# THE ADMINISTRATION OF JUSTICE IN CRIMINAL MATTERS

## INTRODUCTORY

CRIMINAL Justice is that part of our law which appeals most strongly to the popular imagination, which most nearly touches and concerns the average citizen, or "man in the street," since he sees it in operation in the presence of the policeman directing the traffic, or "running in" a drunk and disorderly person, arresting a notorious criminal, or assisting to keep order at a public meeting, armed with all the vague terrors of the law. Yet the blue-uniformed police officer is only the outward and visible sign of an inward and real power, the "Rule of Law," the whole force of the State at the back of the policeman, by which public law and order are maintained. Sir Robert Peel, who reorganised the police force, is reported to have said: "Behind the uplifted hand of one of my policemen stands the power of the British nation." Again, the average citizen reads in his daily newspaper full reports (too full sometimes) of police-court proceedings, of trials in the higher courts, or it may be the occasional carrying into execution of the last dread sentence of the law. Or he may himself be called upon to play his part as a citizen in the administration of this system; he may be summoned to serve as a juror at a Coroner's Inquest, at Sessions, Assizes or Central Criminal Court; or he may even be called upon, in an emergency, to assist a police officer in the execution of his duty, if, happily, he escapes the necessity of appearing in court in the rôle of a prosecutor. This is part of the price which he pays for the security of his life and limb, the protection of his property, and the enjoyment of all his rights as a citizen of a well-governed community.

A great master of our criminal law, the late Mr Justice Stephen, describes it as "an important part of our institutions, of which surely none can have a greater moral significance, or be more closely connected with broad principles of morality and politics, than those by which men rightfully, deliberately, and in cold blood, kill, enslave and otherwise torment their fellow-creatures" (*General View of the Criminal Law*, Pref. p. vi). A subject of such far-reaching importance, which affects the lives, the liberties, and the property of every member of the community, both male and female, adult and juvenile, ought to be of interest to all thoughtful citizens and not merely to lawyers and magistrates.

Historically, with the exception of the law relating to land, criminal law is the oldest part of our law; and this will be easily understood when it is remembered that the King at an early period undertook the preservation of the peace, known at first as the King's Peace, since the killing of a man meant the loss to him of a possible soldier and taxpayer. Accordingly the King at first regulated, and finally suppressed, the right of private vengeance, satisfying the injured party by the punishment of the offender. Thus, from acts of personal violence, the jurisdiction of the King was gradually extended to all other offences, on the assumption (which still lies at the root of the legal conception of every crime) that the State itself is thereby primarily injured. Although an individual may also suffer injury or loss, it is the State which punishes the offender for the sake of example and as a deterrent to others.

Those who wish to make a more intimate acquaintance with the details of criminal law, the nature and classes of the different offences known to it, and the rationale of the whole system, cannot do better than read Prof. Kenny's excellent *Outlines of Criminal Law*, a work designed for the general reader as well as the professional student, and characterised both by exact knowledge and broad philosophical and historical treatment. We are concerned here only with the working of the system.

The organs of the body politic, which we call the State, by means of which it administers justice, are the Courts of Law. These are presided over by judges of various degrees. In the higher courts the judges are assisted by juries, a characteristically

English institution, for the purpose of ascertaining and determining facts; but in the inferior courts, which deal with cases of less importance, the judges decide both the facts and the law. This distinction between law and fact, between the province of the judge and that of the jury, is a very strongly marked one; it runs throughout the whole of our system of judicature, and should never be forgotten. There can be but little doubt that the practice of calling in laymen to assist in the administration of justice has had a powerful influence upon both the judges and the jurors, and has contributed not a little to the growth of the system. The judges (except the unpaid Justices of the Peace) are trained lawyers of great experience, and to them belongs the determination of all points of law that may arise in the course of a trial. The jurors are ordinary citizens. The function of the jury is, under the guidance of the judge, to determine all disputed questions of fact, to which the judge then applies the law; yet it is well known that in the past jurors have had, and still have, considerable effect in restraining the judges, especially in criminal cases, where the political sympathies of the jurors have been with the prisoner, or where they detect, or think they detect, any unfairness towards him, either in the state of the law or in the conduct of the prosecution or of the presiding judge. Hence the jury has been belauded as the "Palladium of British Liberties," and many other similar panegyrics have been bestowed upon it. The jury will, however, be more fully considered hereafter.

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There is no need to dwell here on the very practical character of English law. It reflects the English national character. But another matter may be mentioned, viz. the importance which English law attaches to publicity in regard to criminal proceedings. Subject to certain exceptions in the case of courts exercising a peculiar jurisdiction, *e.g.* the Divorce Court, which may hear cases *in camerâ*, where to do otherwise would tend to defeat the ends of justice, it has long been regarded in England as a settled rule that justice should be administered "in open court," especially in criminal cases. But until the recent case of *Scott* v. *Scott* [1913], A.C. 417, there was a singular lack of judicial or other authority to this effect. In this case, however,

the House of Lords affirmed the rule, and it may now be regarded as a cardinal principle of the administration of justice in England, not only in criminal but also in civil matters. Indeed there can be no better security for the proper administration of justice and the purity of national life than the vigilance and criticism of a free and enlightened public press. This freedom of criticism after a trial does not, however, justify comment before or during a trial. Such comment, so far from assisting tends to defeat the ends of justice, and amounts to gross contempt of court; and any editor who indulges in it renders himself liable to severe penalties. "Trial by newspaper," as it has been called, is not desirable in the interests of justice.

Bentham, the greatest of English jurists, declared: "Where there is no publicity there is no justice"; and "Publicity is the very soul of justice."

# PART I. JUSTICES OF THE PEACE AND THEIR WORK

## I. POLICE-COURTS, OR PETTY SESSIONS

Beginning, then, at the lowest rungs of the judicial ladder, and working our way gradually upwards, we find that the Court of Summary Jurisdiction, popularly called the Police-Court, is the first court with which we have to deal. This is the court of which Sir F. Pollock says, it is "in modern times, to many citizens, the only visible and understood symbol of law and justice" (*Exp. of Com. Law*, p. 31).

The judges of police-courts are styled Justices of the Peace. They are, for the most part, unpaid magistrates appointed by the Crown on the advice of the Lord Chancellor, by commission under the Great Seal, to keep the peace within certain districts. They date their origin as Justices from the reign of Edward III, A.D. 1360. Previously to that time they had been styled Conservators or Keepers of the Peace. Speaking of the office of Justice of the Peace, Sir Edward Coke says: "And it is such a form of subordinate government for the tranquillity and quiet of the Realm, as no part of the Christian world hath the like, if

the same be duly executed" (4th *Inst.* cap. xxxi). Shakespeare, in verse, and Addison, in prose, have described the character of the Justice, and few personages are better known to English literature. Roughly speaking, in modern times, Justices of the Peace fall into two classes, (1) County Magistrates, (2) Borough Magistrates.

County Justices are much the older class. When first appointed their chief duties were, as their name implies, "to keep the peace," to prevent assaults, affrays, routs and riots, and to arrest, or issue warrants for the arrest of, offenders of all kinds, and commit them for trial. They were, indeed, at first little more than superior police officers, directing and controlling the parish constables. Lambard's *Eirenarcha, or the Office of the Justices of the Peace*, was first published in 1581. This manual, being "written in a clear and unaffected style," long remained the standard authority on the subject; and Blackstone (*Comm.* 1. c. 9) recommends the study of it. It ran through seven editions before 1610, and with the last three of these editions there was bound up *The Dueties of Constables, Borsholders, Tythingmen, and such other Lowe and Lay Ministers of the Peace*, showing how close was the connection between the Justice and the constable. But Justices have gradually acquired more and more the character of judicial officers, and on the establishment of a general system of police in 1856 they were practically stripped of their character of police officials.

County Justices are appointed by the Crown on the advice of the Lord Chancellor, usually on the recommendation of the Lord Lieutenant of a county; but the Crown is not bound to act upon such recommendation, and it may even appoint in opposition to the wishes of the Lord Lieutenant, though he is *Custos Rotulorum* of the county. Before the passing of the Justices of the Peace Act, 1906, a county Justice was required to have a certain qualification by estate or occupation, but by that Act the qualification by estate was abolished. The Act also provides that a person may be appointed a Justice for a county, although he does not reside in the county, if he resides within seven miles thereof. By the same Act a solicitor, if not otherwise disqualified, may now be appointed a Justice of the

Peace for any county, but it is unlawful for him or for any partner of his to practise directly or indirectly before the Justices for that county or for any borough within that county.

All chairmen of county councils, and of urban and rural district councils, are also *ex-officio* county magistrates. But if a woman happens to be elected to any of these offices, she does not thereby become a Justice.

Borough Justices were first appointed in the reign of Charles I. By the Municipal Corporations Act of 1835 (5 & 6 Wm. IV, c. 76) they were to consist of the Mayor, the Recorder and such other persons as the Crown might appoint by commission.

In all municipal boroughs, even where there is no separate commission of the peace, there are at least two *ex-officio* Justices, viz. the Mayor, for the time being, and the ex-Mayor, for one year. In such a case the Mayor, ex-Mayor, and county Justices have co-ordinate jurisdiction within the borough, but the Mayor takes precedence when acting in relation to the business of the borough, except when the business is "ear-marked" as county business. (See the observations of Farwell, J., in *Lawson* v. *Reynolds* (1904), 1 Ch. 718, hereon.) "The authority of the *county* Justices *includes*, and that of the *borough* Justices is *limited to*, offences committed within the borough," says Mr C. M. Atkinson (*The Magistrate's General Practice*, p. 6).

By section 156 of the Municipal Corporations Act, 1882, the Crown may, on the petition of any borough, grant it a separate commission of the peace on the recommendation of the Home Secretary. But the persons thereby appointed Justices are not authorised to act at the county Quarter Sessions; and if the borough has its own Quarter Sessions, the Recorder is the judge. So that the jurisdiction of borough Justices is strictly limited to the borough and to Petty Sessions. When a municipal borough has a separate commission of the peace, the Mayor takes precedence over all the other borough Justices, and is entitled to take the chair at their meetings. When a municipal borough has a separate court of Quarter Sessions, the Recorder (*q.v. infra*) is *virtute officii* a Justice of the borough, having precedence next after the Mayor.

Borough Justices (other than the Mayor, who is chosen by

the corporation) are appointed by the Crown on the advice of the Lord Chancellor. The Lord Chancellor sometimes adopts the recommendation of the town council, or other bodies; but frequently he acts quite independently of them, or even contrary to their wishes. Borough Justices need not be burgesses, but they must, while acting, reside in or within seven miles of the borough, or have an occupation qualification within the borough.

As regards the mode of their appointment, Justices of the Peace fall into several classes:

1. Those appointed by being named in the schedule to the special commission of the peace for the county, riding, division, borough or liberty for which they act. This is the ordinary mode of appointment.

2. Those who *virtute officii* are always included in such commission, viz. the Lord Chancellor, the Lord President and all the members of the Privy Council, all the Judges of the Supreme Court, and the Attorney- and the Solicitor-General. These are national Justices of the Peace; and their jurisdiction extends to the whole country, as opposed to the first class, whose jurisdiction is local, and is confined to the county, borough, etc., for which they are appointed.

3. Those who acquire the status or position of Justices of the Peace by various statutes, viz. county court Judges, Recorders of boroughs and stipendiary and metropolitan magistrates.

4. Those who become Justices by reason of holding or having held certain municipal or local government offices, viz. all Mayors of municipal or metropolitan boroughs, all ex-Mayors of municipal boroughs, for one year following their year of office, and all chairmen of county councils and urban and rural district councils. But if a woman happens to be elected to any of these offices (as she may now be) she does not thereby become a Justice of the Peace.

5. Justices by charter, *e.g.* the Lord Mayor and Aldermen of the City of London.

A few words as to what Prof. Maitland has described as "That most thoroughly English of institutions, the commission of the peace" (*Justice and Police*, p. 79) may not be out of place. From what has been said above it will have been gathered that

each county in England, and every borough which has a bench of magistrates of its own, has a separate commission of the peace. This is a formal document, issued under the Great Seal, which has varied but little in form from the time when it was first instituted, in the fourteenth century. In fact, it was settled in 1590. Its original form in Latin is given in Lambard's *Eirenarcha* (Bk I. chap. VIII). It is delivered into the keeping of the Lord Lieutenant of the county, who is primarily a military officer and as such head of the royal forces in the shire, as the sheriff is the chief executive officer of the shire in legal matters. As such custodian of the commission of the peace, the Lord Lieutenant is *Custos Rotulorum* of the county, and head of the unpaid, county magistracy. Certain older and more experienced justices are signalled out for the honour of being appointed Deputy Lieutenants. As showing their originally military character, they wear on official occasions a military uniform, consisting of a scarlet coat, etc. Whenever the commission is required for the purpose of adding new names to it, it is returned to the Lord Chancellor by the Lord Lieutenant.

In boroughs which have a separate bench the commission is usually entrusted to the Town Clerk. Whenever it is required for the addition of new names it is transmitted to the Lord Chancellor by him.

All Justices of the Peace, both for counties and for boroughs, before acting, must take certain oaths, under penalty of vacating the office or becoming disqualified to enter upon it. These are the oath of allegiance and the judicial oath, the forms of which are settled by the Promissory Oaths Act, 1868, and are as follows:

*The Oath of Allegiance*

"I, *A.B.*, do swear [by Almighty God] that I will be faithful and bear true allegiance to His Majesty King George the Fifth, His heirs and successors according to law [So help me God]."

*The Judicial Oath*

"I, *A.B.*, do swear [by Almighty God] that I will well and truly serve our Sovereign Lord, King George the Fifth, in the office of Justice of the Peace, and I will do right to all manner

of people after the laws and usages of this realm, without fear or favour, affection or ill will [So help me God]."

The terms of these oaths ought always to be present to the minds of Justices when they are discharging the duties of their office[1].

These oaths may be taken in open court at Quarter Sessions or in any division of the High Court. Chairmen of urban and of rural district councils may take them before two Justices of the Peace at Petty Sessions, and, if re-elected, they may continue to act without again taking the oaths. Borough Justices may take these oaths before the Mayor, and they must also, in addition, make the declaration required by the Municipal Corporations Act, 1882.

This declaration reads as follows:

*Declaration by Borough Justices*

"I, *A.B.*, hereby declare that I will faithfully and impartially execute the office of Justice of the Peace for the Borough of ——— according to the best of my judgment and ability."

This declaration may be made before the Mayor or two other members of the council of the borough.

The Mayor of a borough, in order to qualify as a Justice of the Peace, may take the necessary oaths before any two Justices of the borough of which he is Mayor; or if there be no such Justices, then before any two councillors of such borough.

If a borough has not a separate commission of the peace, it is regarded as part of the county in which it is situate, and speaking generally, the county Justices can exercise their powers even in and for boroughs which have separate commissions of the peace. "The borough is but a part of the county which has some additional Justices of its own" (Maitland, *Justice and Police*, p. 96). If, however, a borough is a county in itself, the Justices of the county in which it is situate have no jurisdiction within the borough. In the same way their jurisdiction is excluded if the charter of the borough contains a "non-intromittant clause"; but this applies only to Quarter Sessions boroughs.

[1] N.B. Wherever an oath is required by law an affirmation may now be made in lieu thereof: see 51 & 52 Vict. c. 16.

Although the necessity of qualification by estate or occupation is now abolished, and although the fact of being a solicitor is now no longer a bar, there are still certain disqualifications which prevent persons from being or acting as Justices of the Peace, *e.g.* no person may act as Justice for a county of which he is sheriff; if a Justice of the Peace become a bankrupt he is disqualified in all parts of the United Kingdom unless and until his bankruptcy is annulled, or he obtains his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part; but such disqualification extends only for five years from the date of the discharge, though no such certificate be granted. Moreover, a Justice of the Peace who is reported as having been guilty of a corrupt practice in reference to an election may be removed from the commission.

As regards *ex-officio* Justices, what will disqualify them from holding the office of Mayor or chairman of a district council will also disqualify them as Justices. Finally, the Lord Chancellor has power to remove the name of any Justice from the commission; but it is almost unnecessary to add that such power is exercised only for good cause, in grave cases, and its exercise is justly regarded as a disgrace.

In particular cases Justices may be disqualified from acting by reason of bias or individual interest, *e.g.* where they are shareholders in a company appearing before them. Wherever there is the slightest suspicion of this, it is much better that they should not only not act, but should also retire from the bench. *Nemo debet esse judex in propriâ causâ* is a maxim of the Common Law as well as a rule of common sense.

It is to be hoped that the case of *Mitchell and others, apps.* v. *Croydon Justices, resps.*, reported in *W.N.* May 16th, 1914[1], is unique. In that case certain Justices were sitting as a Borough Licensing Committee (which is not, however, a court of law) and after three cases had been heard by them, one of the sitting Justices came down from the bench and gave evidence, and the licence which was the subject of the case was refused. A case was stated for the opinion of the King's Bench Division as to

[1] See also L.T. Rep. vol. 111, p. 632 (Dec. 12, 1914).