THE COMMON LAW POWER OF THE POLICE TO CONTROL PUBLIC MEETINGS *

1. Introduction

This article is concerned with the common law power of the police to disperse a public meeting which is being lawfully held. There is no direct English authority on the matter, and the leading English textbooks [1] uncritically accept nineteenth century Irish cases which give the police wide discretion to end public meetings where they consider a breach of the peace is likely to occur. Whatever the position may be in Ireland,[2] it is suggested that in England the courts should not allow such a power at all, since the Irish cases were decided under quite different political and social circumstances.

No attempt is made here to deal with situations where a criminal offence has been committed at a public meeting.

2. Arrest for Breach of the Peace [3]

Mention should, however, be made of the power of arrest for breach of the peace.

At common law anyone may arrest for a breach of the peace committed in his presence or reasonably feared by him, provided that the arrest is made with sufficient promptitude.

Precisely what constitutes a breach of the peace is difficult to determine, since "there is a surprising lack of authoritative definition of what one would suppose to be a fundamental concept of the criminal law." [4] Clearly riots, routs, affrays and fights are breaches of the peace. So also is an unlawful assembly. It would also seem that the following are sufficient to justify arrest for disturbing a public meeting: threats of force to the person of another, but not to property; verbal disorderliness where the arrester believes the person to be on the point of committing or actually committing an act of violence—swearing or quarrelling with words is not enough; inflammatory words where there is a danger of violence from third parties. Despite some authority to

* I am grateful to Professor S. A. de Smith for his comments on an earlier draft of this article.

1 Hood Phillips, *Constitutional and Administrative Law* (5th ed. 1973), 438; Wade and Phillips, *Constitutional Law* (8th ed. 1970), 533; Keir and Lawson, *Cases in Constitutional Law* (5th ed. 1967), 193–194; de Smith, *Constitutional and Administrative Law* (1971), 490.

2 Kelly, *Fundamental Rights in the Irish Law and Constitution* (2nd ed. 1967), 145–149. I omit any reference to powers conferred by statute in either the Republic of Ireland or Northern Ireland.

3 Williams, "Arrest for Breach of the Peace" [1954] Crim.L.R. 578.

4 *Ibid.* See also Brownlie, *The Law Relating to Public Order* (1968), 3–6.

the contrary, it is suggested that noise alone directed in a hostile manner should not be a breach of the peace.[5]

It seems clear, however, that a breach of the peace or conduct that may lead to a breach of the peace are not offences at common law,[6] though they may be a constituent of a statutory offence such as using insulting words or behaviour in a public place.[7] Thus a person arrested for a breach of the peace can only be bound over; he cannot be fined or imprisoned unless he refuses to enter into recognisances or is unable to find sureties.[8]

3. UNLAWFUL ASSEMBLY [9]

If a meeting is an unlawful assembly, then the police are under a duty to disperse it.

Unlawful assembly is defined [10] as (1) an assembly of three or more persons; with (2) a common purpose (a) to commit a crime of violence or (b) to achieve some other object, whether lawful or not, in such a way as to cause reasonable men to apprehend a breach of the peace.

The *actus reus* of the offence is thus the assembling of three or more persons in such a manner as to give persons of ordinary firmness in the neighbourhood reasonable grounds to fear a breach of the peace.[11] Factors such as the speeches made, attitude and size of the crowd, the nature of the organisers, or inscriptions on banners are therefore relevant ones for the jury to consider.[12]

The prosecution must also prove the defendant intended to use or abet the use of violence; or to do or abet acts which he knows to be likely to cause a breach of the peace.[13]

In recent years the crime of unlawful assembly along with other

[5] *Ibid.* at 582. In *Wooding* v. *Oxley* (1839) 9 C. & P. 1, it was held that disturbance by noise at a meeting, by cries of "Hear, Hear" and interjections, would not be a breach of the peace.

[6] In Scotland there is a substantive offence of breach of the peace, and it has been receiving an increasingly wide definition in the courts: Gordon, *Criminal Law* (1967), 38–39, 926–930.

[7] Race Relations Act 1965, s. 7.

[8] *Davies* v. *Griffiths* [1937] 2 All E.R. 671. This statement is challenged by Brownlie, *supra* n. 4, at 3, n. 2, who points out that the information concerned in that case did not disclose a breach of the peace, and on the facts alleged in the information the justices only had power to bind the appellants over to keep the peace and perhaps to find sureties.

[9] The best short account is Brownlie, *supra*, n. 4, at 37–46.

[10] Smith and Hogan, *Criminal Law* (3rd ed. 1973), 609, citing Dalton, *Country Justice*, chap. 136, s. 1; Hawkins, 1 P.C. 1, chap. 28, ss. 9, 10; Blackstone, *Commentaries*, iv. 146; Stephen, *Digest*, Art. 90, and 2 H.C.L. 385. See also Halsbury, *Laws of England*, Vol. 10 (3rd ed. 1955), 585. *Cf.* Archbold, *Pleading, Evidence and Practice in Criminal Cases* (38th ed. 1973), para. 3571; Kenny, *Outlines of Criminal Law* (18th ed. 1962), 399, arguing that a decision to commit a future act is enough.

[11] "The essence of the offence is the disturbance, or the probability of the disturbance of, the public peace." Smith and Hogan, *supra*, n. 10, at 610.

[12] Brownlie, *supra*, n. 4, at 40. See also Sachs L.J. in *R.* v. *Caird* (1970) 54 Cr.App.R. 449 (C.A.).

[13] Smith and Hogan, *supra*, n. 10, at 611, citing *R.* v. *Stephens* (1839) 3 St.Tr. (N.S.) 1189, 1234. See also *R.* v. *Clarkson* (1892) 66 L.T. 297.

serious common law crimes has again been invoked by prosecutors after a long period of disuse, pointing to an increasing desire on the part of the Government to severely punish civil disobedience.[14]

4. Lawful Public Meetings: the Irish Cases

Whether a meeting which is not in itself unlawful may be prohibited or dispersed by the police is a more controversial matter.[15]

The earliest Irish case is *Humphries* v. *Connor*.[16] In this case the plaintiff, a Protestant woman, walked through the streets of Swanlinbar, Co. Cavan, wearing an orange lily in her buttonhole. Several persons (presumably Catholics) were provoked by this, and followed her, making "a great noise and disturbance"[17] and threatening her with personal violence. The defendant sub-inspector of constabulary first asked the plaintiff to remove the lily, and when she declined to do so, "then gently and quietly, and *necessarily and unavoidably*,[18] removed said emblem from the plaintiff, doing her no injury; and in so doing, and for the purpose of so doing, *necessarily*[19] committed the said trespass . . . and thereby protected the plaintiff from said threatened personal violence which would otherwise have been inflicted on her, and preserved the public peace which was likely to be, and would otherwise have been broken."[20]

The Court of Queen's Bench[21] held that the defendant's act was a good defence in law where it was necessary for the purpose of preventing a breach of the peace.[22]

[14] Thus in one case thirty-nine people had barricaded themselves inside the Greek Embassy in London in April 1967. See *The Times*, October 4, 1967, p. 3, cols. 1–2; *The Times*, October 5, 1967, p. 3, cols. 3–5. Another case involved a demonstration at a Cambridge hotel by university students in February 1970. See *The Times*, July 3, 1970, p. 4, cols. 6–8; *The Times*, July 4, p. 1, cols. 4–6; *R.* v. *Caird* (1970) 54 Cr.App.R. 449 (C.A.). A third case involved students who demonstrated at the University of London Senate House in October 1970. See *The Times*, July 23, 1970, p. 2, cols. 7–8; on appeal (1970) 114 S.J. 652.

[15] The discussion in the text is confined to political meetings. In a commercial context it has been held that a trader who attracted crowds which blocked the pavements was liable in nuisance: *Lyons, Sons & Co.* v. *Gulliver* [1914] 1 Ch. 631.

[16] (1864) 17 I.C.L.R. 1. The case was decided on the plaintiff's demurrer to a defence of necessity in an action of assault and battery.

[17] *Ibid.* at 2.

[18] Original emphasis.

[19] Original emphasis.

[20] *Ibid.*

[21] O'Brien and Hayes JJ., Fitzgerald J. *dubitante*.

[22] The court did not decide the validity of the second ground argued: that the act was necessary and was done for the purpose of protecting the plaintiff from physical injury. O'Brien J. said that in the present case: "It would be difficult to contend that the defendant would be liable to an action, on the ground that, although such act was for the benefit of the plaintiff, it was done against her will." *Ibid.* at 7. The case is unclear as to whether the fact of wearing the lily, or the plaintiff's intent in wearing it, was relevant. The facts, admitted by demurrer, were that the wearing of the lily was "calculated and tended to provoke animosity between different classes of Her Majesty's subjects." *Ibid.* at 1–2. O'Brien J. did not discuss the plaintiff's intent. Hayes J. appears to find an intent to provoke a breach of the peace. *Ibid.* at 8. Fitzgerald J. found no such intent and would allow the defence of necessity, if

The judgment of Mr. Justice Hayes, regrettably, goes further than this narrow holding. A police officer, he says,[23] " is not only at liberty, but is bound, to see that the peace be preserved, and that he is to do everything that is necessary for that purpose, neither more nor less."

The most convincing judgment is that of Mr. Justice Fitzgerald, concurring *dubitante*. The learned judge points out[24] that the main problem raised by the court's holding is " whether a constable is entitled to interfere with one who is not about to commit a breach of the peace, or to do or join in any illegal act, but who is likely to be made an object of insult or injury by other persons who are about to break the Queen's peace."

The principle of *Humphries* v. *Connor* was applied to public meetings in *O'Kelly* v. *Harvey*,[25] a case arising out of the Land War in the early 1880s. Placards had been put up, by the Land League, announcing a demonstration with the object of persuading tenants not to pay their rent. The local Orange Order had organised a counter-demonstration and sent out notices calling on its members . . . " Assemble in your thousands at Brackenborough on Tuesday, and give Parnell and his associates a warm reception." [26] Informations were sworn by three persons stating that if the Land League meeting were held, the public peace would be broken. The defendant justice of the peace attended the meeting and requested the persons present to disperse. On their refusing to do so, he " laid his hand on the Plaintiff in order to separate and disperse the meeting, using no more violence than was necessary for that purpose. . . ." [27] In an action for assault and battery, the defendant claimed he " believed, and had reasonable and probable grounds for believing that a breach of the peace would occur if said meeting were allowed to be held and continued, and that the public peace and tranquillity could not otherwise be preserved than by separating and dispersing " the meeting.[28]

The only evidence apparently offered by the defendant was (a) the Orange Order placard, and (b) the sworn informations. These are very inadequate grounds indeed for closing down the meeting.[29]

at all, only where clear intent to provoke a breach of the peace is shown. *Ibid.* at 8–9.

[23] *Ibid.* at 7. Similar language is used at 8.

[24] *Ibid.* at 9. *Cf.* O'Brien J. in *R.* v. *Justices of Londonderry* (1891) 28 L.R.Ir. 440, 449.

[25] (1882) 10 L.R.Ir. 285 (Q.B.D.). On appeal (1883) 14 L.R.Ir. 105 (C.A.). This was also a decision on the plaintiff's demurrer to a defence of necessity.

[26] (1882) 10 L.R.Ir. 285, 288.

[27] *Ibid.* at 289. The defendant was equated with a police officer by the court.

[28] *Ibid.* at 288.

[29] Palles C.B. does say that: " If it had been distinctly shown by the pleadings that the only breach of the peace which could reasonably have been anticipated was an attack by the Orange party upon the Land League party, the case might possibly have been different. Upon this I desire not to offer any opinion one way or the other. The defence, however, does not confine the apprehended breach of the peace to such an attack." *Ibid.* at 293. Since the only evidence is that already noted in the text, this is a misleading statement. The fact that

There is no evidence that any Orangemen did meet to attack the Land League meeting as threatened.

The decision in the Exchequer Division rests on the fact "that the conspiracies alleged in these defences were illegal, and that every meeting held to promote them was an unlawful assembly, and might have been dispersed as such."[30]

In the Court of Appeal,[31] the judgment of the Exchequer Division was affirmed, but on a different ground. Chancellor Law, giving the judgment of the court, disagreed with the view that the Land League meeting was an unlawful assembly.[32] He continued[33]:

> "The question then appears to be reduced to this: assuming the Plaintiff and others assembled with him to be doing nothing unlawful, but yet that there were reasonable grounds for the Defendant believing, as he did, that there would be a breach of the peace if they continued so assembled, and that there was no other way in which the breach of the peace could be avoided but by stopping and dispersing the Plaintiff's meeting —was the Defendant justified in taking the necessary steps to stop and disperse it? In my opinion he was so justified, under the peculiar circumstances stated in the defence, and which for the present must be taken as admitted to be there truly stated. Under such circumstances the Defendant was not to defer action until a breach of the peace had actually been committed. His paramount duty was to *preserve the peace unbroken*, and that, by whatever means were available for the purpose. Furthermore, the duty of a Justice of the Peace being to preserve the peace unbroken he is, of course, entitled, and in fact bound, to intervene the moment he is in reasonable apprehension of a breach of the peace being imminent; and, therefore, he must in such cases necessarily act on his own *reasonable* and *bona fide belief* as to what is *likely* to occur. Accordingly, in the present case, even assuming that the danger to the public peace arose altogether from the threatened attack of a threatened body on the Plaintiff and his friends, still if the Defendant believed and had just grounds for believing that the peace *could only be preserved* by withdrawing the Plaintiff and his friends from the attack with which they were threatened, it was, I think, the duty of the Defendant to take that course."

The next case is *R.* v. *Justices of Londonderry*,[34] one which is too often brushed aside in the books. The defendants—members of the Salvation Army—marched down Ferguson Street in Londonderry playing musical instruments and carrying a flag. They were

magistrates have published a notice cautioning all persons against attending a meeting does not render the meeting unlawful in the absence of anything otherwise illegal in the circumstances, manner, or purpose of the meeting. *R.* v. *Dewhurst* (1820) 1 St.Tr.(N.S.) 529.

[30] *Ibid.* at 291, *per* Palles C.B., giving the judgment of the court. And see *ibid.* at 293.

[31] (1883) 14 L.R.Ir. 105.

[32] *Ibid.* at 109.

[33] *Ibid.* at 109–110.

[34] (1891) 28 L.R.Ir. 440.

warned by the police to desist, but continued the march. The next day they again paraded and were again warned, with like result. The marches were witnessed by a large crowd, but no incidents took place and there was no misconduct on the part of the defendants. A riot had taken place some four years before when the Salvation Army were parading in a similar manner. The defendants were bound over to keep the peace and be of good behaviour. They applied to the Queen's Bench Division for writs of certiorari to quash the binding over orders. It was held that on this evidence, the orders must be quashed.[35]

Although strictly concerned with binding over, the case is important for the attitude taken by the court towards police claims of public danger, and for recognition of the importance of the claim of free speech. Thus Mr. Justice O'Brien stated [36] that:

> "If danger arises from the exercise of lawful rights resulting in a breach of the peace, the remedy is the presence of sufficient force to prevent that result, not the legal condemnation of those who exercise those rights."

And Mr. Justice Holmes, discussing the English case of *Beatty* v. *Gillbanks*,[37] said:

> "The principle underlying that decision seems to me that an act innocent in itself, done with innocent intent, and reasonably incidental to the performance of a duty, to the carrying on of business, to the enjoyment of legitimate recreation, or generally to the exercise of a legal right, does not become criminal because it may provoke persons to break the peace, or otherwise to conduct themselves in an illegal way."[38]

Criticisms that *Humphries* v. *Connor* and *O'Kelly* v. *Harvey* did not involve the legal condemnation of persons exercising their rights, "but of placing a temporary and necessary restraint on them,"[39] do not help analysis of the cases, nor do they indicate what the law ought to be in a pluralistic society that values free speech. Neither does it help to claim that action as recommended by Mr. Justice O'Brien[40] "would be to put the police at an

[35] See the judgments of Sir P. O'Brien C.J. at 446; O'Brien J. at 448–449; Johnson J. at 453; Holmes J. at 460.

[36] *Ibid.* at 450.

[37] (1882) 9 Q.B.D. 308. In that case the Salvation Army regularly marched through the streets of Weston-super-Mare. There was violent opposition from the Skeleton Army. The magistrates and police purported to ban the Salvation Army parades. The ban was disregarded and disorder ensued. Members of the Salvation Army were bound over to keep the peace on the ground that they had been unlawfully assembling. The Divisional Court quashed the binding over order. Field J., giving the judgment of the court, said: "What has happened here is that an unlawful organisation has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition. . . ." *Ibid.* at 314. For criticisms of the case see Brownlie, *supra*, n. 4, at 42.

[38] (1891) 28 L.R.Ir. 440, 462.

[39] Kelly, *supra*, n. 2 at 147.

[40] *Supra*, n. 35.

embarrassing disadvantage" in keeping the peace.[41] The citizen's right to assemble lawfully and unmolested is more important than police inconvenience.

Coyne v. *Tweedy*[42] is another case usually ignored by English writers, concerning a dispute between two priests over their respective rights to be the parish priest of Killanannin, Co. Galway. On the occasion in question, Priest A and his supporters broke down the door of the parish church wherein were Priest B and his followers. A detachment of police had been sent to the scene. The police stood by while the door was broken down, but entered the church with Priest A and some of his followers. An argument then took place between the two priests, ending with B pushing A "roughly back." A rush was then made at B, at which point the defendant police inspector intervened and removed B from the church premises. B sued the defendant for assault and trespass. It was held by the Queen's Bench Division and, on appeal, by the Court of Appeal, that even assuming the plaintiff to have been legally in possession of the chapel, the defendant had done nothing exceeding his power as a police officer.

The judgments in the case are cast in broad language, widening still further the power given in *Humphries* v. *Connor* and *O'Kelly* v. *Harvey*. Thus, in the Court of Appeal, Fitzgibbon L.J. said that:

> "... it is too late, at least in Ireland, to question the power of a constable, as a reasonable exercise of his duty to preserve the peace, to put a person into a safe place, who is not himself a wrongdoer, but who, if not removed, will become the subject of a breach of the peace."[43]

Several comments may be made about *Coyne* v. *Tweedy*. First, it is suggested that despite the wide language used, the case should be limited to its facts, and as Barry L.J. pointed out[44]:

> "In point of fact, before Tweedy interfered at all, there was an actual breach of the peace, because one of the clergymen[45] shoved the other in such a manner as to throw him back on the foot of the police officer, who was endeavouring to maintain the peace."

In such a situation the defendant was quite justified in arresting the plaintiff for assault and battery.

Secondly, there were other offences which the defendant could have used to avert a confrontation, such as malicious damage to property,[46] possession of offensive weapons (by both groups), and

[41] Kelly, *supra*, n. 2 at 147.
[42] [1898] 2 I.R. 167 (Q.B.D. and C.A.).
[43] *Ibid.* at 202–203 (C.A.). See also Sir P. O'Brien C.J. at 171 (Q.B.D.), and Lord Ashburn C. at 198 (C.A.).
[44] *Ibid.* at 204.
[45] The plaintiff.
[46] By Priest A in breaking down the church door.

unlawful assembly. There was also statutory power to arrest persons brawling in a church in Ireland or England.[47]

Finally, it should be made clear that the police have no power of preventive detention. This is the effect of *Connors* v. *Pearson*.[48] Here, the plaintiff, a boy aged twelve years, had given some information to the police about the murder of two policemen. He was then taken to the local police barracks at Tipperary for the purpose of obtaining a complete statement from him. He was kept there for four days, and then sent up to the Constabulary Depot at Phoenix Park, where he was kept for a further two months. On his release he brought an action for false imprisonment against the defendant who was the Commandant of the Depot. It was held to be no defence that the defendant bona fide believed the plaintiff to be in danger at the hands of wrongdoers and accordingly detained him for his own protection.[49]

Both the King's Bench Division and the Court of Appeal distinguished *Coyne* v. *Tweedy* on the ground that in that case the breach of the peace was "imminent," whereas in *Connors* v. *Pearson* it was not.[50]

The setting out of these cases in chronological order clearly shows that the Irish courts have gradually widened the basis for intervention by a police officer in a lawful public meeting. This is notwithstanding anything said in *R.* v. *Justices of Londonderry*.

The courts in England have given some indication of their willingness to accept the principle of the Irish cases. The most obvious example is *Thomas* v. *Sawkins*,[51] where the Divisional Court held that the police may enter and remain at public meetings on private premises[52] wherever they apprehend that seditious speeches or a breach of the peace may occur.[53]

[47] Ecclesiastical Courts Jurisdiction Act 1860, s. 2. The Act applies to a clergyman as well as to a layman: *Vallancey* v. *Fletcher* [1897] 1 Q.B. 265. A claim of right is no defence: *Kensit* v. *Dean of St. Paul's* [1905] 2 K.B. 249; *Asher* v. *Calcraft* (1887) 18 Q.B.D. 607.

[48] [1921] 2 I.R. 51 (K.B.D. and C.A.). See also *McLaughlin* v. *Scott* [1921] 2 I.R. 51, decided the same day.

[49] The court equated the defendant's position with that of a police officer.

[50] Molony C.J. at 64 and 66; Gibson J. at 68 and 71; Gordon J. at 74, all in the King's Bench Division. For similar language in the Court of Appeal, see O'Connor M.R. at 100–101. Professor Glanville Williams has suggested that protective custody may possibly be lawful "in extreme cases" under the general doctrine of necessity: [1954] Crim.L.R. 578, 590.

[51] [1935] 2 K.B. 249. See Goodhart, "*Thomas* v. *Sawkins*: A Constitutional Innovation" (1936) 6 Camb.L.J. 22.

[52] It would seem that the power applies equally to private meetings on private premises: Goodhart, *supra* at 25; Street, *Freedom, the Individual and the Law* (3rd ed. 1973), 57–58.

[53] This limits the ruling to the offences mentioned in the judgments. Lord Hewart C.J., however, seems prepared to give the police a wider power still: "it seems to me that a police officer has *ex virtute officii* full right so to act when he has reasonable ground for believing that an offence is imminent or is likely to be committed": [1935] 2 K.B. 249, 255. See also Avory J. at 256–257. *Cf. Wooster* v. *Webb and Sussum* [1936] *The Solicitor* 26; *Hughes* v. *Casares*, *The Times*, April 19, 1967, p. 13, cols. 2–3.

5. The Effect of Duncan v. Jones [54]

How far have these cases been affected by the decision in *Duncan* v. *Jones*? The facts in that case were as follows: the appellant, Mrs. Duncan, was about to speak at a meeting of around thirty people called to defend "the right of free speech and public meeting." The meeting was held near to the entrance of an unemployed training centre in Mynehead Street, New Cross, in London. The respondent police inspector told the appellant the meeting could not be held there but that it could be held in another street, some 175 yards distant. The appellant nevertheless stated she was going to hold the meeting, stepped onto the box previously placed there, and began to address the audience. She was immediately arrested, and convicted at petty sessions of wilfully obstructing the respondent in the execution of his duty.[55]

On appeal to London Quarter Sessions the deputy-chairman was of the opinion: (1) that in fact (if it be material) the appellant must have known of the probable consequences of her holding the meeting—namely, a disturbance and possibly a breach of the peace—and was not unwilling that such consequences should ensue; (2) that in fact the respondent reasonably apprehended a breach of the peace [56]; (3) that in law it thereupon became his duty to prevent the holding of the meeting; and (4) that in fact, by attempting to hold the meeting, the appellant obstructed the respondent when in the execution of his duty.[57]

The Divisional Court dismissed the appeal from Quarter Sessions in an opinion taking up just over two pages of the Law Reports. Thus Lord Hewart C.J. said that [58]:

> "The case stated which we have before us indicates clearly a causal connection between the meeting of May 1933 and the disturbance which occurred after it—that the disturbance was not only *post* the meeting but was also *propter* the meeting.[59] In my view, the deputy chairman was entitled to come to the conclusion to which he came on the facts which he found and to hold that the conviction of the appellant for wilfully

[54] [1936] 1 K.B. 218. For the background to the case, see A Barrister, *Justice in England* (1938), 247–260. There is an exhaustive analysis in Daintith, "Disobeying a Policeman: A Fresh Look at *Duncan* v. *Jones*" [1966] Pub. Law 248. See also de Smith, *Constitutional and Administrative Law* (1971), 491–494; Goodhart (1936) 52 L.Q.R. 158; Coutts, *ibid.* at 470.

[55] The case was decided under the Prevention of Crimes Act 1885, s. 2, amending the Prevention of Crimes Act 1871, s. 12. The present statutory provision is the Police Act 1964, s. 51 (3). There is a separate offence of assaulting a police officer in the execution of his duty: Police Act 1964, s. 51 (1).

[56] There had been a similar meeting addressed by the appellant fourteen months before. Following this meeting disorder had occurred in the centre, and the respondent apparently feared a similar disturbance might follow this meeting. It seems probable, however, that there was no connection between the meeting and the disturbance: *Justice in England*, *supra*, n. 54 at 256–257.

[57] It has been suggested that these findings were influenced by the political bias of the deputy-recorder: *Justice in England*, *supra*, n. 54 at 254–259.

[58] [1936] 1 K.B. 218, 223.

[59] As to which see *supra*, n. 56.

> obstructing the respondent in the execution of his duty was right."

And Humphries J. stated that [60]:

> "It does not require authority to emphasise the statement that it is the duty of a police officer to prevent apprehended breaches of the peace. Here it is found as a fact that the respondent reasonably apprehended a breach of the peace. It then, as is rightly expressed in the case, became his duty to prevent anything which in his view would cause that breach of the peace. While he was taking steps so to do he was wilfully obstructed by the appellant. I can conceive of no clearer case within the statute than that."

The finding that the respondent reasonably apprehended a breach of the peace has not gone unchallenged.[61] There is, however, a more serious ground of criticism. It has been convincingly shown by Mr. Daintith [62] that the court gave an entirely new interpretation to the word "obstructs," while citing no authority for it.[63]

Hence the law now is that the police have a duty to prevent breaches of the peace, and thus a power to forbid any meeting whether or not it amounts to an unlawful assembly, which creates in them a reasonable apprehension of a breach of the peace.[64]

Like the Irish cases, the central issue in *Duncan* v. *Jones* concerned the scope of a police officer's duty to interfere with someone who has done nothing unlawful.[65] In the Irish cases, however, it had been held that it was the officer's duty to disperse the meeting only if he entertained a reasonable belief that disorder was likely to ensue and dispersal of the gathering was the sole means of averting it. In *Duncan* v. *Jones*, the court held the officer's duty to include any act calculated to preserve the peace.[66]

[60] [1936] 1 K.B. 218, 223. *Cf.* Singleton J. at 223–224.

[61] Wade, "The Law of Public Meetings" (1938) 2 M.L.R. 177, 185–186; Wade, "Police Powers and Public Meetings" (1938) 6 Camb.L.J. 175, 177–179; *Justice in England*, *supra*, n. 54 at 256–257.

[62] *Supra*, n. 54.

[63] ". . . not until 1936 was it revealed that facts insufficient to establish the offence of unlawful assembly might yet amount to obstruction of the police in the execution of their duty. In 1882, and long after 1885, the police and the judges could see no difference between the two offences; the view was taken that unless an assembly was unlawful, the police had no duty to disperse it, and hence the offence of obstructing . . . the police when in the execution of their duty could not be proved without first proving an unlawful assembly." *Ibid.* at 251–252. In *Rice* v. *Connolly* [1966] 2 Q.B. 416, 419, Lord Parker C.J. gave an even wider definition: ". . . it is in my view clear that 'obstruct' under s. 51 (3) of the Police Act 1964, is the doing of any act which makes it more difficult for the police to carry out their duty." See also *Hinchcliffe* v. *Sheldon* [1953] 3 All E.R. 406, 408, *per* Lord Goddard C.J.; Coutts, "Obstructing the Police" (1956) 19 M.L.R. 411.

[64] As Professor Coutts has rightly said: "It would appear that the only check upon these powers is that the police must act in a reasonable manner." *Supra*, n. 63 at 471.

[65] [1936] 1 K.B. 218, 219.

[66] None of the judges mentions the concept of necessity. Nor do they cite any of the Irish cases. The only authority given for this radical departure was *R.* v.

There is a factual difference between the cases in so far as the apprehended disturbance in *Duncan* v. *Jones* would not have been caused by the defendant's opponents, as in the Irish cases. As, however, this was not referred to by the Divisional Court, it cannot be considered a factor in the court's reasoning.

Some might find hope in the fact that the test of the "reasonableness" of the belief of the police that a breach of the peace is likely to occur is supposed to be an objective one. One is not encouraged, however, by *Piddington* v. *Bates*.[67] In that case the defendant had been arrested while picketing outside factory premises. He was charged with obstructing a police officer in the execution of his duty. The magistrate found there was no obstruction of the highway in the vicinity of the factory, nor any violence threatened by any of the pickets or anyone else. But he found as a fact that the prosecutor was justified in concluding a breach of the peace was possible, and thus was under an obligation to prevent such a breach of the peace, and he could do this by limiting the number of pickets as he had done. He therefore convicted the defendant.

The appeal to the Divisional Court was dismissed. Lord Parker C.J. stating the following propositions of law:[68]

> "First, the mere statement of a constable that he did anticipate that there might be a breach of the peace is clearly not enough. There must exist proved facts from which a constable could reasonably anticipate such a breach. Secondly, it is not enough that his contemplation is that there is a remote possibility of a breach of the peace. Accordingly, in every case, it becomes a question of whether, on the particular facts, it can be said that there were reasonable grounds on which a constable charged with this duty reasonably anticipated that a breach of the peace may occur."

On the face of it this sounds well, but it should be remembered that the appeal was dismissed, and in subsequent cases the Divisional Court has not shown itself any more willing to question police evidence.[69]

Prebble (1858) 1 F. & F. 325, an ill-reported case from which Lord Hewart seizes a two-line dictum of Bramwell B. at 326. *Beatty* v. *Gillbanks*, *supra* n. 37, was distinguished as concerning unlawful assembly and not the scope of a police officer's duty.

[67] [1960] 3 All E.R. 660.

[68] *Ibid.* at 663. For a list of factors the courts will take into account in assessing whether a belief was a reasonable one see Kilbride and Burns, "Freedom of Movement and Assembly in Public Places" [1966] 2 N.Z.Univ.L.R. 1, 19–22.

[69] *Dass* v. *Rennie* (1961) 105 S.J. 158; *Tynan* v. *Chief Constable of Liverpool* [1965] 3 All E.R. 99, affirmed *sub nom. Tynan* v. *Balmer* [1967] 1 Q.B. 91. The principle has been applied in New Zealand: *Burton* v. *Power* (1940) N.Z.L.R. 305. But see *Rice* v. *Connolly* (1966) 2 All E.R. 649. *Cf. Elder* v. *Evans* (1951) N.Z.L.R. 801; *Matthew* v. *Dwan* [1949] N.Z.L.R. 1037. But *cf. Steele* v. *Kingsbeer* [1957] N.Z.L.R. 552. The New Zealand cases are discussed in Adams, *Criminal Law and Practice in New Zealand* (1964), 697–698.

Duncan v. *Jones* has unfortunately not yet been considered either by the Court of Appeal or by the House of Lords. It is suggested when that occasion arises that the case should be overruled and the law brought into line with that of Scotland, where a similar statutory provision exists,[70] but which has been interpreted to mean obstruction only when physical force is involved.[71]

6. CONCLUSION

The common law power of the police to intervene in lawful public meetings has never been litigated in England. If the power exists, then it should be narrowly defined. Unfortunately, the wide discretion granted in *Duncan* v. *Jones* means that the police now have a much broader legal power on which to rely. In a period of increasing political demonstration it is essential that basic civil liberties are protected by law.

Clearly *Duncan* v. *Jones* and *Thomas* v. *Sawkins* must be overruled. But this is not enough. Two further questions should be considered. The first is whether the police should have any preventive powers at all, or should they always be compelled to act after the event? As a matter of principle preventive justice must be kept to a minimum, but it is possible to envisage situations where the police need to act before violence erupts. The best

[70] Police (Scotland) Act 1967, s. 41.

[71] Gordon, *Criminal Law*, *supra* n. 6 at 763, citing *Curlett* v. *McKechnie*, 1938 J.C. 176. See especially Lord Fleming at 178: " . . . the words 'wilfully obstructing' are used in association with the words 'resisting' and 'assault,' and the reasonable inference is that the wilful obstruction must have the same character as the other matters dealt with in the two relevant sections. In my opinion, to bring a case within these sections it must be proved that the obstruction has some physical aspect." See also Lord Moncrieff at 180. There has been no discussion here as to when a police officer is acting in the execution of his duty. These duties are laid down in general terms. Halsbury, *Laws of England*, Vol. 30 (3rd ed. 1959) at 129–130. The general principle is that in the absence of specific statutory or common law powers, the command of a police officer made in pursuance of his general duty of preventing crime does not turn a lawful act or omission into an unlawful one. See Daintith, *supra*, n. 54 at 256. See also Smith and Hogan, *supra*, n. 10 at 291–293. Brownlie, *supra*, n. 4 at 18–22; Fitzgerald, "The Arrest of a Motor Car" [1965] Crim. L.R. 23. Illustrations of this principle include *R.* v. *Prebble* (1858) 1 F. & F. 325; *Davis* v. *Lisle* [1936] 2 K.B. 434; *R.* v. *Waterfield and Lynn* [1964] 1 Q.B. 164; *Rice* v. *Connolly* [1966] 2 Q.B. 416; *Kenlin* v. *Gardiner* [1967] 2 Q.B. 510; *Ludlow* v. *Burgess* [1971] Crim.L.R. 238; but see *Donnelly* v. *Jackman* [1970] 1 W.L.R. 562. This general principle should have been applied in *Duncan* v. *Jones*. The principle is different where the command of a police officer is made in pursuance of special statutory or common law powers such as arrest or search, *e.g. Hinchcliffe* v. *Sheldon* [1955] 1 W.L.R. 1207. *Cf. Gelberg* v. *Miller* [1961] 1 W.L.R. 153. It is unfortunately true that the fact that a constable has a statutory or common law power to do something may influence a court reaching a conclusion that in so doing he was engaged in the general performance of his duties. *E.g. Chic Fashions (West Wales) Ltd.* v. *Jones* [1968] 2 Q.B. 299; *Ghani* v. *Jones* [1970] 1 Q.B. 693; *Garfinkel* v. *Metropolitan Police Commissioner* [1972] Crim.L.R. 44. It is suggested here, however, that there was no such power to order Mrs. Duncan to desist from holding her meeting so as to make her disobedience unlawful. Neither was there any evidence that she was conducting an unlawful assembly or obstructing the highway.

illustration of such a situation is that involving the hostile audience, which has to be kept in check to enable a speaker who is doing nothing unlawful to continue.[72]

The second question is what preventive powers should the police then have? There are three obvious ones: the threat of prosecution, the threat of arrest, and actual arrest without warrant. These three are sufficient to enable the police to contain violence or the possibility of violence at a public meeting. There is no need for a power to disperse crowds who are doing nothing unlawful (*O'Kelly* v. *Harvey*), or to remove a person who is a provocation if that person is doing nothing unlawful (*Humphries* v. *Connor*). The remedy is a strong, impartial, and well disciplined police force, not a wide range of subjective powers of prevention. Where violence actually occurs, the police have a wide range of criminal offences to utilise.

There is one final word. The present writer remains totally unconvinced by the argument that the courts critically scrutinise the facts of a case when the police claim they acted in a reasonable manner.[73] The tendency of the courts to accept police evidence uncritically is well known. In the sensitive and vital area of civil liberties every step should be taken to ensure that this does not occur.

WILLIAM BIRTLES.*

[72] Note, "Freedom of Speech and Assembly: The Problem of the Hostile Audience" (1949) 49 Col.L.Rev. 1118.

[73] See *e.g.* Kilbride and Burns, *supra*, n. 67, *passim*.

* LL.M. (London and Harvard), Lecturer in Law, University College, London.