs of the hundred received respectful but not very regretful obsequies in the High Constables Act, 1869.

#### HUE AND CRY

The Statute of Winchester, consolidating many previous provisions and existing customs, became the principal enactment governing another type of group liability in county and hundred—the hue and cry. This was a very ancient institution of Anglo-Saxon times and appears often in the old dooms, especially those of Edgar, Athelstan and Ine. It was aimed at any kind of felony or depredation, but above all at cattle-theft. There were elaborate provisions for following the trail of the thief from point to point and from one tenement to another. If the felon was caught red-handed, or, as the phrase was, “with the mainour” (“hand-having” such incriminating evidence as the bloody knife or the stolen beast), he was in effect an outlaw and was despatched there and then. No defence was allowed against flagrant delict. There were heavy penalties for allowing the culprit to escape, for failing to join the hunt if physically fit to do so, or for impeding it. If the Anglo-Saxons were like their descendants, the penalties for failure to find or kill must have been compensated in some measure by the sporting excitement of the chase, though we have no means of knowing how often it succeeded or how vigorously it was prosecuted. The Statute of Winchester provided that if any vagrants

resisted or eluded the watch and ward (which will presently be mentioned) the watch must raise the hue and cry in their own and neighbouring townships, and the suspect was to be followed from town to town until delivered to the sheriff; "and for the arrestment of such strangers none shall be punished"—which meant (contrary to the general rule of Common Law still valid) that arrest upon mere suspicion, even if it turned out that no felony had been committed, was justified. Whether or not this crude police system ever worked very well it is difficult to say, but at all events it rapidly declined in the fourteenth century after the Justices of the Peace began to issue summonses and warrants for the apprehension of suspects. An obscure provision in the Statute of Elizabeth I,<sup>15</sup> already mentioned, seems to have been an attempt to revive and reinforce the old man-hunt. After reciting former enactments and rules, it provided that no hue and cry should be lawful unless pursued on horse and foot. The exact purpose is matter for speculation.<sup>16</sup> The hue and cry still

<sup>15</sup> 27 Eliz. I, c. 13.

<sup>16</sup> Captain Melville Lee (*History of Police in England*, p. 104) ingeniously suggests that the intention was to prevent pursuit on foot with dogs, as being too cruel. This tenderness to the fugitive would be surprising, and I think it much more probable that the pursuit on foot had become somewhat perfunctory and that the Act was intended to stimulate a more ardent chase. The Statute of Winchester had provided that *sheriffs and bailiffs* should keep horses and armour "according to their degree" for the hue and cry, but nothing was said of the commonalty—perhaps for the reason that in the Middle Ages it was not everybody who possessed a horse of "hunter" breed. Possibly such mounts were more common in the Spacious Days.

appears in Blackstone,<sup>17</sup> but in a more strictly regulated form, for although it may be raised by "any private man that knows of a felony," it is implied that the more usual procedure is by precept of a Justice of the Peace or a peace officer. Even the private complainant no longer has the satisfaction of himself rousing the neighbourhood by clamour and horn, but must report all the circumstances to the constable, whose responsibility it then becomes to raise the hue and cry with horse and foot. Blackstone's whole description, however, is somewhat tepid, and we gather the impression that hue and cry cannot have been a common occurrence in his day. Heavy penalties attended the wanton or malicious use of it. The 8 Geo. II, c. 16,<sup>18</sup> imposed a penalty of £5 on any constable who neglected to make hue and cry, but it seems to have had little effect. With the passing of those Acts, already mentioned, in the reign of George IV which repealed the Statute of Winchester and the hundred's liability for robbery, hue and cry virtually passed from our law, though it receives a ceremonious reference as late as the Sheriffs Act, 1887, which commands that "every person in a county shall be ready and appalled at the command of the sheriff and at the cry of the country to arrest a felon whether within a franchise or without and in default shall on conviction be liable to a fine."

<sup>17</sup> 4 *Comm.*, 294.

<sup>18</sup> *Ante*, p. 82.

## ASSIZE OF ARMS

The duty of being "ready and apparelled" takes us back to the medieval provisions for the accoutrement of the whole people against enemies within and without. The first of these measures of which we have record was Henry II's Assize of Arms in 1181, the main purpose of which was to create a militia on the lines of the ancient *fyrd*. All freemen were to possess arms according to their wealth and were to be subject to periodical census by the justices on the report of a jury. An ordinance of 1252 extended the expedient to the whole population, including the villani, between the ages of 15 and 60, and all were to be sworn to arms according to the quantity of their land and goods. The Statute of Winchester re-enacted these requirements "according to the ancient assize" and entered into precise details of assessment, which was to be conducted by two constables of the hundred; their duty was to report to the itinerant justices deficiencies of arms and any breaches of the other main provisions of the statute, which concerned watch and ward, the harbouring of strangers, and the widening of highways by removing such trees and undergrowth as might provide ambushes for robbers. The purpose was dual: first, to maintain a "Home Guard" for emergency, as the original assize intended, and also to ensure counter-attack on criminal *vis et arma*. The kings of a ruder age took a different view of the repression of crime from the authorities of today, who do not permit the householder to protect himself with fire-arms against the cosh, the razor and the bicycle-chain.

## WATCH AND WARD

Bound up with the hue and cry and with the arming of the citizenry was the system of watch and ward. It has a very long history, but for our present purposes we need not go back farther than this same famous police Act, the Statute of Winchester, 1285. It introduced nothing new in this respect but re-affirmed and regulated the law of watches "as it hath been used in times past." Every city was to have sixteen men at each gate, every borough twelve, every township "of the open country" six or four according to population; "and they shall watch continually all night from the sun-setting unto the sun-rising."<sup>19</sup> Their chief duty was to arrest all undesirables and deliver them to the sheriff, or to raise the hue and cry if the suspect escaped them. For authority upon their duties and their quality I again turn to Dogberry and Verges, not because I suppose Shakespeare stinted dramatic licence in his representation of them, but because they at least show that by the sixteenth century the watch had become a standing joke. It was destined to remain so for centuries, and indeed, as we shall see, to degenerate from joke to scandal.

## THE APPROVER

After the consolidating provisions of the Statute of Winchester, "the constabulary and the militia," as Maitland has observed,<sup>20</sup> "took the form that they

<sup>19</sup> By a statute of the same year, London had a special system of its own, much more elaborate and efficient than that of most other cities.

<sup>20</sup> Pollock and Maitland, *op. cit.*, i. 565.

were to keep during the rest of the Middle Ages." But before I pass from this phase of the Queen's Peace, let me refer briefly to two other adventitious aids which have played a long and inglorious part in our system of law-enforcement. One was the approver, the medieval prototype of "King's evidence."<sup>21</sup> In the days of the appeal of felony there was a rule (described by Bracton) that if a person was accused of a crime to which he confessed, he could name others as his accomplices on the understanding that he was prepared to substantiate his charge either by his body (*i.e.*, by battle) or by the country (*i.e.*, by the verdict of a jury). This kind of informer was of all men the most wretched and detested, and, one must imagine, the most desperate, for he performed his base office at fearful risk. When the test came, he seldom if ever dared trial by battle; nor did he often obtain a conviction against his confederates, for he was so much loathed and distrusted that juries would seldom accept his evidence. Having failed to make good his charge, he was immediately executed, and even if he succeeded he was required to abjure the realm. It is surprising that any man, however abject, could risk such a hopeless gamble, but the fact seems to me that a good many prisoners, not understanding the fate which lay before them, were forced by torture at the hands of their gaolers to make confessions in the hope of escaping by incriminating others. A statute of Edward III, mentioned by Blackstone<sup>22</sup> forbade, on pain of felony, this practice by gaolers,

<sup>21</sup> See Coke, 3 *Inst.*, 128.

<sup>22</sup> 4 *Comm.*, 128.

but it seems to have continued, and there is significant evidence that approvers often died in prison of the treatment which they received.<sup>23</sup> By Blackstone's time approvement was obsolete, having for long been discouraged by the judges; and Blackstone observes<sup>24</sup> that any purpose that it may have served was better fulfilled by various old statutes which promised rewards and pardons to those who turned King's evidence—a very disputable statement. These enactments have long since disappeared and would not now be tolerated by public opinion, any more than the former practice, which Blackstone also mentions, of Justices of the Peace extracting confessions on a half-promise, which they were never entitled to give, of pardon.

#### THE COMMON INFORMER

The other lickspittle of the law has been the common informer, who has incurred the odium of the tell-tale with less risk and more profit than the approver. It is not a flattering testimony to the adequacy of our law-enforcement that for over five hundred years we have felt it necessary to set the law in motion by this means. When the Common Informers Act, 1951, was drafted, immense industry was necessary to collect from our so-called "statute book" the principal enactments which offered reward for private denunciation. A schedule to the Act lists forty-eight statutes which are repealed in whole or in part; they

<sup>23</sup> See Pike, *op. cit.*, i. 286ff., where the evidence is chiefly adduced from the reign of Edward III.

<sup>24</sup> 4 *Comm.*, 330.

range in date from 1382 to 1949 and relate to an extraordinary miscellany of subjects, from simony to hosiery. No consistent principle seems to have been applied to the common informer; he has been employed entirely at the caprice of Parliament, and the penalties and forfeitures prescribed at his instance have been similarly variable. Nineteen of the repealed Acts belong to the nineteenth and one to the twentieth century, the last being the Representation of the People Act, 1949, which provided common-informer penalties for canvassing at general or local elections by police officers and for default by prison officers in receiving persons committed to gaol under the Act. Why these rare offences should have been selected for the attentions of the delator remains a mystery. The general scheme of the Act of 1951 is to substitute for the common informer's perquisites prosecution by summary procedure or on indictment and a fine not exceeding £100 (together with a forfeiture in some instances) for the various offences forbidden by the relevant Acts. With this statute Parliament finally says *non tali auxilio* and the lineage of Titus Oates passes from our law unwept, unhonoured and unsung, except in the criminal underworld, where he still plies his trade but where he enjoys no legal status. It is said, with what truth I do not know, that in some countries, and especially in France, he is regarded as indispensable to the system of criminal detection. To what extent he assists Scotland Yard today in the character of "copper's nark" is one of those matters which do not appear in official records.

Similar, and even more mischievous in effect, was the system of "blood-money," or rewards (generally of £40) for information about crimes, which began in the reign of William III and was indiscriminately used by a Parliament at its wits' end to abate the volume of crime. The gross evils, conspiracies and perversions of justice which resulted from this desperate expedient were scathingly exposed both by Henry Fielding and by a Parliamentary Committee in 1817. More than anything else they founded the fortunes of Jonathan Wild, to whose astonishing career I shall have futher occasion to allude.

### THE SUCCESSORS

#### "PUBLIC POLICE AND ŒCONOMY"

WE have passed in rapid review the chief means<sup>1</sup> which this nation had adopted for keeping the peace until, in the nineteenth century, an entirely new system was developed out of the old. There were no "police" in our sense of the term, which is quite modern. To Blackstone,<sup>2</sup> to Dr. Johnson, and even to Macaulay, "police" meant only certain public

<sup>1</sup> No attempt is made here to describe the ancient and elaborate system of forest police and officers.

<sup>2</sup> "By the public police and œconomy I mean the due regulation and domestic order of the kingdom; whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rule of propriety, good neighbourhood and good manners; and to be decent, industrious, and inoffensive in their respective stations": 4 *Comm.*, 162. See Maitland, *Justice and Police*, 105.

services, very rudimentary at that, such as scavenging, “street-keeping,” prevention of nuisances, some vague attempts at controlling traffic in cities, and the like. Macaulay<sup>3</sup> regarded it as an epoch-making measure of “police” when an Act of Charles II required the citizens of London to exhibit a few wan candles to illuminate the streets, which till then had remained completely fuliginous, to the satisfaction of all footpads and drawlatches. The community continued to protect itself against depredation with constantly diminishing success until civil war engulfed it in the seventeenth century. There followed, under Cromwell, a short-lived and foredoomed experiment with military police—happily the only one which has ever been attempted in this country. The general reaction of laxity which set in with the Restoration is common knowledge. Let us move on to the eighteenth century and glance at the condition of the officers of the peace in the age of elegance and of “nature to advantage drest.”

#### THE PETTY CONSTABLE

The sheriff, once so mighty in the land, was but a shadow of his medieval self, with few more powers and functions than he possesses today. The High Constable of the hundred remained in our law until, as already mentioned, he was abolished as an excrescence in 1869, but centuries before then he had declined to the status of a figure-head and his authority over the petty constables amounted to little

<sup>3</sup> Quoted by J. F. Moylan, *Scotland Yard*, 1.

or nothing. The petty constable himself, in parish, township or manor, was an official of long lineage, certainly as old as the thirteenth century<sup>4</sup> and possibly much older. He was unpaid, was selected by rotation in his community, and was frequently reluctant to serve (though liable to penalties for evasion), for his duties were, in theory, onerous and multifarious, and in his heyday he exercised swingeing powers and bore formidable responsibilities. He was probably at his most active under the Tudors, when, as we shall see, he became the henchman of the Justices of the Peace in a host of minor disciplines. In 1581, when Lambard published his treatise on the duties of constables, we find these "low and lay Ministers of the Peace" (as Lambard calls them) entrusted with a remarkable hodge-podge of functions—serving precepts, conveying offenders to gaol, maintaining a survey of rogues and vagabonds, restraining many trifling misbehaviours, and above all making presentments (through the High Constable or the justices) at assizes and quarter sessions. They performed many other humble offices created by old statutes now long forgotten, but in the year when Lambard's monograph appeared they lost, by Elizabeth I's famous statute of the Poor Law, their ancient right of supervising the paupers of the parish. Their office originally was no mean one, but at a comparatively early period it seems to have become usual for the more substantial citizens, who shrank from the

<sup>4</sup> See Henry III's Writ of 1252, Stubbs, *Select Charters*, 9th ed., 362.

load, to employ humbler beasts of burden to carry it. So it was even in Shakespeare's day, as we may learn from "Measure for Measure" (Act II, sc. 1):

"*Escalus.* Come hither to me, Master Elbow; come hither, Master constable. How long have you been in this place of constable?"

"*Elbow.* Seven year and a half, sir.

. . . . .

"*Escalus.* Alas, it hath been great pains to you! They do you wrong to put you so oft upon't: are there not men in your ward sufficient to serve it?"

"*Elbow.* Faith, sir, few of any wit in such matters: as they are chosen, they are glad to choose me for them; I do it for some piece of money, and go through with all."

The "piece of money" was the cheapest price which the people's constable in search of a deputy could find in a market of bankrupt stock, and it may be imagined what he got for his money. The quality of the deputies did not improve as time went on, and after the Restoration it deteriorated so notoriously that the parish constables and watchmen—now scarcely distinguishable from tithingmen, borsholders, headboroughs, thirdboroughs, and such survivors of the *ancien régime*<sup>5</sup>—were held in universal contempt

<sup>5</sup> See Blackstone, 1 *Comm.* 355, who observes that "considering what manner of men are for the most part put into these offices," it is just as well that they are ignorant of the extent of their powers! Blackstone's account is very tentative and is taken to task for historical inaccuracies by H. B. Simpson, "The Office of Constable," *English Historical Review*, Oct., 1895, which is the best modern treatment of the obscure

and derision. The courts leet had long since abandoned their duty of appointing constables and the selection was in practice made by the Justices of the Peace, though their right to appoint was not formally sanctioned until 1673.<sup>6</sup> Some 300 years after Elbow's day a Committee of the House of Commons described in the following terms these pillars of law and order: <sup>7</sup> "Their deputies in many instances are characters of the worst and lowest descriptions; the fine they receive from the person who appoints them varies from ten shillings to five pounds; having some expense and no salary, they live by extortion, by countenancing all species of vice, by an understanding with the keepers of brothels and disorderly ale-houses, by attending in courts of justice and giving there false evidence to ensure conviction when their expenses are paid, and by all the various means by which artful and designing men can entrap the weak and prey upon the unwary." As late as 1842<sup>8</sup> an attempt was made (before the new metropolitan police system was fully extended to the provinces) to give the parish constable a blood transfusion; it failed, the patient being too far gone.

#### QUIS CUSTODIET?

Watch and ward was in little better case than the constabulary. In the country towns it was a farce and a byword. Some serious efforts were made to

question of the origin of the petty constables. On their general duties and history see also Webb, *English Local Government, The Parish and the County, passim*.

<sup>6</sup> 14 Car. II, c. 12.

<sup>7</sup> Cited Pike, *op. cit.*, ii. 464.

<sup>8</sup> 5 & 6 Vict., c. 109.

reform it in London, the boldest being the thousand "Charlies" or Bellmen who were appointed in Charles II's reign to restore some semblance of order to a city where wise men did not, if they could help it, go beyond the well-bolted doors of their houses after nightfall. But the watchmen enjoyed little better reputation for efficiency than the "low and lay ministers" of the parishes and, for the ordinary citizen, they were less of a safeguard than a nuisance, with their perpetual banging of staves and bawling *the hour throughout the night*. Any hopes which could be reposed in them were destroyed by the dispersal of authority in London. Westminster and the whole of the growing metropolitan area were parcelled out among so many different controls of wards and vestries that there was mere confusion, not to mention jealousy, of responsibilities. This, as we shall see, was to prove a serious obstacle to the formation, after Peel, of a consolidated police force. An Act of 1735<sup>9</sup> bluntly said of the beadles of St. James's and St. George's, Hanover Square, that they were "found by experience . . . to be of great charge and of little use."

#### THE HEYDAY OF CRIME

In sum, there was nowhere in the country any sure shield for the protection of law-abiding men against the proliferating swarm of cheats, bawds and cut-purses.<sup>10</sup> Everybody knew this, but nobody had any

<sup>9</sup> 8 Geo. II, c. 15.

<sup>10</sup> A brief and incisive picture of the general conditions at the end of the eighteenth century is to be found in the first chapter of *A Tale of Two Cities*.

remedy to suggest except blood and blood-money. Statute after statute gorged the gibbet and debauched the already sadistic populace with the unending ghoulis procession to Tyburn. Between the accession of Charles II and 1819, 187 statutes imposed the capital penalty. In 1830 this was the punishment for 42 different kinds of forgery. The more the victims, the more the candidates; never was there greater example of the truth of Bacon's aphorism, "The acerbity of a law ever deadens the execution." The ferocity of the criminal law led not to fear but to contempt of it. Juries would not convict of trivial offences which sent petty thieves, often children, to the scaffold; innumerable spoliations went unpunished because private prosecution was too expensive to be worth while, and in any event justice was openly bought and sold and perjury flourished unchecked. Even in 1838, when the Peel régime had established itself, there were some five hundred Prosecution Societies in the country, many of them with police corps of their own, and the Royal Commission of that year observed that their mere existence pointed to a state of national barbarism. Law enforcement grievously lacked the support of public opinion and there was much glorification of melodramatic brigands, especially "gentlemen of the road" of the romantic school of Dick Turpin, Claude Duval and Macheath. The "have-nots" made heroes of those who despoiled the "haves"—this was the "social justice" which in song, story and even now in pantomime, canonised the Sherwood Foresters who

robbed rich Peter to pay poor Paul. Not that crimes against life and property were by any means confined to the needy. The "bloods" of the age—the Mohocks and Corinthians and their kidney—showed what young gentlemen of quality in their cups could do to terrorise the town. It is almost incredible to us nowadays what brutalities could be committed, and with what little reprobation, by drunken roysterers with swords at their sides ready to be drawn on the slightest provocation. Elsewhere<sup>11</sup> I have described some of their exploits and the extraordinary indulgence with which they were treated by the courts. There was not a watchman in London who did not flee for his life before these sons of Belial. If wine could inflame them to such excesses, what was to be expected of the thousands of city troglodytes whose chief sustenance, according to Henry Fielding,<sup>12</sup> from the cradle to the grave, was dirt-cheap gin? Fielding attributed much of the lawlessness among the "lower orders" to the disparities of wealth and the "high life" and bad example of the opulent.

#### THE MASTER CRIMINAL

An epitome of the underworld in the early eighteenth century is presented by the career of Jonathan Wild, the ancestor and exemplar of all modern gangsters. If Fielding had been content to relate the plain facts of Wild's life, instead of making it a subject of satirical fiction and fatiguing irony, his "biography" would

<sup>11</sup> *Legal Duties*, 82ff.

<sup>12</sup> *Inquiry into the Causes of the late Increase of Robbers*, 1750.

be more biting than it is: for the facts transcend invention. Here was verily the "master criminal" in real life. Wild established in his own person a kind of Unholy Trinity, as receiver, informer and protector of property. The stolen goods were brought to his clearing-house and the thief rewarded; any pilferer who traded elsewhere was instantly denounced, convicted (if necessary by concocted evidence), and hanged—all this with the connivance of the authorities—while the informer waxed fat on the blood-money. The stolen goods were then restored, at a price, to the owner, a transaction which was itself a felony without benefit of clergy but which was widely and openly practised by those who well knew that it was futile or too costly to prosecute. In this way Wild established an unexampled power over the criminals, their victims and the law itself. The plan had the simplicity of genius. Far more than Professor Moriarty, Wild was "the Emperor of them all." He created a monopoly in receiving, with warehouses and gangs all over the country, highly organised and cunningly distributed; he had a ship of his own for disposing his merchandise abroad. He lorded it with a silver "wand of office" and surrounded himself with a bodyguard like any modern Big Shot in the national or the international sphere. It is needless to say that he was completely ruthless in all his dealings. Fielding formulates brilliantly the unvarying principles of his code of amorality; they might apply, word for word, to any gangster-dictator of the twentieth century—indeed, most of the code is to be found, *mutatis*

*mutandis*, in more prolix form in *Mein Kampf*. Fielding's cynical theme is that Jonathan Wild was a GREAT man (he always prints the adjective in capitals) because he possessed exactly those qualities which have made the Alexanders and Caesars and all their kind GREAT in the eyes of history. If Fielding had lived through the Napoleonic wars, or until our own day, the barbs of his satire would have been even sharper. Of course Wild's greatness was too great to last; his enemies, who must have been legion, trapped him in the end for an offence which he had committed countless times before; and the gallows, to which he had sent so many who had dared to question his sway, claimed him in 1725, in his forty-third year. At that time Henry Fielding was only eighteen years old, but the significance of Jonathan Wild and all that he stood for was deeply imprinted on his mind when later he became a magistrate and a law-reformer.

#### THE CRIME TIDAL WAVE

If this was the state of affairs in the early eighteenth century, it was even worse a hundred years later. Probably at no time in our history have law and order been at such a low ebb as at the beginning of that century which, before its close, was to see Great Britain at the height of her power, fame and prosperity. Sir Charles Warren,<sup>13</sup> himself a Commissioner

<sup>13</sup> Cited Melville Lee, *op. cit.*, 272. A vivid account of the general lawlessness of the early nineteenth century is given in Lord Bowen's "The Victorian Period," *Select Essays in Anglo-American History*, i. 551ff.

of Metropolitan Police, writing in 1888, calculated that at the end of the eighteenth century at least 10 per cent. of the population of London were engaged in criminal pursuits of one kind or another. Eight thousand of them, it is estimated, were receivers of stolen property. At least fifty mints poured out counterfeit money. Murder, blackmail, forgery, swindles upon banks, white slavery (especially of children), enjoyed an unparalleled prosperity. Such peace officers as there were, and many of the magistrates, were notoriously corrupt; as for the gaolers and the nightmare pest-houses which they controlled, both seem to have touched the lowest trough of degradation. It is difficult to say how many capital offences there were; over 200 could be found in the statute-book, but this by no means represented the total, because the noose hung over an indefinite number of accessories besides the principal offenders. The law was as capricious as it was bloodthirsty; it was always a gamble whether the convicted prisoner would be hanged, transported, sent to prison, pardoned or allowed to escape on some quibble of the indictment. Blood-money continued to feed the vultures; in 1815 alone £80,000 of public money were poured out to feed an illimitable verminous appetite.

If all this sounds like lurid fiction, it sounded otherwise to Sir Robert Peel when, in 1828, he told the House of Commons that in London one person in every 22 was a criminal and that lawbreaking throughout England was "without parallel in the annals of

any other civilised country.” But indeed the House of Commons needed no telling, for the facts were notorious and open to anybody’s inspection in voluminous Parliamentary records. By 1770 the public and its legislators had really taken fright. From that time onwards<sup>14</sup> began a series of Royal Commissions and Parliamentary Committees which were frequent up to 1828 and continued at intervals throughout the nineteenth century. The evidence given before these examining bodies reveals an extent and variety of lawlessness which are beyond the hyperbole of the most morbid imagination. Some of it disclosed such an ingenious planning of fraud and corruption that the Commissions of 1828 and 1839 (the most searching of all) thought it unwise to publish it in full. Yet, despite all these revelations, Parliament continued to find the remedy in piling Pelion on the Ossa of capital punishment, in suborning more and more informers, and in expressing pious hopes for the improvement of morals by the betterment of laws. The sanctimonious conclusion of the Committee which sat from 1816 to 1818 was that “the police of a free country was to be found in rational and humane laws—in an effective and enlightened magistracy . . . above all, in the moral habits and opinions of the people.”<sup>15</sup>

<sup>14</sup> The starting-point was really the Parliamentary Committee of 1750, appointed largely as a result of Fielding’s pamphlet on the *Increase of Robbers*. A full account of the eighteenth century inquiries and their findings may be found in Radzinowicz, *A History of English Criminal Law*, Vol. 1.

<sup>15</sup> Quoted J. F. Moylan, *Scotland Yard*, 24.

## CIVIL COMMOTION

In nothing was the impotence of the police arm shown more alarmingly than in the civil commotions which erupted constantly throughout this period. The story was always the same; the exiguous, unskilled and timid officers of the law being quite powerless to control a menacing rabble, the military were called in and what might have been a rowdy demonstration was turned into a sanguinary battlefield. These tactics, needless to say, brought all authority, and especially the soldiery, into the most furious detestation. The crisis was reached in 1780 with the Gordon Riots, when, at the instance of a madman, London lay at the mercy of a raging, pillaging mob, mostly criminals, for six days of terror. Dickens did not exaggerate the fury of it in *Barnaby Rudge*. This, too, gave the public and the politicians a salutary fright, not to be diminished in the ensuing years by the repercussions of the French Revolution. The early years of the nineteenth century were to witness other perturbing tumults—the Luddites in 1811, the Corn Law Riots in 1815, the demonstrations in favour of Queen Caroline in 1820, and, worst of all, the stricken field of “Peterloo” in 1819, where wholly unnecessary bloodshed was caused by the incompetence and nervousness of Lord Sidmouth’s new Yeomanry. A few at least were beginning to be convinced that some better safeguard was needed against ochlocracy than savage statutes and a reluctant and ill-disciplined soldiery. And yet, as we shall see, when

five years after this terrifying outbreak Pitt contemplated a civil police force, the outcry was so strident that he dropped the project like a coal of fire.

### THE TURNING-POINT

The solution, as we all know, was eventually found in a new type of officers of the peace. It is not my intention to attempt a history of the modern police force, though the temptation is considerable, for the story is both exciting and instructive and if (as I believe) it represented a turning-point in our national affairs, it has been strangely neglected by most of our social historians. "Peel's reform of the police can indeed be accounted one of the most revolutionary changes in the social history of England. As the result of the establishment of the new police, the lives and property of law-abiding citizens were invested with a degree of security which we now accept as a matter of course, but which was previously thought to belong to the realm of unattainable ideals."<sup>16</sup> This seems to me to be no overstatement. Before we consider the change which it wrought in the Queen's Peace let us glance for a moment at some of the hesitating experiments which preceded it.

### FIRST STEPS

It was Henry Fielding who in 1749 conceived the idea, so self-evident to us but so novel to most of his contemporaries, that with a disease like crime

<sup>16</sup> J. F. Moylan, *Scotland Yard*, 2. The introductory chapters of this book contain the best short history of the modern police which is known to me.

prevention was better than cure. His small band of citizen police—chiefly serving or former parish constables—together with the foot and horse patrols which followed, had much success in breaking up the street gangs of London and making the city approaches safer for travellers. His “New Plan” was vigorously developed by that remarkable man, his blind half-brother Sir John, who first served with him and then reigned after him at Bow Street.<sup>17</sup> Unfortunately the Bow Street Runners degenerated as time went on, because they depended increasingly on spies and rewards and thus became themselves contaminated by too close association with their criminal quarry. Nevertheless, the Fieldings had shown that all officers of the peace need not be dodderers and half-wits and that a good watchdog was worth several blunderbusses. The Bow Street police, however, were unequal to coping with the whole volume of crime, especially burglaries; these continued to swell to proportions which neither public nor Parliament could ignore. Inquiries and reports, notably that of 1772, resulted only in various ineffectual attempts to strengthen the petty constables and watchmen, particularly in Westminster. In 1780 came the Gordon Riots, and, as I have already mentioned, in 1785 Pitt, reviving a project of Lord Shelburne’s, introduced his London and Westminster Police Bill. It was in many ways a well-conceived measure and was not wholly without effect, for it served as a model for the Dublin police force of 1786 which was to

<sup>17</sup> For the early history of Bow Street, see Moylan, *op. cit.*, 12.

become the Royal Irish Constabulary; but in London the opposition was so violent, most of all from the City and from the Justices of the Peace, that Pitt withdrew the bill in haste. (Lord Sidmouth had a similar experience in 1815.) Some advance was made in 1792 with the Middlesex Justices Act (re-enacted in improved form in 1801), which established "police offices" throughout the metropolis, each with a stipendiary magistrate and with its own small force of constables on Fielding's lines; but, since all were ludicrously underpaid, neither the quantity nor the quality of these new officers was equal to the situation. The most successful experiment before Peel stands to the credit of Patrick Colquhoun, a man of great force and vision who had had a distinguished public career in Scotland, and who in his *Treatise on the Police of the Metropolis* (1796) had not only made startling disclosures of London's criminality but had preached vigorously the Fielding doctrine of prevention rather than punishment. Colquhoun established in 1798 the "Marine Police" whose descendant today is the admirable Thames River Police, since 1839 a branch of the Metropolitan force. It was an unquestionable success, but Colquhoun would never have been able to achieve it if he had not had the financial backing of the West India merchants, who had long been suffering almost unbelievable depredations in the docks. In the then state of public opinion only private money and organisation could provide the protection which was plainly a public duty.

## “THE LIBERTIES OF A SELF-RESPECTING PEOPLE.”

Why, then, was the duty so long repudiated? It is difficult for us nowadays to be patient with the shrill denunciation which greeted every suggestion of a professional police force. Yet the opposition was not due solely to stupidity and prejudice. To most Englishmen the idea of “police” was, not without reason, synonymous with *gens d’armes*, an instrument of tyranny, espionage and false accusation. England had had one experience of *gens d’armes* under Cromwell; it was enough. It had seen them, or heard of them, on the Continent of Europe, and especially it had heard of Napoleon’s Gestapo under the arch-trimmer, Fouché, and of the exploits of agents like the founder of the *Sûreté*, Vidocq. It had also had ample experience of spies and informers from the times of Titus Oates to the days of all the birds of prey who battered on blood-money and the carrion of the gibbet. Only four years after the establishment of the New Police, when a constable named Popay showed excess of zeal in his detective activities, the public reaction nearly brought the whole system tumbling down; and even today, when we are accustomed to innumerable plain-clothes detectives, road patrols which do not loudly advertise their presence are denounced as “un-British.” Despite such extremes, it is a healthy thing that the public should instantly resent any tendency in the police to become mere spies or *agents provocateurs*; and in 1800 the ordinary man could not conceive their being anything else. And so one Committee after another, having stirred

up the silt and slime of our urban life till it stank in all men's nostrils, continued to chant that a police force was incompatible with the liberties of a self-respecting people. It remained for Sir Robert Peel to give effect to his peculiar notion (as he expressed it to the Duke of Wellington) “that liberty does not consist in having your house robbed by organised gangs of thieves, and in leaving the principal streets of London in the nightly possession of drunken women and vagabonds.”<sup>18</sup> I do not think that Mr. Charles Reith<sup>19</sup> exaggerates when he says that Peel taught this simple lesson “in spite of the British people,” however much we may like to think today that our world-famous police are the product of our national genius.

#### THE INDOMITABLE PIONEERS

It may have been sheer luck, or it may have been extraordinary perspicacity, which led Peel to choose as the first instruments of his policy two men of exceptional calibre. Charles Rowan was a soldier who had fought with distinction in the Peninsula and at Waterloo and had served as a police magistrate in Ireland. Richard Mayne, a much younger man, was a barrister without any previous experience, so far as I have discovered, of constabulary matters. From the very first these two far-sighted Commissioners insisted on the two principles which are still the key-stone of our police system—first, that the primary aim of the police must be to prevent rather than

<sup>18</sup> Quoted Melville Lee, *op. cit.*, 243.

<sup>19</sup> *The Blind Eye of History*, 131.

avenge crime, and second, that they must be the friends and not the enemies of the public.<sup>20</sup> No praise can be too high for the patience, restraint and intelligence which Rowan and Mayne brought to their task, for the difficulties which confronted them were gigantic. The first problem was to find 3,000 of the right sort of men and to train them in a new method and habit of thought; from the outset it was recognised as essential that the new officers must be men of good character, fit and willing, for slight rewards, to maintain high standards of duty, honesty, courage and moderation. This was no easy thing to do in the London of 1829 and it was some considerable time before the very mixed material was sifted, especially as the Commissioners were constantly pressed by noble patrons to find places for their more disreputable *protégés*.

A large section of the press was scurrilously hostile and the public almost unanimously so. Pamphleteers and demagogues poured scorn and abuse on the "Raw Lobsters" (a somewhat far-fetched reference to the unobtrusive blue uniform) and called upon an outraged people to stamp out "those MERCENARY, DAMNABLE, VILE WRETCHES, PEEL'S BLOOD-THIRSTY GANG." It was even suggested that their secret purpose was to place the Duke of Wellington on the throne! Many magistrates, if not quite as hysterical as this, were wholly unsympathetic to the licensed bullies, as they considered them, and refused to protect them

<sup>20</sup> Mr. Reith, *ibid.*, formulates clearly and usefully nine guiding rules of the modern police, but they are all really variants of the two master principles.

against the frequent assaults and injuries which they suffered. The Commissioners could not even look for support to those from whom they were most entitled to obtain it. The Whigs had bitterly opposed the whole project of the police and it was hardly to be expected that while they were in power they would show themselves very sympathetic to the new institution, though they dared not dispense with it. Lord Melbourne gave the Commissioners very ambiguous support, Lord John Russell was always tepid, and in 1834 a forgotten Whig Home Secretary, Lord Duncannon, might have destroyed the whole enterprise if he had not fortunately reverted to obscurity on the return to power of Peel's government. He was concerned with one of the most vindictive enemies of the police—the Chief Magistrate of Bow Street, Sir Frederick Roe—in an attack based upon what seems to have been an entirely false charge of outrageous misconduct against a certain Inspector Wovenden.<sup>21</sup> Men of less exemplary patience than Rowan and Mayne would have instantly resigned under the humiliations which they constantly suffered from Ministers.

#### LITTLE BY LITTLE

The vestries continued to be bitterly jealous of the supersession of their deboshed constables and watchmen. There was great dilution of authority, involving absurd frontiers of preventive action, throughout the metropolis, for besides the "Peelers" there were still,

<sup>21</sup> This ugly and astonishing story is told by Charles Reith, *British Police and the Democratic Ideal*, 167ff. and *A Short History of the British Police*, 70ff.

in 1829, the Bow Street Horse Patrol, the constables attached to the stipendiary magistrates under the Act of 1792, the River Police and the City of London Police (who remain a separate corps to this day). It was not until 1839 that an intelligent consolidation of these various forces was effected. About the same time—ten years after the great experiment, and not a moment before—there began to appear fitfully that kind of tolerant chaffing which is the surest sign of the respect of the British public. But it had emerged painfully and reluctantly, after many vicissitudes. They are described in detail in Mr. Reith's *British Police and the Democratic Ideal*, to which I commend the reader for the epitaph of devoted public servants whose names are hardly known today but who deserve the undying gratitude of their fellow-countrymen.

Not that the troubles of the New Police were ended within a decade, nor, indeed, within a century. Even if they had enjoyed full public and official support, they could not have wrought instant miracles. Many crises and disappointments awaited them. Throughout the century there were periodical outbreaks of crime and terrorism which aroused fierce public criticism—the Fenians, the garotters, Jack the Ripper, and many others less well known. There was from time to time much discontent in the ranks and between 1872 and 1918 there were four strikes—none of them wholly unjustified—the most serious being the most recent, that of 1918, which led to the formation of the Police Union. Inevitably there were black sheep who occasionally brought the whole flock into discredit and in 1877 there was one resounding scandal

from which it took the Force a long time to recover. This was the so-called De Goncourt case, better known as the "Trial of the Detectives," in which three senior officers of Scotland Yard were found to have been confederated with notorious swindlers in ingenious betting frauds. Not all the Commissioners of later times were as well fitted for their office as Rowan and Mayne, though their general contribution of service and policy has been admirable. The nests of crime and infection did not disappear in an instant; there were many Fagins and Bill Sykeses in real life, there were still many places of dreadful night when that neglected author, Arthur Morrison, was writing *A Child of the Jago* and *The Hole in the Wall* at the end of the century; and within living memory there were parts of our cities which no policeman, much less a defenceless "toff," would enter save in able-bodied company. Nevertheless, before the end of the century crime, relatively to the vastly expanded population, had reached its lowest statistical point and the citizen enjoyed a greater sense of security than ever before in our history.<sup>22</sup> It would be an exaggeration to assign the whole credit to the police system, for throughout the century there was a continuous improvement in social conditions and general prosperity; but these advantages—as we ourselves are learning today—do not necessarily abate the malignant resourcefulness of the criminal mind, and I do not think it open to doubt that in the nineteenth

<sup>22</sup> See J. F. Moylan, *op. cit.*, 51f., and Melville Lee, *op. cit.*, Chap. 17.

century this nation had at last found, certainly not the perfect means of maintaining the Queen's Peace, but at all events the best that it had yet devised.

#### A SITUATION SAVED

It is to be remembered that in 1829 England was on the verge of a crisis which might well have developed into civil war if it had been met by the old method of soldiery against citizenry; and that was how it appeared to people like the Duke of Wellington, who had his troops concentrated near London at the height of the Reform Bill crisis—though, in justice to the Iron Duke, it is fair to say that he extremely disliked military methods of dealing with popular commotion, and that he had himself urged the establishment of an adequate police force. I have referred to our former national pastime of rioting, and in these days of comparative quiet we are apt to forget what "civil tumult" was in the nineteenth century and what a challenge it was to a small body of unarmed police. The Reform Act outbreaks in 1832 and 1862, Coldbath Fields in 1833, Birmingham in 1839, the Chartists in the 'forties, the Sunday Trading riots in 1855, the Trafalgar Square riots of 1886 and 1887, with their "Black Monday" and "Bloody Sunday"—all these were severe tests of discipline and restraint. The Chartist agitations, which began in 1839 and lasted until 1848, might well have precipitated another and possibly a worse crisis than the Gordon Riots if it had not been for the cool and well-planned preventive measures of the police. They did not always act with

perfect prudence or strategy, and several times they incurred sharp official censure, the more wounding because they had suffered severe casualties throughout these encounters. The public indignation at the Trafalgar Square riots—the last really serious outbreaks which have occurred in England—led to the resignation of the then Commissioner, Sir Edmund Henderson. The fact remains that the nation survived these grave disorders, throughout a period of deep social unrest, with far less bloodshed or smouldering hatreds than it could have done without the existence of a civil police force. Chequered though the story is, I think its outcome is to be accounted to the Metropolitan constabulary as one of their conspicuous successes. The same is to be said of the improved atmosphere—or at least the diminishing scandal—of Parliamentary elections, though, as we have seen, these continued until comparatively recent times, to be characterised by “a certain liveliness.”

#### EXTENSION AND COMPLETION

Perhaps, however, the most striking, if unintended, compliment to the “Bobbies” of London was the attitude which the criminal classes adopted towards them—the very simple but significant reaction of getting out of their way as fast as possible. It began to be found that crime did not pay in the capital and there was a steady exodus of the London “habituals” to the provinces, which were quite unable to meet this new menace with their existing resources. The local police arrangements in the urban centres were

highly variable in quantity and quality, and in the rural districts they hardly existed at all. The country at large began to look with increasing respect, and even envy, on the reviled "Peelers" of the capital. The first authorities to follow its example were the boroughs, who in 1835, by the Municipal Corporations Act of that year, were given power to maintain their own police forces, as they still do.<sup>23</sup> Then, in 1839, as the result of a Royal Commission, came the Rural Police Act—the so-called "Permissive Act"—which empowered quarter sessions, entirely at their option, to create paid constabulary forces in the counties. This half-way house soon showed its fissures, for it merely accentuated the great disparities of police organisation throughout the land; nor was it repaired by the futile attempt in 1842, already mentioned, to revivify the parish constable system. Finally, in 1856, was passed the "Obligatory Act"—also intituled the Rural Police Act—which extended the metropolitan plan, with necessary modifications, to all counties in England and Wales. It was not, however, until 1888, by the Local Government Act, that the control of the county police was transferred from the justices in quarter sessions to a Joint Standing Committee of the county authority. The framework of the whole modern system was now complete, and still stands, though much has been done, and continues to be done, to amplify and improve the structure. I need not

<sup>23</sup> Boroughs and county boroughs pay a posthumous, probably unconscious, and certainly ill-deserved compliment to the old watch and ward system, since their police are under the general control of the "Watch Committee" of the local authority.

describe it in detail, but it is built on a combination of local responsibility and central supervision—supervision only, however, not control or dictation. There is no national police force in England and Wales, but a number of different corps working on the same principles. Such authority as the Home Office possesses is exercised indirectly through the reviews and reports of the Inspectors of Constabulary, by information and advice, by the appellate jurisdiction of the Home Secretary for serious disciplinary offences, by uniformity of training, and by the power (rarely exercised) to withhold financial grants in aid of local rates. Despite this division of control, there are in fact remarkable consistency and co-operation throughout the whole country and there is extremely little conflict of authority. It is an interesting and instructive example of national unity in diversity. I have made no mention of the Scottish police force, which is under separate organisation and control.

One other historical landmark should be noticed. While the police have never departed from the principle of employing *a priori* rather than a *posteriori* measures against crime, it soon became evident that detective methods needed to be intensified in order to outwit the increasing ingenuity of the criminal, who was not slow to seize new opportunities offered by science and “progress.” As early as 1842 a small body of constables had been detached for detective work, but it was not until 1869 that a much ampler special detective force was set up. It met with much opposition at first, on the usual ground that it was inquisitorial and “un-British,” but it proved so

valuable, and indeed indispensable, that in 1878 it grew into the Criminal Investigation Department, the success of which needs no emphasis.

### THE "KIN-POLICE"

Looking back on the 124 years of the new system of British police, one can claim for it a success far beyond the most rosy expectations which might have been entertained in 1829, when the whole constitutional and social order of the country was in peril. The achievement has not been confined to these islands, for the model of the English police has been studied and followed throughout the British Commonwealth. In his vigorous series of books on the subject, Mr. Charles Reith has underlined the fundamental distinction between what he calls "kin-police" and "ruler-appointed police." The latter type he has sketched throughout the ages, and we who have seen, and can still see, the "ruler-appointed" agents of terror at work in modern totalitarian states need no reminder of their disastrous effects on the lives of nations and individuals. With one brief exception we have never resorted to them in this country, not even in times of the greatest stress. Our constables are still "kin-police," men and women with more disciplinary duties but few greater powers than any of their fellow-citizens; they are legitimate descendants of the old pledges and watchmen and constables of the people—but with one vast difference. It took us a thousand years to discover that the effective guardianship of the peace is a "whole-time job" for highly

qualified and disciplined officers, not a side-line for those who are least fitted for it and who undertake it because they are even less fitted for anything else. Gradually and reluctantly the public became convinced that the whole-time job could be performed without becoming a scourge and that efficiency was not synonymous with oppression. Yet in the public attitude we have also found a typical British compromise. On the one hand, the community gives the police that support without which any system of criminal law is hamstrung; on the other hand, let the police exceed their powers by an inch and the protest is immediate and intense. The temptation to unorthodox methods must sometimes be almost irresistible for the police—indeed, it is doubtful whether they could perform their duties at all if they did not sometimes depart from textbook rubrics. But they do so at great risk, for vigilance never relaxes, and it is powerfully reinforced by the democratic principle, which many a Home Secretary has discovered to his cost, that a Minister of the Crown is ultimately responsible to Parliament and to the nation for any shortcoming or irregularity. Democracy provides another safeguard which was grasped from the first by Peel, Rowan and Mayne, though doubted and controverted by many of their contemporaries—namely, that the police are purely executive officers whose duties must be kept rigidly distinct from judicial functions. This principle is so firmly embedded that I do not think the public today would tolerate the smallest departure from it, not even to the extent of

“on-the-spot” police fines, which are common in some countries, for trifling infractions, such as traffic offences.

### POLICE PROBLEMS

Today the police are passing through a difficult phase. There is no evidence of any decline in their efficiency and their training is more thorough and well-designed than ever before, but they suffer from various disadvantages of which I will briefly mention a few only.<sup>24</sup>

In the great volume of modern legislation there has been a constant tendency to pile more and more duties on the constabulary so that the whole organisation has become highly complex and the knowledge required of the ordinary policeman wide and exacting. This problem can be met only by a good deal of specialisation which inevitably subtracts man-power from the main duty of maintaining law and order.

Our Gregsons and Lestrades cannot be quite as ill-informed or dull-witted as they were even in the days of Sherlock Holmes (in reality, I do not think they ever were). Everybody knows that the motor-car alone has added vastly to police duties and problems within recent years. And these multiplying burdens take no account of the innumerable unofficial services which the police render in the way of information and advice on an astonishing variety of subjects. Every police station is an “Inquire within” bureau,

<sup>24</sup> A good brief account of the organisation, training and duties of the modern police is to be found in Chap. 14 of Mr. George Howard's *Guardians of the Queen's Peace*.

and "Ask a policeman" is a national motto. No body of men in history has ever suffered so many fools so gladly—not only bipeds, either, but errant quadrupeds. "A dog a day" is a fair average at most provincial stations, and I am sure that it is not the least pleasant day in a dog's life. I think, too, that that most pathetic creature, a lost child whose whole world has suddenly dissolved in utter desolation, looks back on its social afternoon with the police more affectionately than on many spent in the nursery at home.

The uniformed men, with their auxiliaries, the "Special Constables,"<sup>25</sup> are by no means the only peace officers of our age. The railways and docks have their own police, and so have many large industrial concerns; but in addition, there are at this moment of writing—the number is being gradually reduced—some 3,000 persons empowered, under a labyrinth of sub-statutes, to enter private premises for purposes of inspection and control. The effect of this dissemination of disciplinary powers, together with the multiplication of penalties for technical offences, is undoubtedly to weaken public support of law-enforcement in general. I do not suggest that the police have lost the confidence or regard of well-affected citizens; it is encouraging to find that the Inspectors of Constabulary, in their latest report (for the year ended September 30, 1952), refer to "the growing public recognition that the vocation of a

<sup>25</sup> On September 30, 1952, 62,094 men and 617 women were on the roll of special constables.

constable offers scope to young men of character, fitness and education." But the police are, in the view of their fellow-citizens, the chief guardians of public order, and any general chafing at petty restraints inevitably detracts from respect for their office.

The chief disability, however, of the police at the present time is simply that there are not enough of them. The position is now much better than it was in the immediate post-war years, but the whole force throughout the country is still seriously under establishment, and it is a question whether the establishment itself is adequate to the volume of crime and to the multiplicity of police duties.<sup>26</sup> It is a sign of grace that in the last statistical year, ending September, 1952, recruitment showed an improvement over the preceding twelve months—a circumstance which the inspectors attribute to a higher scale of pay—but the total of recruits (4,769) is still considerably below the numbers for the years ending September, 1947, 1948 and 1950. In the eyes of many young men "a policeman's lot" does not compare favourably with other occupations less exacting and more highly (if insecurely) rewarded; and it would seem, if my information is correct, that many applicants are found unsuitable principally on grounds of intelligence—surely a surprising fact in the age of widespread education.

<sup>26</sup> The total establishment (excluding the Metropolitan Police, who are gravely under strength, but including the City of London) in September, 1952, was: *Policemen*, establishment 51,994, strength 47,572, deficiency 4,422; *Policewomen*, establishment 1,471, strength 1,221, deficiency 250.

Whatever may be the cause of the present insufficiency of police, the result is plain for all to see. It is impossible to regard the Queen's Peace today as being in a satisfactory state of security. A fashion has recently grown up of dismissing the question by asserting that the alleged "crime wave" is merely the product of newspaper sensationalism. It is undeniable that journalistic emphasis may easily distort the perspective; but anybody who supposes that this is a sufficient explanation of an ugly problem is simply ignorant of plain facts and plainer figures, which cannot be brushed aside by merely saying that "statistics can prove anything." I will not enter into comparative figures here, but I do not hesitate to say that the increase of serious crime within a generation is enormous and that its quantity is not the only cause for disquiet but also its quality in savagery, ruthlessness and ingenuity of organisation. It was hoped that the black year 1948, with its total of 522,684 crimes known to the police, was the zenith (or nadir); but 1951 surpasses it with the grim total of 524,506. There is some decline in offences against property with violence, but on the other hand felonious and malicious wounding, and sexual offences including rape, show a perturbing increase. Even the most complacent persons who warn us against "panic" will not deny the gravity of the fact that a startling proportion of serious misdeeds are committed by juveniles, many of them little more than children. Nor is it possible today, as once it may have been, to assert that the bulk of crime is attributable to

destitution and the pitiful condition of the "submerged tenth." We must abandon the comforting notion that "welfare" excludes wickedness.

#### A POLICEMAN AT HIS ELBOW

This is not the place to add to the interminable discussion of the causes of crime. We are all familiar with those which are usually assigned—the effects of war, broken homes, the decline of family and school discipline, the decay of religion. Many add the insufficiency of police, but it always seems to come in the last place. My suggestion is that it should come in the first place and that it should be a capital item of expenditure on "national defence"; for it seems to me hardly less important to protect ourselves against enemies at home than enemies abroad. Nobody denies that all the causes which are commonly canvassed are highly relevant and that everything possible should be done to grapple with them; but do they amount to more than saying that the root of evil is in the human heart and that we should do all we can to improve that refractory organ? The old question still remains: "Would he have done it if there had been a policeman at his elbow?" It is remarkable what an edifying effect the proximity of a constable may have on morality. Are we not in danger of making the same mistake as that devoted band of men, like Romilly, Eden, Mackintosh and Buxton, who strove so valiantly for the reform of the old barbarous criminal law? Concentrated (not unnaturally) on the urgency of that immediate task,

they seemed to suppose that once that particular purge had been administered, the whole body politic would be healthy. Like the succession of Parliamentary commissions and inquiries, they clung to the belief that good laws would make good order, and it does not seem to have occurred to them that the most admirable laws are nugatory without the means of implementing them, and that the best means of enforcement is to forestall the very necessity of enforcement. Today we hear much of the experimental reforms introduced by the Criminal Justice Act, 1948, such as corrective training and preventive detention, but we may have to wait a long time to estimate their true effects, and any hopes which may be reposed in them do not offset the necessity for meeting an immediate threat. Our whole history teaches us that crime cannot be repressed by merely increasing the severity of punishments, but by circumventing the criminal and holding over him penalties which, while moderate and humane, are reasonably certain to overtake him.

I borrow from Captain Melville Lee three simple words which express an invariable social law: "Crime follows impunity." At this moment the professional criminal's impunity is perturbing—some place it as high as a fifty per cent. chance of escaping detection and arrest. By all means let us attack the root causes, in public and private ethics, of evildoing; but we have been painfully disabused of the faith of our grandfathers that the advance of "civilisation" means the continual betterment of human nature, nor can we accept their naive assumption that either the spread

of education or the multiplication of material amenities necessarily has any ameliorating effect on morals. In any society, at any time, there are always the "two nations" of conformists and non-conformists. The conformists are, fortunately, the great majority of the community, who prefer to abide by the law for a variety of motives which are partly prompted by genuine moral conviction, and partly follow a line of least resistance without much conscious moral judgment. The non-conformists—by whom I mean not the casual offenders but the criminals by vocation—are those who repudiate social discipline, being actuated by motives of indolence, easy money, vanity, excitement and (I fear we must face it) in many cases by the sheer love of evil. The conformists find freedom in the laws of give-and-take, the non-conformists find it only in the law of take. The non-conformists are always a minority—otherwise, of course, there would be no society at all but merely *homo homini lupus*—but unless they are vigilantly held in check they can acquire a degree of power and intimidation which can hold the majority to ransom. Strength for strength and strategy for strategy are the first safeguards against those who declare war upon their fellows, whatever other measures we may take to purify the secret springs of their wrongfulness. This fact, in my belief, is borne out by the whole history of the Queen's Peace, and I question whether it is sufficiently grasped in the uncomfortable phase through which we are now passing.

Do I exaggerate the danger? I repeat, however much it may shock my readers, that we are a lawless

people and only for a short time have we been on good behaviour. I think we should be very foolish, and very neglectful of the lessons of our past, if we assumed that heaven decided about a hundred years ago to endow us with some eternal, immutable genius for honesty, docility, gentleness and respect for law.



**KEEPERS OF THE PEACE**



## 5

### KEEPERS OF THE PEACE

#### *THE FORERUNNERS*

##### THE CONSERVATORS

WE come finally to an aspect of the Queen's Peace which is peculiar to our society and of great practical usefulness to it. The citizens who today dispose of the vast majority of criminal charges, and who examine the evidence of practically *every* alleged crime (whether they themselves eventually deal with it or not), are officers of the peace, and are sworn to it in the name of the Sovereign, who appoints them through her Lord Chancellor. In their long history they have passed through many transformations. They have acquired powers at one time, lost or changed them at another, combining judicial and governmental functions in different proportions at different periods; but whatever their vicissitudes, they have never been in serious danger of losing their place in our social system.

As early as the twelfth century we hear of exalted Conservators, Wardens and Keepers of the Peace. The exact duties of the early Conservators, Custodians and Keepers are not very well defined. They administered oaths to good and lawful citizens to keep the peace—a procedure which was as old as Cnut and perhaps older, but the efficacy of which is not manifest. They assisted the King's principal peace officer, the sheriff, in receiving and handing over

prisoners and suspects, they served as conduits for presentments by the constables, and they had some share in the enforcement of the kind of duties which were laid down in the Assize of Arms and the Assize of Clarendon. Stephen<sup>1</sup> regards them as themselves little more than magnified constables, but later researches suggest that they had early acquired minor judicial functions of the kind which we should call "summary," though they were primarily administrative officers, founding their executive powers on military force.<sup>2</sup> At all events, between the end of the twelfth century and the early years of the fourteenth there is considerable legislation, together with many writs, orders and proclamations, about them. In the year of Edward III's accession conservators were appointed for each county, and to this reign belongs the great legislative activity which moulded their future. When, in 1349, the Black Death devastated the land, there were special and urgent reasons for reinforcing social control. At all events, in the first forty years of Edward's long reign, a whole series of statutes regulated the functions of the conservators in the counties. One of them, in 1344, gave these officers jurisdiction over felonies and trespasses, but in somewhat more restricted terms than the capital statute to which I jump ahead, that of 1361. The main provisions of this statute have been already

<sup>1</sup> *Op. cit.*, i. 112.

<sup>2</sup> In *Entick v. Carrington* (1765) 19 St.Tr. 1030, Lord Camden C.J. seems to have considered that their principal duty was the taking of sureties of the peace and of good behaviour, and the same impression is conveyed by Hawkins, *Pleas of the Crown*, Bk. II, Chap. 8.

mentioned (*ante*, p. 64). By it there were appointed "one lord and three or four of the most worthy of the county, with some learned in the law," as keepers of the peace, and among their duties was the immensely important power to "hear and determine at the King's suit all manner of felonies and trespasses done in the same county." Let me mention in passing that the numbers of justices, though fixed by this Act at five per county, have varied greatly at different periods, but there would be little profit in discussing all the fluctuations and their causes.

#### THE JUSTICES AND THEIR JURISDICTION

Two years after the Act of 1361 the justices were required to hold their sessions every quarter, and so they have always continued to do, though with modifications, throughout a long series of enactments, down to the Administration of Justice Act, 1938. Quarter Sessions *are* the justices in the beginning; it was only by later developments that two or more justices in special sessions became not only subordinate administrators but judge-and-jury for minor offences, with the quarter sessions above them as a higher jurisdiction. The essence of quarter sessions, on the other hand, has always been the collaboration of the magistrates as judges of law and the jury as finders of facts.

About this time, having now acquired, or been confirmed in, extensive judicial powers, these guardians of the peace came to be known as justices. They were the King's own appointees, no less than the

Justices of Assize themselves, and on this point Edward III was firm, despite some agitations for local and popular elections. None of his successors departed from the principle.

“To hear and determine all manner of felonies and trespasses” is a very wide commission, and it was widely interpreted. With the exception of treason, there seems to have been no limit to the kinds of offences which quarter sessions could try on presentment, and it is certain that until the eighteenth century, they constantly disposed of capital charges. When they ceased to do so, this important limitation of their jurisdiction (as against assizes) seems to have come about by practice rather than by ordinance. By Blackstone’s time<sup>3</sup> they tried petty larcenies and non-clergyable offences, and all misdemeanours except common law forgery and perjury. He is emphatic that they do not pass sentence of death. It was not until the nineteenth and twentieth centuries that, by various statutes, precise lines were drawn between the jurisdictions of assizes, quarter sessions and petty sessions. There was, however, a provision in the actual Commission of the Peace that if any difficulty arose it should be referred to one of His Majesty’s judges. What exactly constituted a “difficulty” is not clear, but it is probable that the justices tended to “play safe” and there is some evidence that in the fifteenth century assizes were extending jurisdiction, certainly in the more serious cases, at the expense of quarter sessions. Nevertheless, the charter

<sup>3</sup> See 4 *Comm.*, 271.

of the justices remained comprehensive, as anybody may learn from the invaluable collection, which we owe to the industry and learning of Professors Putnam and Plucknett, of actual sessions cases from Edward III to Richard III,<sup>4</sup> *i.e.*, for the greater part of the fourteenth and fifteenth centuries. It is clear that besides the large number of grave charges which came before them the justices were burdened with a great many trivial complaints made by constables and others, and the list of "articles" for the jury's cognizance was constantly and inconveniently growing. It was doubtless for this reason that, as we shall see, these trifling concerns were increasingly committed to one or several justices "out of sessions," who eventually became regular petty sessions.

### BOROUGH JUSTICES

Hitherto we have been concerned with the county justices, but their numbers and functions were largely supplemented by their brethren in the boroughs. It would be as tedious as unilluminating to describe their growth and distribution, for it is largely a matter of historical accidents—royal grants (for which there was no uniform rule) of charters, and sometimes of separate commissions of the peace, to various towns and cities.<sup>5</sup> In many instances the charter contained a *non intromittant* clause, which preserved the borough jurisdiction distinct from the county in which

<sup>4</sup> B. H. Putnam and T. F. T. Plucknett, *Proceedings before Justices of the Peace, Edward III to Richard III* (Ames Foundation).

<sup>5</sup> Examples are to be found in Stubbs, *Select Charters*.

it lay. It is enough for our purposes to say that in the judicial sphere the borough magistrates had the same powers as those of the county, and in the administrative sphere even more, for the magistrates were practically identical with the mayor and corporation. It was not until the Municipal Corporations Act of 1835 that their executive functions were transferred to town councils and that they became a separate body appointed, like all other justices, by the Lord Chancellor. In the course of time, some of the old boroughs which were dignified by separate commissions of the peace, and therefore with separate quarter sessions, shrank in size and importance, and it was necessary to suppress certain of them (not without moaning at the Bar) by the Justices of the Peace Act, 1949. Borough Quarter Sessions nowadays differ from those of counties in that the sole judge is a Recorder (now appointed by the Lord Chancellor), a barrister in receipt of a nominal salary, and the other borough justices are merely spectators—intelligent, let us hope, but not always assiduous. There are at present 98 barristers holding the office of Recorder.

#### WARRANTS AND OTHER NEW POWERS

The administrative duties of the justices were at first principally connected with the application of the Statute of Labourers and control of the rates of wages—a task of great importance after the Black Death and even more so after the Peasants' Revolt in 1381. How these economic responsibilities developed we shall presently see. Meanwhile, the

justices were acquiring—perhaps arrogating—one function which was to prove an immense convenience in the machinery of law enforcement—namely, the issue of warrants for the arrest of suspects and accused persons. This, as we have seen, was really the province of the hue and cry; but that was a clumsy and uncertain expedient and a justice's warrant was obviously a more wieldy instrument for setting the law in motion. As late as the seventeenth century Coke denied the right of the justices to issue warrants, but he seems to have stood alone in that opinion and was challenged by Hale, whom Blackstone supported. By Blackstone's time, however, the controversy had become purely academic, having been settled beyond doubt by statutes, which I need not name, of the eighteenth century. Whatever the strict law of the matter may have been in Coke's day, it is certain that the justices had long been in the habit of issuing their warrants for arrest and examination. The hue and cry declined proportionately, and Stephen tells us<sup>6</sup> that in the eighteenth century to "obtain a hue and cry" from a magistrate was synonymous with swearing a warrant before him.

This was not the only ancient institution on which the new jurisdiction rapidly encroached. Very soon it largely superseded the archaic procedure of the county court and displaced the minor schoolmastership of the court leet. The jury of presentment had come to be an established procedure which was adaptable to many uses. It was not associated in men's minds

<sup>6</sup> *Op. cit.*, i. 190.

with mere officialdom, any more than the sessions themselves—indeed, not the least salutary of their activities was the control which they exercised over officials. It is an illuminating, if depressing, reflection upon the vices of medieval government that many of the cases collected by Professor Putnam are concerned with extortions by this and that jack-in-office. If it be true that the conservators were originally intended to be mere military assistants of the sheriff and other royal peace officers, it is highly significant that by the end of the fifteenth century the position was completely reversed: the sheriff was commanded to attend on the justices and was subject to their jurisdiction for malpractice, while the high and petty constables had become the nominees of the sessions.

This is only one example of the firm place which these guardians established in the social system as soon as they had been given full responsibilities and had shown how much more efficient they could be than the many other types of peace-keepers who had preceded them. I am now going to make a kangaroo-leap to the Tudor age, when we begin to get learned expositions of the duties of the justices.

#### THE MEN OF ALL WORK

In the preceding century the multiplication of the magistrates' duties is truly astonishing. Under the energetic government of the Tudors the Justices of the Peace became, as Sir William Holdsworth has observed, the "men of all work" of the administration. From the beginning it has been, as it still

remains, a characteristic of their jurisdiction that it was derived solely from statute, and it was by this means that their functions were prodigiously expanded. At the end of his "Eirenarcha" Lambard gives a table of no less than 318 statutes affecting the justices, and these had all been passed between the reigns of Henry III and James I. It is no wonder that Lambard complained of "not loads but stacks" of enactments and sighed for a systematic, annotated collection of them instead of the sprawling mass which he said plaintively could be mastered only by "continual study and painful meditation of the statutes at large." This was a labour which we cannot suppose the ordinary justice was either willing or competent to undertake, any more than a justice today would memorise, without fear of unseating his reason, all the statutes in Stone's *Justices' Manual*.

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,<sup>7</sup> tipping 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

<sup>7</sup> Legislation from the fourteenth century onwards (12 Rich. II, c. 6) was remarkably stern about sports. Among the forbidden games were such innocent amusements as bowls, quoits, tennis and football. The object was to encourage practice with the long-bow as the only true manly sport.

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. In his study of *The Office of Justice of the Peace in England*,<sup>8</sup> Mr. C. A. Beard has classified the functions of the Tudor magistrates under eight different heads, as follows: (1) Organisation of office and central control; (2) Consolidation of county administration (supervision of local officers, records, juries); (3) General administration (maintenance of communications, buildings, etc.); (4) Parochial affairs (paupers and vagrants, soldiers and sailors); (5) Trade and labour; (6) Police control (maintenance, liveries, unlawful assemblies, etc.); (7) Ecclesiastical legislation (Protestant penal laws under Henry VIII and Elizabeth I, with a sharp reversal under Mary); (8) National defence (archery, militia, etc.). No sinecure this! Lambard complains of an excessive number of justices in the shires, but large numbers must have been necessary to discharge all these duties. A very remarkable feature of the whole system is its economic complexion. We are accustomed to think of the twentieth century as the age of price-control and economic planning, but from the Middle Ages onward our statute-book abounds in

<sup>8</sup> *Columbia Studies in History, Economics and Public Law*, Vol. 20 (1904).

such regulations, the burden of which fell upon the justices. We should also observe the emphasis laid on the game laws, which in the eighteenth and nineteenth centuries were to become as jealous and severe as the forest laws had been in an earlier day. In addition to the general statutes, there were a considerable number of local Acts which assigned special duties to the justices in different parts of the country.

#### JUSTICES "OUT OF SESSIONS"

All these affairs, besides the punishment of felonies and trespasses, were the province of quarter sessions, but by the sixteenth century there is an increasing assignment of functions to one, two—and by some statutes three, four or six—justices "out of sessions," *i.e.*, at any time as circumstances demanded, or at periodical meetings, which became more frequent, for certain kinds of business, especially rates and licensing. These categories, which were quite arbitrary, need not detain us, beyond noting the powers committed to a single justice, or two acting together. The most important were the ancient ones of taking sureties of the peace or of good abearing, restraint of breaches of the peace, routs, riots, and forcible entries and detainers, granting of bail, issue of warrants and the examination of suspects. To the last of these subjects I will presently return, for it became of increasing moment. All these services were, in effect, gratuitous. In the fourteenth century the justices were paid four shillings a day, but it was not long before they ceased to claim it. Lambard remarks

sardonically that "the laws do now and then cast them a trifle, rather to let them know that they do behold their well doing than that themselves do stand in need of any recompense." The "trifle" consisted of a few fees for certain formal duties and apparently the right to retain a proportion of goods stolen and recovered. Against these meagre perquisites the justices were themselves subject to a formidable catalogue of fines and forfeitures for defaults and irregularities. The "great unpaid" are a very ancient institution. It was only in the metropolis at a later time that, as we shall see, certain magistrates made a good thing, and a shameful thing, out of their offices. In Lambard's day they gained nothing from fines and amercements, a share of which (we are not surprised to learn) went to the royal treasury.

#### LITERATURE OF THE PEACE

Since I have mentioned Lambard, I will pause here to consider his and other treatises concerning the justices of the peace, for they form a very interesting, though now largely forgotten, part of our legal literature. Lambard himself lived from 1536 to 1601, and was a Bencher of Lincoln's Inn and a justice in Kent. His celebrated treatise, the "Eirenarcha," was published in 1581. It is admirable in exposition and arrangement, though the author seems often to despair at the vastness of his subject and to apologise for his imperfections. Though the most famous handbook of the sixteenth century, it was only one of a cloud of witnesses. As early as 1510 Fitzherbert had

published his *L'Office et auctoryte des Justyce de pees*, which, in Crompton's edition of 1588, became a standard work. But there was a huge literature besides. Professor Putnam<sup>9</sup> calculates that there were printed between 1506 and 1599 at least 57 editions or issues of treatises for justices, apart from masses of manuscript material yet unexplored. To this distinguished scholar we owe a printed edition of the work on which, as he frequently acknowledges, Lambard founded his book. This is the *Reading on the Peace* (1503) of Thomas Marowe, a Serjeant-at-Law, justice and under-sheriff—a scholarly work on which, however, Lambard improved in style and arrangement. In succeeding ages the most successful manuals were those of Dalton, which, published in 1618, enjoyed vigorous avatars for more than a century, and Burn, which ran to thirty editions between 1755 and 1869.<sup>10</sup> But there were many others which have passed into the catacombs of libraries, and they were not inconsiderable works of learning. For example, I have in my possession the three elegant volumes of a work which I do not find mentioned in any of the histories and which I think is not contained in many libraries. It is *The Law of*

<sup>9</sup> *Early Treatises on the Practice of Justices of the Peace in the Fifteenth and Sixteenth Centuries* (Oxford Studies in Social and Legal History, ed. Vinogradoff, Vol. 7).

<sup>10</sup> Among the authorities the great Coke is not to be numbered. His *Institutes* were published in 1628, and although he extols the jurisdiction of the peace, his chapter on the subject (XXXI of the 4th Institute) is surprisingly jejune, being confined to a few statutes and various points of procedure. Even more unexpectedly, while he refers the reader to Fitzherbert, he ignores Lambard.

*a Justice of Peace and Parish Officer*, by Lord Dudley and Ward and T. Cunningham. It bears the date of 1769, but there is nothing to show whether it is a first or later edition. Constructed on the plan of the old Abridgements, with full apparatus of references to statutes and decisions, it represents monumental industry and is a thesaurus of information for the legal antiquarian. It has, I suppose, passed into the dust and débris of learning, with multitudes of other lucubrations. Today they are supplanted by the prodigious *Stone*, now in its 85th edition of over 3,000 closely-printed pages. Justices of this age who are rash enough to ask for bread are given a *Stone*—and a heavy one.

#### CLERKS OF THE PEACE

He who studies these old treatises is at once struck not only by the immense amount of law which they contain but by the great variety of forms and precedents which they include for all manner of duties and occasions. Procedure was a vital matter, as it still is, but today a Clerk to Justices, amid the mountains of forms and papers which are his daily fare, has the assistance of such works as Oke's *Magisterial Formulist*. It is highly improbable that in the sixteenth and seventeenth centuries, and still more improbable in the eighteenth, the average justice—men like Lambard and Burn and Dalton cannot have been average—knew very much law or procedure. It is true that in the fourteenth century a certain legal element among the magistrates was ensured by the *quorum*. The King nominated his officers, "among

whom we will" (*quorum unum esse volumus*) that so-and-so, learned in the law, be one. But by the eighteenth century, and probably much earlier, this had become a fiction and the practice was to include every justice in the *quorum*. Even Justice Robert Shallow, who was never distinguished either for legal attainments or commanding intelligence, was "coram." This must have given pain to Lambard, who in ponderous periods insists that "learning in the laws is so necessary a light as without the which all the labour is but groping in the dark, the end whereof must needs be error and dangerous falling." Who, then, saved the squires, in sessions and "out of sessions," from the pitfalls which beset their tortuous path? I think we may safely assume that most of the Clerks of the Peace for Quarter Sessions must have been well qualified and skilled lawyers. This official, though occasionally appointed in the early period directly by the Crown, was the nominee of the *Custos Rotulorum*,<sup>11</sup> a justice specially charged with the duty of keeping records; eventually he became the Lord Lieutenant of the county, with purely titular duties, as at present. (Boroughs always appointed their own Clerks.) It is a pity that we do not know more about these mute, inglorious servants of the law and the work which they did for the King's Peace. It is an even greater pity that we have so few published records of the criminal jurisdiction of quarter sessions

<sup>11</sup> *Harcourt v. Fox* (1693) 1 Shower K.B. 527. In 1829 the matter was the subject of elaborate opinions by the judges and a decision of the House of Lords: *Harding v. Pollock*, 6 Bing. 25.

(even today there are hardly any), for I think it past doubt that it settled or developed, no less than the King's Bench and the assizes, many of the doctrines and the practice of our criminal law. Much unpublished material awaits the industry of scholars.

#### THE SCOPE OF THE PEACE

From this digression, which I trust needs no apology, let us return to the duties of the justices in the sixteenth and seventeenth centuries. They are in a fair way to becoming the "civil service" of the whole country, and at first sight it might seem that they set at naught any principle that we ever possessed of the separation of powers. But it was not so in reality. Whether we think of them as executive or as judicial functionaries, their jurisdiction was still *of the peace*. Whatever they did to maintain good and honest administration was done as a corrective of failure of duty which was regarded as criminal. Nowadays the civil servant, especially of the lesser kind, is more fortunate than many of his fellows in that he may look for the absolution and remission of sins with more confidence than those who work in competitive conditions. The worst that can happen to him for his blunders or shortcomings is loss of promotion or, in the extreme, deprivation of office; and, unless common observation is much deceived, his incompetence must be very gross indeed before that condign penalty overtakes him. It was far otherwise three hundred years ago. Public service was every qualified man's duty and was both compulsory and unremunerated. It

was the business of the justices to see that it was performed and to punish any neglect of it. Every failure in it, deliberate or inadvertent, was a blemishing of the peace and was visited accordingly. Thus each new type of supervision which was committed to the magistrates was an extension of their criminal jurisdiction, nor were they themselves immune from the inquisition, for not only were they removable at pleasure but they were as liable as any others to presentments before their brethren for lapses and misfeasances, not to mention civil suits for assault or false imprisonment if they exceeded jurisdiction. There was as yet no notion of a local or national corps of whole-time, salaried executants of government, though soon the forerunners appeared in the shape of Commissioners of Sewers, Turnpike Trusts, Poor Law Administrators, Improvement Commissioners, and the like. This method, to us so strange, of controlling administration by judicial discipline was a survival of a society of small population; it could not last for ever and already in the seventeenth century it was showing its anomalies and inconveniences, not to say its injustices; but it was not abandoned until the growth of population and the changed character of English society in the nineteenth century made it an unworkable anachronism.

#### EXAMINING JUSTICES

There was another function of the magistrates which became, and still remains, an important part of the whole administration of criminal justice. The

magistrate in sessions was a judge, but out of sessions he was also a detective and a prosecutor—for that is what he really became in the process of examining into the circumstances of alleged offences. He generally issued the warrant, and when the suspect was in charge, he examined him in person orally and either committed him, bailed him or discharged him. From all we can learn, the examination was a highly informal, and probably arbitrary, procedure. The accused had no rights at all. He could not, of course, be assisted in his defence, he could not call witnesses, he was not informed of the evidence against him and had no right of access to it, and although reasonable magistrates doubtless elicited his story and put it on record, they were under no obligation to do so. Thus the magistrate was really in the position of an accuser or quasi-prosecutor, not unlike the French *juge d'instruction*, and there was no other kind of official prosecutor in the sixteenth century. In 1554 it was enacted by the 1 & 2 Phil. and Mary, c. 13, that before a person accused of felony could be admitted to bail, statements must be taken in writing and witnesses bound over to appear at the trial; and in the following year the same provision was extended to all felons in charge, whether bailed or not. Under this new régime the statements of the accused and of the witnesses (who continued to be examined separately) were forwarded under the seal of the examining justices to the court of trial.<sup>12</sup> We shall be mistaken,

<sup>12</sup> The old procedure of the *mittimus* is described by Lord Goddard C.J. in *Reg. v. Norfolk Quarter Sessions, Ex p. Brunson* [1953] 1 Q.B. 503.

however, if we think that these provisions were intended for the benefit of the prisoner. They were rather aimed at the too facile granting of bail by magistrates. Already in 1486 it had been enacted that this duty was to be performed by *two* justices, and the King and his Council seem to have thought that too many criminals were thwarting justice through the excessive leniency of magistrates with regard to bail and mainprise. The accused himself gained no greater advantages for many years to come, and in this preliminary inquisition remained virtually gagged and bound until the nineteenth century. We shall see that in 1848 the whole nature of the preliminary proceedings was changed to more humane methods; till then, we must think of the Justices of the Peace as judges, administrators, a Criminal Investigation Department, and Directors of Public Prosecutions.

#### SQUIREARCHY AND HIERARCHY

The eighteenth century was the aristocratic age and the squirearchy formed an aristocracy all of its own, in some ways more self-sufficient than the nobility itself. The county justices were now numerous—there were between two and three thousand of them—and they undoubtedly formed a “ruling class,” the more so because many of them were Members of Parliament as well. They were now definitely, if not a plutocracy, a class “of substance,” for they had to satisfy a property qualification which was raised in 1732 from the £20 annual estate income of the

fifteenth century to £100; and this condition of appointment held good (except that in 1875 the amount was fixed at £100 rateable value) for the next 174 years, until it was removed by the Liberal administration in 1906. In their quarter sessions they were the chief local governors of counties and boroughs and their judicial and disciplinary powers out of sessions had continued to multiply exceedingly. Blackstone in his fourth volume has a chapter on "summary convictions," and it is clear that he is uneasy about their wayward growth. Born and bred in the tradition of jury-trial, he does not like the notion of criminal jurisdiction in hands which he obviously does not consider always very well qualified to hold it. He observes that the formidable accumulation of duties leads to "backwardness of magistrates"—he clearly means the *right kind* of magistrates—to take office; and there is a good deal of evidence of this reluctance among the better sort who shrank from the burdens, and indeed the perils, of the task—I say perils, because, as has been mentioned, the magistrates were subject to numerous criminal penalties and civil actions for faults and errors, and it was not until 1848, by the Justices' Protection Act, that they were given reasonable indemnity for things *bona fide* done within the limits of their jurisdiction. The result, says Blackstone, was that the county magistracy was liable to get into the hands of "mere tools of office." I doubt whether he means by this lackeys of the government, but rather drones (they still exist!) who accepted the prestige and neglected the responsibilities; and the fact seems to be that

in every county there were a certain number of "working justices" who really knew their business and who, with the aid of their clerks, in effect "ran the show."

As for the extent of these "summary convictions," Blackstone mentions, with ill-disguised disrelish, that the justices out of sessions are now disposing (concurrently with the Commissioners) of offences against the excise and of "a vast variety" of minor offences which were formerly dealt with by the courts leet. These he does not attempt to specify in detail, for this would have meant a tedious catalogue of statutory powers, of no great legal significance. Blackstone admits that the jurisdiction has the advantage of being "extremely speedy," and hints that it had carried celerity to dangerous lengths until the superior courts insisted, though "the justices long struggled the point," that summons was "an indispensable requisite"—an elementary rule, he adds, of natural justice—before adjudication, which was based on the sworn evidence of witnesses (but not, of course, at this time, of the defendant himself).

#### WESTERNS AND ALLWORTHIES

This was an oligarchical and in some respects an arbitrary rule, though (apart from the ferocious game laws) I question whether it was quite as oppressive as some writers, like Redlich and the Webbs, have represented. But undoubtedly some strange things were done, and there is much evidence in literature that the squires asserted or assumed powers which

today we should find startling. I will take only one or two examples from *Tom Jones*. It will be remembered that the unfortunate schoolmaster, Partridge, was accused before Mr. Allworthy "for incontinency"—that is, paternity of Jenny's child. The information was actually laid by the egregious Mrs. Wilkins, but the principal evidence (mostly irrelevant or hearsay) was given, with much emotion and no little robustness of language, by Mrs. Partridge against her husband. Allworthy is represented as the most charitable and patient of magistrates, but he seems to have had peculiar ideas of the value of evidence and he had no hesitation in convicting the schoolmaster. And mark the penalty: he deprived Partridge of his annuity, and therefore of his livelihood—though Fielding leaves us to guess whether or not he had any legal power to do so. The author, with his tongue in its usual position, commends the excellence of the rule which forbade a wife to give evidence against her husband; but he slyly comments that not only was the evidence "more than sufficient to convict him before Allworthy," but "much less would have satisfied a bench of justices on an order of bastardy." "Continency" must have been a somewhat hazardous virtue in the eighteenth century. So that light lady, Molly Seagrim, found when the same charitable Allworthy committed her to Bridewell (an ironical name in such cases) for illicit pregnancy; whereupon Fielding observes: "A lawyer may perhaps think Mr. Allworthy exceeded his authority a little in this instance. And, to say the truth, I question, as here was no regular information before

him, whether his conduct was strictly regular. However, as his intention was truly upright, he ought to be excused *in foro conscientiae*; since so many arbitrary acts are daily committed by magistrates who have not this excuse to plead for themselves."

Squire Western himself nearly fell into one of these "arbitrary acts," and evidently it was not his first, for we are informed that "he had already had two informations exhibited against him in the King's Bench, and had no curiosity to try a third." When the maid, Mrs. Honour, had the temerity to reflect upon the personal appearance of her mistress (the Squire's sister), Mr. Western, in his just wrath, very nearly committed her to Bridewell. His sister was highly indignant when he refrained from doing so, being positive that there were more sensible justices in London who "would commit a servant to Bridewell at any time when a master or mistress desired it." But the cautious voice of the law, in the person of the Squire's clerk, had intervened, and luckily this functionary "had a qualification, which no clerk to a justice of peace ought ever to be without, namely, some understanding in the law of this realm." It would be an advantage, adds Fielding, if magistrates listened more often to the advice of their clerks, especially in matters relating to game, for, failing to do so, "they often commit trespasses, and sometimes felony, at their pleasure." This sidelight shows that by Fielding's day, in addition to the Clerks of the Peace to Quarter Sessions, some—perhaps many—

individual magistrates had clerks of their own, who were to become the Magistrates' Clerks of our own times.

#### CORRECTIVE JURISDICTION

All licence allowed to the satirist, these examples were probably not uncharacteristic. There is other evidence in abundance that eighteenth century justices had somewhat vague ideas of their discretion and frequently exceeded their powers, for numerous prerogative writs, especially of certiorari, issued against them from the King's Bench. The superior courts, indeed, spoke with an equivocal voice about magisterial proceedings, for at one time they emphasised the necessity of exercising a strict control over summary jurisdiction, and at another they extended indulgence to magistrates who had acted in good faith, though in error. They seemed disposed to regard sympathetically those who could stand as confidently *in foro conscientiae* as Mr. Allworthy, for it was recognised that they had a difficult and complex office to perform, and even Blackstone allows that "the country is greatly obliged" to those who undertake it, with the prospect of more kicks than ha'pence. Many errors had to be put right and, as Sir William Holdsworth observes, it would have been impossible for the justices to discharge their functions with any approach to legality but for the corrective discipline of the King's Bench. One is left, however, with an uncomfortable impression that there must have been many victims of arbitrary procedure, like poor Partridge and Molly Seagrim, who could not

afford to appeal to the higher court for a certiorari and probably did not know that they had any right to do so.

The ancient prerogative writs, and especially certiorari, were the regular form of appeal from justices and under the old practice the proceedings before them had to be recorded in great detail in case of review by the King's Bench. In the age of strict legal niceties it appears that appeals on mere quiddities of form were thought to be too easy and too frequent, and consequently a number of statutes concerned with matters of summary jurisdiction (many of them being what we should today regard as administrative rather than judicial) expressly excluded recourse to certiorari. This tendency reached its culmination in the Summary Jurisdiction Act, 1848 (Jervis's Act), which limited the "record" of summary proceedings, when challenged by certiorari, to the charge, the conviction and the sentence. The remedy was then available for error appearing on the face of this concentrated abstract or for excess of jurisdiction. There was, however, another type of procedure closely analogous to an appeal from quarter sessions, though not truly appellate, as we understand that term. Exactly when or how it arose it is difficult to say, but it was certainly in use in the early eighteenth century and it seems to have sprung entirely from "the custom of the Court." It has been noticed that under the old Commission of the Peace if a "difficulty" arose before the magistrates, they were bound to refer it to a puisne judge; the exact words were that they were not to

proceed to judgment "unless in the presence" of a judge of either Bench (King's Bench or Common Pleas) or of assize. In lieu of this procedure, which very possibly had its inconveniences, a practice grew up of giving a *conditional* judgment at quarter sessions, subject to the opinion of the King's Bench. This was, in effect, a "case stated," but it was not an appeal as of right, for it could be employed only at the instance of the court itself. On the civil side of summary jurisdiction this procedure was in use long after the passing of Jervis's Act. Technically, this kind of conditional judgment amounted to a "speaking order" which, when called in question by certiorari, was subject to review not merely for form and jurisdiction, but for matters of substance in law or fact arising out of the statement of the case. The history of the procedure is not entirely free from obscurity and it cannot be pursued here, but it is mentioned because it has recently been shown to have an important bearing on the whole nature and scope of certiorari.<sup>1</sup> The modern form of appeal from justices on points of law by way of case stated is governed by Acts of the nineteenth and twentieth centuries, now consolidated by the Magistrates' Courts Act, 1952, and is a familiar procedure, but it does not exclude the general corrective jurisdiction of the Queen's Bench by prerogative orders.

<sup>1</sup> *R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1951] 1 Q.B. 711, and [1952] 1 Q.B. 338. The history of the matter is discussed in *R. v. Chantrell* (1875) L.R. 10 Q.B. 587, *Walsall Overseers v. London and North Western Ry.* (1878) 4 App.Cas. 40, and *R. v. Nat Bell Liquors, Ltd.* [1922] 2 A.C. 128.

## THE STIPENDIARY MAGISTRATES

Our concern thus far has been with the lay justices, and it is unnecessary to say much about the rise and growth of the salaried magistrates, who, sitting alone, today have the same jurisdiction as their unpaid brethren sitting in benches of not less than two and not more than five. In the eighteenth century the county justices were, as we have seen, far from impeccable; but London bred a group of magistrates who became an open scandal. These "trading justices" lived by fees, extortions and (there can be little doubt) bribes. Henry Fielding recorded that they could make as much as £1,000 a year—a handsome income in the eighteenth century—out of their peculations, which he called "the dirtiest money on earth." When Fielding himself was appointed to Bow Street through the influence of friends, in order to rescue him from financial distress, the intention was that he should line his pockets in the same way; and it is greatly to his credit that, poor and ill though he was, he steadfastly refused to pick wealth out of the gutter. One of the favourite tricks of the trading justices was to issue warrants indiscriminately against vagrants and prostitutes and then to release them all on bail at a fee of 2s. 4d. each; and a Bow Street Runner, giving evidence before a Parliamentary Committee in 1816, testified that in the good old days a magistrate, by "taking up 100 girls" a night, could wax fat and flourish. This infamy became notorious, and we have noticed that in 1792 the first "police offices" were established in the metropolis, with paid magistrates

and staff. Many of the justices appointed under these provisions were still conspicuously unqualified for their office, and it remained for later legislation, which I need not discuss, in the nineteenth century to limit the selection to barristers of seven years' standing and to extend the network of courts proportionately to the expansion of the metropolitan area. At present there are 13 such courts, staffed by 27 magistrates, within the ambit of London and Greater London, and in addition there are six special juvenile courts. (Within the City itself—that holy ground—the Mayor and Aldermen are magistrates, though unpaid, by ancient charter.) By the Stipendiary Magistrates Act, 1863, and the Municipal Corporations Act, 1882, boroughs and urban districts with a population of 25,000 persons might apply for the appointment of a stipendiary magistrate, or of more than one, to sit instead of, or in addition to, the lay justices. The matter is now governed by the Justices of the Peace Act, 1949, under which a borough with a separate commission of the peace, or a county exclusive of boroughs, or "joint districts" comprising several such areas, may petition for the appointment of one or more stipendiary magistrates, but only after consultation between the council and the Magistrates' Courts Committee for the area. A barrister or solicitor of seven years' standing is eligible. A certain number of the large cities have their stipendiaries, but it is remarkable how few of the localities which are entitled to apply for them have in fact done so. There are at present only 15 stipendiary magistrates in the whole country, outside London. This seems to indicate that

the lay justices on the whole command the confidence of the public; and there are those who view with some distrust the committal of issues of combined fact and law to a single magistrate, however well qualified. (I do not myself think that there is any sufficient ground for this apprehension, though the danger is not fanciful.) Formerly, stipendiary magistrates were appointed on the recommendation of the Home Secretary, but now, by the Justices of the Peace Act, 1949, on that of the Lord Chancellor. Like their lay brethren they hold office during the royal pleasure.

## *THE SUCCESSORS*

### A NEW ERA

WE pass to the nineteenth century, and now great changes are impending in the office of Justice of the Peace. England was now on the verge of changing its whole economy and of quadrupling its population in the process. The rustic rule of the Westerns and Allworthys is soon to become manifestly unsuitable to this transformed society. It early comes under fire. In 1828 Lord Brougham made a famous speech in which he brought all the shafts of his mordant wit upon the country justices, especially in their administration of the game laws; and at that date the London magistrates had not yet redeemed their unsavoury reputation for ill-gotten gains. The justices, in these rapidly shifting conditions, could not indefinitely retain their dual capacity of judges and governors.

The wonder is that they discharged it as well as they did and held it as long as they did. The first abridgment of it was urgent and manifest, and has already been mentioned—the creation of the town councils in 1835 and the separation of the borough justices from the city fathers. In the counties, however, the justices continued to exercise large administrative powers for upwards of another fifty years. The control of the Poor Law, which they had acquired early in the seventeenth century, was almost entirely removed from them in 1834; but if we take a glance at quarter sessions in, say, 1885, we find them still supervising highways and bridges, rates, the county police force, weights and measures, licensing, the visiting (though not now, as formerly, the administration) of prisons and lunatic asylums, the slaughter of cattle, and many other miscellaneous duties, which include the division of the county into petty sessional districts, coroners' districts and polling districts. A list of minor functions would fill, but not enliven, many pages. The curious may find them in any standard work on the history of local government, and will wonder, I suspect, how comparatively small bodies of justices managed to perform their duties with any approach to efficiency.

After a succession of minor reforms, which again belong to the history of local government, the great change came in 1888, when, as most people know, by the great enactment of that year, England laid the foundations of her modern system of local government—the foundations only, for the building went on, and still goes on, by stages and storeys which are not our

present concern. By this Act the justices lost to the councils, at one stroke, all their financial powers with regard to rates, borrowing and accounts; the management of county property; control of institutions for pauper lunatics and reformatory and industrial schools; maintenance of bridges, highways and rivers; appointments and salaries of many county officers; the county police; weights and measures; contagious diseases of animals; the division of counties into polling districts; and many other kindred matters and powers. Those which I have mentioned are given only in very summary form and need qualifications (arising out of a long course of legislation) in many particulars; but I shall not be guilty of too rash a generalisation if I say that in 1888 the justices of quarter sessions lost all the major administrative functions which they had discharged for so many centuries.

Thus a chapter closed, and there is little more to say of the future of the justices as executive officers. Their administrative duties today, chiefly "out of court," are limited and need not claim our special attention. The modern magistrate who signs one of the many forms of certificates and declarations which are brought to him hardly feels himself, like the squires and borough justices of yore, to be a ruler of the realm.

#### PETTY SESSIONS

Let us now turn from Quarter to Petty Sessions. We have seen that they grew out of the statutory powers conferred by a host of enactments on single justices,

or small teams of them, sitting "out of sessions," and that these occasions tended to become more frequently periodical for the despatch of various kinds of recurrent business. They were not, however, given statutory recognition as regular courts of justice until 1849, by the Petty Sessions Act of that year. Thereafter a number of Acts, the details of which may be found in any of the standard manuals, regulated the division of counties into petty sessional areas under a clearly defined procedure by which formerly quarter sessions had been the determining authority. It is needless to say that these provisions were made necessary by the growth and redistribution of population, and under these powers the courts of summary jurisdiction multiplied rapidly throughout the country. By the 'eighties there were more than 700 of them. At this moment of writing there are 898—746 in the counties, 65 in county boroughs, and 87 in boroughs with separate commissions of the peace. These figures, however, must be considered as transitional only, in view of the Justices of the Peace Act, 1949. By that statute the management of certain affairs of each county and borough has been entrusted to new corporate bodies called Magistrates' Courts Committees. They are concerned chiefly, in conjunction with the local authorities, with the finance of the administration of summary justice, but one of the duties committed to them (under the approval of the Secretary of State), is the revision of petty sessional divisions. In the course of time, as might be expected, the geographical distribution has become uneven and in some respects unrealistic. This work of revision is

not yet complete, but when it is done it will be surprising if between 700 and 800 divisions do not survive.

#### SUMMARY JURISDICTION ACTS

“Summary Jurisdiction,” then, has become in the nineteenth century, with apologies to the shade of Blackstone, a nation-wide, integral part of our whole judicial system, and its firm establishment is witnessed by a series of Summary Jurisdiction Acts, chiefly affecting procedure. Of these I will mention only two of the most important, for they are indeed landmarks. The first is that which is commonly named after its only begetter, Chief Justice Jervis—the Summary Jurisdiction Act, 1848. It provided a code of procedure which, with subsequent amendments, served the courts well for more than a century. It regulated the issue of process, the attendance of witnesses, summonses, warrants, complaints, informations and orders, the form, place and procedure of the hearing (including the nature of the evidence), adjournments, remands, costs, distress, fees, records and returns, and many other matters; in short, for the informalities of the old methods “out of sessions” it substituted as solid a basis of “hearing and determining” as the superior criminal courts had worked out for themselves in the course of centuries. Such gaps and ambiguities as it left were corrected by later statutes, which, being mainly procedural, do not call for comment. It did not include, however, any special provisions for appeals to the High Court on points of law, and this necessary supplement was supplied by

the Summary Jurisdiction Act of 1857. Another stage is marked by the Act, of the same title, of 1879. It has already been noticed (*ante*, p. 62) that this Act changed the whole character of the procedure for taking sureties of the peace; it also dealt with such important matters as the power to impose fines instead of imprisonment when the statute was silent about monetary penalties (with provisions, of humane tendency, about conditions of payment), offences by juveniles, distress, appeals to quarter sessions and to the High Court, civil debts, bail, recognisances, local venue of jurisdiction, the register of the court, and a pregnant provision that when any accused person was liable, on a summary offence, to imprisonment for more than three months, he could claim as of right trial by jury. The other Summary Jurisdiction Acts of the nineteenth century, those of 1881 and 1899, are short statutes, the former concerned with process and the latter providing that on a charge of false pretences the exact legal meaning of that term must be explained to the accused. From 1879 onwards we can observe the growth of a more solicitous and less threatening tone towards the minor offender, and this was to develop apace in the next century.

Amid these various Acts, and others which followed them, there was a good deal of overlapping and not a little uncertainty on many points of interpretation. A consolidating and clarifying Act was long desired, and this has now come in the Magistrates' Courts Act, 1952. This giant among many other stalwarts of our age repeals, amends or re-enacts no less than 65 predecessors, dating from 1697 to 1950. To

examine all its contents would take me far afield and would not greatly illuminate my theme, since most of its provisions, though of great practical importance, are concerned with procedure rather than substance. The Acts of 1848 and 1879, save for a few sections, are repealed and re-enacted with amendments and with "resolution of doubts."

### PRELIMINARY EXAMINATION

A most timely reform was effected by the Indictable Offences Act of 1848. We have seen how peremptory, before this date, was the preliminary examination of persons accused of indictable offences. Now a procedure was instituted which was essentially judicial and no longer inquisitorial only. The justices were from henceforth required to take down in writing, in the presence of the accused, the sworn testimony of the witnesses for the prosecution, whom the accused was permitted to question, and whose attendance both at the preliminary examination and at the trial (if the accused was committed) the magistrates were empowered to enforce. The depositions must be read over to the witnesses, and signed by them as well as by the examining justice or justices; and on this evidence the court decided whether there was a case to answer and if so to commit the accused, with or without bail, for trial at quarter sessions or assizes; and if not satisfied that there was a *prima facie* case, there and then to discharge him. This was a great advance, for it placed the examination upon a fair and systematic basis; it at least allowed the prisoner

to know the case against him, and if he were committed for trial it supplied the higher court with a useful summary of the case for the prosecution. It did not yet give the accused the right, which no accused person possessed at this date, to give evidence on his own behalf. This was at last accorded to him, together with the right to call witnesses, by the Criminal Justice Act of 1925, a statute which supplemented and enlarged the Act of 1848 in many particulars, and none too soon. It is on the foundation of these enactments, with a few others containing minor amendments, that justices of the peace inquire into the circumstances of every crime, whether they themselves have power to deal with it or not, and, save for special leave of a High Court judge, or on a coroner's warrant for homicide, no person charged with an indictable offence goes to trial before a jury unless it has first been decided whether there is at least evidence whether a jury *can* (not necessarily *will*) reasonably convict him. This is a duty which may be discharged by a single magistrate, though it is generally undertaken by several. The task of taking depositions, word for word, in cases which involve many witnesses, is a very heavy tax on the time and patience of magistrates.

#### NEW TENDENCIES

At the end of the nineteenth century we find that to the innumerable old statutory offences of summary jurisdiction (a large number of which, however, had become obsolete) many others had been added by

Victorian legislation. A whole series of statutes, severe in tone, were concerned with the stealing or killing of game and of dogs, and with certain injuries to property, fences, trees, vegetables and telegraphs, together with a limited jurisdiction over receivers of certain kinds of stolen chattels. It is very characteristic of the "Forsyte" era that the chief emphasis was laid on protection of property; but the mammoth Offences against the Person Act of 1861 gave the justices jurisdiction for assaults, both "common" and upon children and women, with fairly severe penalties. Perhaps more significant, however, are the beginnings of extension of jurisdiction to indictable offences. This was cautious at first, and limited itself chiefly to what we nowadays adorn with the title of "juvenile delinquency"—*Anglice*, crimes by children and young persons. It is to be remembered that at this period a child over the age of seven years who committed any indictable offence—the commonest of all being larceny in its many different forms—generally had to stand trial before the full panoply of the law at quarter sessions or assizes. The Summary Jurisdiction Act, 1879, provided that when a child under the age of 12 was charged with any indictable offence other than homicide, the justices might, with the consent of the parent or guardian, deal with the case summarily and impose penalties limited to one month's imprisonment, a fine of forty shillings, and six strokes of the birch. The Act applied the same principle to certain offences of larceny, embezzlement and receiving committed by young persons between the ages of 12 and 16, but

with this important difference, that the accused must consent to summary trial. In this category the penalties were imprisonment for not more than three months, a fine of £10, and twelve strokes with the birch for a male child under the age of 14. When the same type of offence was committed by a person over the age of 16, and the property did not exceed forty shillings in value, the justices again could deal with it summarily (but only with the consent of the accused), and inflict penalties of three months' imprisonment or a fine of £20; or, if the offence seemed trifling, dismiss it with an order to pay damages and costs, or bind over. In all these cases, if imprisonment was imposed without the option of a fine, there was an appeal to quarter sessions. These do not seem to be very startling extensions of magisterial jurisdiction, but in reality they were of great significance for the future, for in them we may discern the seeds of three great developments of the next era—namely, juvenile jurisdiction, probation, and the extension of summary to indictable jurisdiction which has in our own day amounted to a revolution in our whole system of criminal justice. Of these we shall have more to say.

Nearly at the end of the century came another measure which deserves special notice. As most people know, divorce (except by extremely cumbrous and expensive methods), and matrimonial remedies in general, came comparatively late in the century, and were uncommon until the Matrimonial Causes Act, 1857. Wives who had been deserted by their husbands, and who could not afford to seek any remedy

in the higher courts, were often left in pitiable state. Two Acts, of 1878 and 1886, had provided for the award of maintenance, under certain conditions, in such cases. In 1895 came the Summary Jurisdiction (Married Women) Act, which empowered the justices, when the wife could prove desertion, aggravated assault, persistent cruelty or wilful neglect, to make a non-cohabitation order (equivalent to a judicial separation), and award maintenance, costs and custody of children. The Act is still the foundation of the modern matrimonial jurisdiction of the Justices of the Peace, which was soon to develop amain. One other statute at the end of the century effected a long-delayed reform—the Criminal Evidence Act, 1898. Although it had no special application to summary jurisdiction, it affected all criminal procedure, since, for the first time in our history, it allowed an accused person, at his option, to give evidence in his own defence.

#### THE TWENTIETH CENTURY

It will be seen that by 1900 the nature of summary jurisdiction had greatly changed and seemed ripe for even larger transformations in the new era. The justices had ceased, for all considerable purposes, to be ministerial officers but were acquiring more and more judicial responsibilities. I propose now to survey very rapidly those new elements which seem to me to be the milestones along the road which they have trodden—I will not say plodded—within the last half-century.

During that time there has been a vast body of legislation, which has added formidably to the duties of the justices, on such subjects as licensing, road traffic, weights and measures, education, bastardy, public health, factories, food and drugs, national health, price control and other economic regulation. These I must pass by and confine myself to those developments which seem to me to have affected in substance, rather than in detail, the character and extent of summary jurisdiction. These changes may be summarised under the following heads:—

*Qualifications of Justices.* As already mentioned, the Justices of the Peace Act, 1906, abolished the property qualification and the Sex Disqualification (Removal) Act, 1919, made women eligible for appointment. There are now some 4,000 female magistrates in the land, and I think, or hope, that after 34 years of experience the masculine sex has learned to abandon its favourite complacent assumption that women are not “logical” and “have not legal minds.” All such generalisations about the sexes are dangerous, and in fact and in experience it seems to be equally true of both sexes that some have the “judicial approach” and some have not, and that of those who do not possess it naturally some can learn it and some never will! It is a question of mind and temperament, not of sex. The Justices of the Peace Act, 1949, imposed certain age limits for active magistrates (75 for ordinary sessions and 65 for members of juvenile courts, with possible but rare exceptions), and regulated qualifications concerning residence and certain occupations and offices.

*Jurisdiction and Procedure.* The Criminal Justice Administration Act, 1914, extended in some respects (principally monetary penalties) the powers conferred by the Summary Jurisdiction Acts of 1879 and 1899 and made new provisions with regard to bail and remands; but it is more relevant to the treatment of offenders, which we shall consider in its place. From a jurisdictional point of view, a far more important statute is the Criminal Justice Act, 1925—indeed, it is one of the most important ever passed in its effect on summary justice. We have seen how, in the latter part of the nineteenth century, a tendency was developing, though hesitatingly, to give the magistrates jurisdiction over a limited number of indictable offences. Now, by this Act, the doors were flung wide open and a large number of offences which previously were triable only before judge and jury were brought within the province of the justices. The accused, of course, always has the right to elect trial by jury, but in the great majority of cases prefers to be tried by a court with powers of punishment limited to fine, usually of maximum £100, or to six months' imprisonment (or both); and on the other hand, it is at the discretion of the justices whether they will give the accused the option of summary trial or will proceed as on indictment—*i.e.*, take depositions and commit for trial if there is a *prima facie* case. This enactment may be regarded as the culmination of the process which we have seen long at work—the shift from administrative to judicial duties; and its remarkable result at the present day is that more than 95 per cent. of the total number of criminal

offences committed in the country are heard and determined by lay justices of the peace. A strangely miscellaneous category of offences—including, however, the more heinous felonies and misdemeanours—is automatically reserved for trial by jury, and one of them, housebreaking, has now unhappily become such a commonplace, especially among youths over 17 years of age, that justices are constantly engaged in taking depositions in housebreaking charges with which they could conveniently deal themselves.

The Criminal Justice Act, 1948, made a number of important changes, but most of them, such as the abolition of penal servitude and the introduction of corrective training and preventive detention, lie beyond the powers of petty sessions, except that magistrates are now forbidden to impose corporal punishment on juveniles or to send any person under the age of 21 to prison (which, in any case, in modern times they have been most reluctant to do) unless no other course seems appropriate or practicable. Justices, however, were given by this Act certain new powers which are now in frequent use; among them I need mention only the new forms of absolute and conditional discharge (available even when the defendant has pleaded or has been found guilty), bench reception orders for defendants of unsound mind, and the power to order finger-prints to be taken in certain cases. There are regulations concerning appeals to quarter sessions and the High Court, and for bail pending appeal; and a new power has been conferred which is proving valuable in practice—namely, that when an indictable offence is tried summarily, and

upon conviction the accused's antecedents seem to call for heavier punishment than petty sessions can impose, he may be committed to quarter sessions for sentence only. The only objection to this expedient is that it encourages some courts to try summarily offences which ought properly to be treated as indictable from the beginning.

The Justices of the Peace Act, 1949, while it contains many provisions concerning qualifications and procedure, is chiefly noteworthy for its administrative and financial aspects. It has placed control in these departments in the hands of elected and incorporated Magistrates' Courts Committees. The complex provisions need not be discussed, for they have little jurisdictional import, and even on the administrative side it remains to be seen whether they will prove very fruitful. I have already referred to the provisions of this Act for the redistribution (at present incomplete) of petty sessional divisions. One anachronism has been abolished—the inconvenient ancient rule that the mayor of a borough (who, however, still remains the titular Chief Magistrate) was *ex officio* chairman of the bench. The chairman is now elected annually by his colleagues by secret ballot.

Finally comes the consolidating statute, the Magistrates' Courts Act, 1952, to which allusion has been made. It revises, amends and reshapes the various overlapping Summary Jurisdiction Acts, but as it is mainly procedural and extensively detailed, it needs no examination here.

*Treatment of Offenders.* Throughout modern legislation there is a growing spirit of what is called in America "individualisation of punishment"—the attempt to rescue the offender from lawlessness rather than merely to chastise him for it, to help him overcome his own weaknesses and to give him reasonable opportunity of expiating his sins. This is the eternal dilemma of criminal jurisdiction—the salvation of the offender as against the protection of society, and there are those today who think that we have passed too precipitately from the temper of vengeance to the mood of compassion; but this perennial controversy is not for discussion here.

One of the first of the "humane" statutes was the Probation of Offenders Act, 1907; it was supplemented, particularly in respect of probation and Borstal detention (now "training") by the Criminal Justice Administration Act, 1914; and it has now been repealed and re-enacted, with large additions, by the Criminal Justice Act, 1948. Probation is now an indispensable and far-reaching institution of our community, with an elaborate machinery which has rapidly grown in recent years; but it lies in the field of social service rather than of law. There is not a court in the land which does not nowadays employ it constantly, especially for the young and for first offenders, and it has undoubtedly saved many a potential recruit from lifelong servitude in the army of crime.

Another merciful tendency has been developed in respect of monetary penalties. The beginnings of this policy we saw in the Summary Jurisdiction Act, 1879.

It was developed by the Criminal Justice Administration Act, 1914, and now the Magistrates' Courts Act, 1952 (repealing and re-enacting the Money Payments (Justices' Procedure) Act, 1935), provides that no defaulter who has been given time to pay a fine shall be sent to prison without a preliminary inquiry into his means; and only for a special reason, which the court is bound to place on record, can imprisonment be included in his sentence, as the alternative to non-payment, when judgment is passed upon him in the first instance.

*Children and Young Persons.* We saw that late in the nineteenth century summary jurisdiction began to stretch out in the direction of juvenile offences, to save the young from all the publicity and shock of jury trial. In our own day this solicitude for citizens in the making has grown hugely in a whole series of statutes. The Children Act, 1908, was followed by others in 1910, 1913, 1930 and 1932, all aimed at saving youth from the many pitfalls which beset its path, and seeking sympathetic means of rescue if nevertheless it fell by the way. In 1933 came the capital statute, the Children and Young Persons Act (now largely revised and extended by Acts of 1938 and 1948) which, among many other provisions, established the juvenile courts. This amounted to the creation of a whole new branch of jurisdiction which imposes anxious and arduous duties on magistrates. Its ramifications are many and its apparatus now elaborate. It is a painful paradox of our age that with all these manifold precautions which Parliament has taken to teach the young idea to shoot, a

perturbing proportion of it now shoots (and sometimes literally) towards crime which is often of a startling gravity.

The year 1925 (prolific in legislation) saw the passing of the Guardianship of Infants Act. It expanded and incorporated the Act, similarly named, of 1886 and established a concurrent jurisdiction of the High Court and of petty sessions for the custody and maintenance of children in various circumstances of difficulty, and not necessarily in connection with any matrimonial proceedings which might be instituted between the parents. By the combined effect of this Act and section 16 of the Administration of Justice Act, 1928, application may be made to the court by either the mother or the father of a child whose custody and upbringing are in dispute. The governing principle, as all magistrates know, is the welfare of the child—a matter often difficult to determine as against contending parental claims. It is only in rare circumstances that summary jurisdiction in this domain extends to infants over the age of 16. When custody is awarded to the mother, the court has power, which it is constantly called upon to exercise, to make an order for the maintenance, within certain limits, of the child by the father.

A year after the passing of this Act, England, having in this respect remained in splendid isolation from most other civilised countries, for the first time in its history conferred legal status on the adoptive parent and child. This new jurisdiction under the Adoption of Children Act, 1926 (supplemented by an Act of 1939 and now replaced by the Adoption Act,

1950) has fallen to juvenile courts, and has added considerably to their adjudication. This again is a jurisdiction which is concurrent with that of the High Court, and also of county courts.

*Domestic and Matrimonial Proceedings.* We saw that at the end of the nineteenth century Parliament, by an Act of 1895, came to the rescue of wives wilfully left destitute by their husbands. The twentieth century has seen an enormous extension of summary jurisdiction in the law of husband and wife, now such an acute problem of our society. The landmarks are the Licensing Act, 1902 (with regard to habitual drunkenness), the Married Women (Maintenance) Act, 1920, the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the Summary Procedure (Domestic Proceedings) Act, 1937, and the much-debated Matrimonial Causes Act, 1937 (now replaced by the Matrimonial Causes Act, 1950) which, as everybody knows, made sweeping changes in "matrimonial offences" and the grounds of divorce. This is a vast subject and all I need say of it now is that it has conferred on magistrates, either in ordinary petty sessions or in special domestic proceedings courts, extensive powers in this intricate branch of the law—indeed, practically all the powers which are possessed by the High Court itself, short of actual dissolution of marriage. In not a few respects this jurisdiction is again concurrent with that of the High Court, and the overlapping at some points is awkward and perplexing. Of all the legislation of the twentieth century, none, except perhaps the Criminal Justice

Act, 1925, and the Children and Young Persons Act, 1933, has so conspicuously added to the tasks of the keepers of the peace.

### THE "GREAT UNPAID"

We may conclude, then, that if the Justices of the Peace have lost the far-reaching administrative and governmental duties which once they exercised, the balance has been more than amply redressed by the constant enlargement of their judicial powers, especially within our own times. The result is that today some 16,000 citizens (a quarter of them women),<sup>1</sup> the vast majority of them without any legal knowledge or training, administer the greater part of criminal jurisdiction and a small, but not unimportant, part of civil jurisdiction. This is, calmly considered, an astonishing spectacle in a country which is jealous of the integrity of its justice, and it is the wonder of all foreigners, for nothing like it exists in any other part of the world. Even from an economic point of view, it is something of a marvel, for if (as some advocate) all the work of the unpaid "amateurs" were done by salaried professionals, the cost to the country would be enormous; nor is it easy to see how enough professionals could be found for the task. Not the least advantage of the system is

<sup>1</sup> This number refers only to "active" justices, and excludes both those who are upon the commission *ex officio* (such as Recorders and County Court Judges), but rarely sit in petty sessions, and those who, having reached the age limit or, being subject to some physical disability, are placed upon the Supplemental List, with power to exercise certain ministerial functions but not to adjudicate.

that it entrusts a considerable section of the community, which in one way and another has proved itself worthy of responsibility, with a direct share and interest in social discipline; and, even more than the jury system, it gives the general body of citizens confidence in the justice of their fellow-lieges. Nothing is more striking in magistrates' courts than the respect which the ordinary person instinctively extends to a tribunal not of scarlet judges, not of eminent personages, not of high dignitaries, but of unremarkable men and women frequently not very different from the delinquent himself. Clearly it is the office, and not necessarily the individual, to which common opinion defers, and this attitude lends immense strength to the British conception of justice according to law. "The king," wrote Coke, "considereth that a great part of the wealth and prosperity of the land standeth in that, that his subjects may live in surety under his peace in their bodies and goods." It is for that suretyship of the peace, which we have seen in many diverse forms throughout our history, that the citizen-magistrates stand today.

#### DOES IT WORK?

To cold, detached calculation—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. Does it in fact work, and, what is more important, does it

work well? It is certainly not above, nor does it escape, vigorous criticism. Mistakes both of law and of discretion are made often enough, and press and public are not slow to castigate them—often, however, without any adequate knowledge of the real facts or of the governing considerations. Decisions of petty sessional courts are frequently reversed by the High Court, not always in the gentlest terms, and magistrates, though humbly subject to superior jurisdiction, are sometimes left wondering whether learned judges always fully understand the difficulties which arise in the day-to-day work of the humbler ministers of the law. When we take into account the vast number of decisions rendered every day by these courts, the proportion of palpable errors which demand correction is infinitesimal; and again, though appeals on law, fact and sentence are easily available and not unreasonably expensive, the number of them is a minute fraction of the total determinations. It is a common error to suppose that the judicial work of petty sessions is a matter of mere routine, limited to trivial offences and involving no legal niceties. It is true that the greater part of the work is straightforward, though even an apparently insignificant offence may be of great importance to the defendant and always demands, or should demand, careful consideration of individual circumstances. It is also true, however, that points of law and interpretation, often uncertain and not governed by authority, constantly arise and may, indeed, emerge in the most unexpected circumstances; and these questions generally have to be decided *ex tempore*, with little

or none of the full, skilled argument and citation which are the daily working tools of the higher courts. The wonder is not that justices sometimes go wrong in these matters, but that they do so, in proportion to the extent and variety of their jurisdiction, so seldom. For this I think great credit is due to the large body of clerks and their assistants throughout the country who serve the justices as their legal advisers. These officers do not occupy a spectacular position in the legal profession and are little known to the public, but in order to discharge their functions satisfactorily in the conditions of today, they must attain a high standard of efficiency, with a wide and ready knowledge not only of procedure but of common and statute law. Many a bench has as much cause for gratitude as Squire Western owed to his clerk for being saved from errors which are very easy to commit in the intricacies of summary practice and which might incur sharp rebuke from superior courts.

#### LOADS AND STACKS

If Justices of the Peace erred even more often and more grievously than they do, some responsibility for their sins should rest upon a legislature which has mercilessly added to their duties. If I have told the story fairly, the reader will agree that magistrates today have just as much cause to complain of "not loads, but stacks" of statutes as Lambard had in the sixteenth century. In the larger centres of population the work of the magistrates (vastly increased of recent years by road traffic offences, juvenile crimes

and matrimonial disputes, and by the taking of depositions for the swelling bulk of major criminality) is voluminous and exacting; courts in large towns are sitting every day, in smaller ones two or three times a week, often for long hours and with two or more courts in session simultaneously. While there is a constant cry for younger magistrates and there are stricter age limits than formerly, yet it is difficult to find qualified men and women in early or middle life who can spare time from their own pressing affairs (and this applies not least nowadays to housewives) for judicial duties. In my humble judgment, a limit has now been reached, and it is greatly to be hoped that if, as time goes on, social legislation grows in volume, duties will not continue to be thrust indiscriminately on petty sessions. Indeed, the time may have come for some curtailment of jurisdiction. If a beginning could be made in that direction, I believe that most magistrates would be thankful to be relieved of their matrimonial jurisdiction. This is a very grave and growing responsibility, and few magistrates feel satisfied with the conditions in which it has to be discharged, especially in the very frequent cases in which spouses, often inarticulate (or else too voluble), smarting under their wrongs and perhaps vindictive in temper, are not represented by advocates. To arrive at the truth of a tangled matrimonial situation in these circumstances, even with the aid of the admirable probation officers or of conciliating justices is a task which leaves few conscientious magistrates with the sense that justice has been fully done between parties whose lives, not to mention those of their

children, will be deeply affected by their decision. Were it within the bounds of possibility one could wish to see this jurisdiction assigned exclusively to tribunals manned by whole-time specialists, with more time than the existing domestic proceeding courts can generally command and with greater latitude than the present rules of evidence and procedure allow; but in a country with 30,000 divorces a year and an infinitely larger number of summary matrimonial determinations, that is doubtless a wish, whether it be pious or impious, which has little prospect of fulfilment.

#### PEACE AND QUIET

We have reached the end of a long road, on which our journey has necessarily been hurried, so that we have been able to glance at only a little of the surrounding countryside and only a few of the "objects of interest." The peace of Our Sovereign Lady the Queen began as a royal privilege and is still symbolised in the person of the monarch; but in the course of ages the Queen's Peace has become the People's Peace, the sinews of a healthy social life. It has not always been well maintained, and today it has many enemies and not enough protectors; but each of us is a trustee of that "peace-and-quiet" which is all men's desire and no small part of our national future depends on how we discharge our trust. *Pax nobiscum.*



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